VOLUME IX OF X

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. 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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VOLUME 4001-4500

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tain the *authority* to issue the writ [in cases of fundamental miscarriage of justice]"); *id.*, at 494–495, 111 S.Ct., at 1470 ("[i]f petitioner cannot show cause, the failure to raise the claim in an earlier petition *may* nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim"); *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986) ("where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court *may* grant the writ even in the absence of a showing of cause for the procedural default") (emphasis added in all quotations).

Of course the latter cases provide as much or as little authority for the right reading of the statute as the former provide for the wrong reading. The truth is that there is simply nothing in this scattering of phrases, this handful of silences and assumptions, by which even the conscience most scrupulous in matters of *stare decisis* could count itself bound either way; for in no case after *Kuhlmann* has the question whether § 2244(b) creates an *obligation* to entertain successive or abusive petitions been necessary to the decision. In both *Sawyer* and *McCleskey* the Court affirmed the judgments of lower courts that had dismissed the petition. See *Sawyer*, *supra*, 505 U.S., at ——, 112 S.Ct. at ——; *McCleskey*, *supra*, 499 U.S., at 503, 111 S.Ct., at 1475. Those decisions could not, and did not, announce *as a holding* that refusal to entertain a petition can be reversible error.

Rather than advancing a different reading of the statute, the Court gives in essence only one response to all of this: that the law of federal habeas corpus is a product of "the interplay between statutory language and judicially-managed equitable considerations." *Ante*, at 863, n. 35. This sort of vague talk might mean one of two things, the first inadequate, the second unconstitutional. It might mean that the habeas corpus statute is riddled with gaps and ambiguities that we have traditionally filled or clarified by a process of statutory interpretation that shades easily into a sort of federal common law. See, *e.g.*, *Brecht v. Abrahamson*, 507 U.S. ——, ——, 113 S.Ct. 1710, 1718–1719, 123 L.Ed.2d 353 (1993). That is true enough. There assuredly are, however, many legal questions on which the habeas corpus statute is neither silent nor ambiguous; and unless the question in this case is one on which the statute *is* silent or ambiguous (in which event the Court should explain why that is so), the response is irrelevant. On the other hand, the Court's response might mean something altogether different and more alarming: that even where the habeas statute does speak clearly to the question at hand, it is but one "consideratio[n]," *ante*, at 863, n. 35, relevant to resolution of that question. Given that federal courts have no inherent power to issue the writ, *Ex parte Bollman*, 4 Cranch 75, 94–95, 2 L.Ed. 554 (1807), that response would be unconstitutional. See U.S. Const., Art. VI, cl. 2.

There is thus no route of escape from the Court's duty to confront the statute today. I would say, as the statute does, that habeas courts need not entertain successive or abusive petitions. The courts whose decisions we review declined to entertain the petition, and I find no abuse of discretion in the record. (I agree with THE CHIEF JUSTICE that they were correct to use *Sawyer v. Whitley*, *supra*, as the legal standard for determining claims of actual innocence. See *ante*, at 870.)[3] Therefore, "we should sustain [their] action without saying more." *Salinger*, 265 U.S., at 232, 44 S.Ct., at 522.

For these reasons, I respectfully dissent.



3. Even if they were wrong in that, it would not be correct to conclude that the *judgment* must necessarily be reversed. See *ante*, at 870 (O'CONNOR, J., concurring). Our habeas cases have not so held. See *Wong Doo v. United States*, 265 U.S. 239, 241, 44 S.Ct. 524, 525 (1924) (affirming even though "the courts below erred in applying the inflexible doctrine of *res judicata*" to dismiss an abusive petition, because "it does not follow that the judgment should be reversed; for it plainly appears that the situation was one where, according to a sound judicial discretion, controlling weight must have been given to the prior refusal").

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 II

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APPENDIX L

505 U.S. 333

Robert Wayne SAWYER, Petitioner

v.

John WHITLEY, Warden.

No. 91-6382.

Argued Feb. 25, 1992.

Decided June 22, 1992.

Petitioner filed first petition for writ of habeas corpus in federal court after he was convicted of capital murder and the Louisiana Supreme Court, 442 So.2d 1136, affirmed. The United States District Court for the Eastern of Louisiana, Henry A. Mentz, Jr., J., denied petition and appeal was taken. The Court of Appeals, 848 F.2d 582, affirmed. On grant of rehearing en banc, the Court of Appeals, 881 F.2d 1273, affirmed. Certiorari was granted. The Supreme Court, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193, affirmed. Thereafter, second petition for federal habeas corpus relief was filed. The District Court, 772 F.Supp. 297, denied relief, and petitioner applied for certificate of probable cause. The Court of Appeals, 945 F.2d 812, affirmed. Certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that: (1) in order to demonstrate actual innocence to permit court to consider merits of abusive claims that fail cause and prejudice requirement, as well as successive claims, 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, and (2) petitioner failed to demonstrate actual innocence.

Affirmed.

Justice Blackmun issued opinion concurring in judgment.

Justice Stevens, with whom Justice Blackmun and Justice O'Connor joined, issued opinion concurring in judgment.

1. Habeas Corpus ⇐401, 897, 898(2)

For habeas petitioner to show that he is "actually innocent" of death penalty imposed, so that court may reach merits of his successive, abusive, or defaulted federal habeas claim, he 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. 28 U.S.C.A. § 2244(b).

See publication Words and Phrases for other judicial constructions and definitions.

2. Habeas Corpus ⇐404, 897, 898(2)

Unless habeas petitioner shows cause and prejudice, court may not reach merits of successive claims which raise grounds identical to grounds heard and decided on merits in previous petition, new claims not previously raised which constitute abuse of writ, or procedurally defaulted claims in which petitioner failed to follow applicable state procedural rules in raising claims. 28 U.S.C.A. § 2244(b).

3. Habeas Corpus ⇐401, 404, 897, 898(2)

Generally, habeas petitioner must show cause and prejudice before court will reach merits of successive, abusive, or defaulted claim; however, if he cannot meet this standard, court may hear merits of such claims if failure to hear them would result in miscarriage of justice. 28 U.S.C.A. § 2244(b).

4. Habeas Corpus ⇐401, 897, 898(2)

"Miscarriage of justice" exception, which permits court to hear habeas petitioner's successive, abusive, or defaulted claim if failure to hear claim would result in miscarriage of justice, applies where petitioner is "actually innocent" of crime of which he was convicted or penalty which was imposed; while it is not easy to define what is meant by "actually innocent" of death penalty, exception is very narrow and must be determined by relatively objective standards. 28 U.S.C.A. § 2244(b).

5. Habeas Corpus ⇐401, 897, 898(2)

Standard for determining whether habeas petitioner is "actually innocent" of death penalty to which he has been sen-

tenced, so that court may reach merits of successive, abusive, or defaulted claim, is whether petitioner showed that no reasonable juror would have found him eligible for death penalty under applicable state law on elements of crime itself and existence of aggravating circumstances, but not existence of additional mitigating evidence that was not introduced as result of claimed constitutional error. 28 U.S.C.A. § 2244(b).

6. Habeas Corpus ⇐898(2)

Psychological evidence allegedly kept from jury which sentenced habeas petitioner to death did not show that petitioner was "actually innocent" of death penalty under Louisiana law, and thus, court would not consider merits of that claim in his successive habeas petition; psychological evidence did not relate to petitioner's guilt or innocence of crime or to aggravating factors found by jury which made petitioner eligible for death penalty, nor could it be said that, had evidence been before jury, reasonable juror would not have found both aggravating factors. 28 U.S.C.A. § 2244(b).

7. Habeas Corpus ⇐898(2)

Evidence allegedly kept from jury due to alleged *Brady* violation failed to show habeas petitioner was "actually innocent" of Louisiana death penalty, and thus, court would not consider merits of that claim in successive habeas petition; much of evidence went to witness credibility and, while statement that petitioner did not set fire to victim went to jury's finding of aggravated arson and, thus, to petitioner's guilt or innocence and first aggravating circumstance, it failed to show that no rational juror would find both aggravating factors. 28 U.S.C.A. § 2244(b).

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Syllabus *

A Louisiana jury convicted petitioner Sawyer and sentenced him to death for a murder in which the victim was beaten, scalded with boiling water, and set afire. His conviction and sentence were upheld on appeal, and his petitions for state postconviction relief, as well as his first petition for federal habeas relief, were denied. In a second federal habeas petition, the District Court barred as abusive or successive Sawyer's claims, *inter alia*, that the police failed to produce exculpatory evidence—evidence challenging a prosecution witness' credibility and a child witness' statements that Sawyer had tried to prevent an accomplice from setting fire to the victim—in violation of his due process rights under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215; and that his trial counsel's failure to introduce mental health records as mitigating evidence in his trial's sentencing phase constituted ineffective assistance of counsel. The Court of Appeals affirmed, holding that Sawyer had not shown cause for failure to raise his claims in his earlier petition, and that it could not otherwise reach the claims' merits because he had not shown that he was "actually innocent" of the death penalty under Louisiana law.

Held:

1. To show "actual innocence" one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law. Pp. 2518–2523.

(a) Generally, a habeas petitioner must show cause and prejudice before a court will reach the merits of a successive, abusive, or defaulted claim. Even if he cannot meet this standard, a court may hear the merits of such claims if failure to hear them would result in a miscarriage of justice. See, *e.g.*, *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364. The miscarriage of justice exception applies where a petitioner is "actually innocent" of the crime of which he was convicted or the

* 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.

penalty which was imposed. While it is not easy to define what is meant by "actually innocent" of the death penalty, the exception is very narrow and must be determined by relatively objective standards. Pp. 2518–2520.

(b) In order to avoid arbitrary and capricious impositions of the death sentence, States have adopted narrowing factors to limit the class of offenders upon which the death penalty may be imposed, as evidenced by Louisiana's definition of capital murder as something more than intentional killing and its requirement that before a jury may recommend death, it must determine that at least one of a list of statutory aggravating factors exists. Once eligibility for the death penalty is established, however, the emphasis shifts from narrowing the class of eligible defendants by objective factors to individualized consideration of a particular defendant by the introduction of mitigating evidence. Within this framework, the Court of Appeals applied the proper standard to determine "actual innocence" when it required Sawyer to base his showing that no reasonable juror would have found him eligible for the death penalty under Louisiana law on the elements of the crime itself and the existence of aggravating circumstances, but not the existence of additional mitigating evidence that was not introduced as a result of a claimed constitutional error. This standard hones in on the objective factors that must be shown to exist before a defendant is eligible to have the death penalty imposed. The adoption of a stricter definition, which would limit any showing to the elements of the crime, is rejected, since, by stating in *Smith v. Murray*, 477 U.S. 527, 537, 106 S.Ct. 2661, 2668, 91 L.Ed.2d 434, that actual innocence could mean innocent of the death penalty, this Court suggested a more expansive meaning than simply innocence of the capital offense itself. Also rejected is a more lenient definition, which would allow the showing to extend beyond the elements of the crime and the aggravating factors, to include mitigating evidence which bears, not on the defendant's eligibility to receive the death penalty, but only on the ultimate discretionary decision between that penalty and life imprisonment. Including mitigating factors would make actual innocence mean little more than what is already required to show prejudice for purposes of securing habeas relief and would broaden the inquiry beyond what is a narrow exception to the principle of finality. Pp. 2520–2523.

2. Sawyer has failed to show that he is actually innocent of the death penalty to which he has been sentenced. The psychological evidence allegedly kept from the jury does not relate to his guilt or innocence of the crime or to the aggravating factors found by the jury—that the murder was committed in the course of an aggravated arson, and that it was especially cruel, atrocious, or heinous—which made him eligible for the death penalty. Nor can it be said that had this evidence been before the jury a reasonable juror would not have found both of the aggravating factors. The evidence allegedly kept from the jury due to an alleged *Brady* violation also fails to show actual innocence. Latter-day impeachment evidence seldom, if ever, makes a clear and convincing showing that no reasonable juror would have believed the heart of the witness' account. While the statement that Sawyer did not set fire to the victim goes to the jury's finding of aggravated arson and, thus, to his guilt or innocence and the first aggravating circumstance, it fails to show that no rational juror would find both of the aggravating factors. The murder was especially cruel, atrocious, and heinous quite apart from the arson, and, even crediting the hearsay statement, it cannot be said that no reasonable juror would have found that he was guilty of the arson for his participation under Louisiana law. Pp. 2523–2525.

945 F.2d 812 (CA5 1991), affirmed.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BLACKMUN, J.,

filed an opinion concurring in the judgment. STEVENS, J., filed an opinion concurring in the judgment, in which BLACKMUN and O'CONNOR, JJ., joined.

R. Neal Walker, New Orleans, La., argued for petitioner.

Dorothy A. Pendergast, Gretna, La., argued for respondent.

Paul J. Larkin, Jr., Washington, D.C., argued for the U.S. as amicus curiae by special leave of Court.

Chief Justice REHNQUIST delivered the opinion of the Court.

[1] The issue before the Court is the standard for determining whether a petitioner bringing a successive, abusive, or defaulted federal habeas claim has shown he is "actually innocent" of the death penalty to which he has been sentenced so that the court may reach the merits of the claim. Robert Wayne Sawyer, the petitioner in this case, filed a second federal habeas petition containing successive and abusive claims. The Court of Appeals for the Fifth Circuit refused to examine the merits of Sawyer's claims. It held that Sawyer had not shown cause for failure to raise these claims in his earlier petition, and that he had not shown that he was "actually innocent" of the crime of which he was convicted or the penalty which was imposed. 945 F.2d 812 (1991). We affirm the Court of Appeals and hold that to show "actual innocence" one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.

In 1979—13 years ago—petitioner and his accomplice, Charles Lane, brutally murdered Frances Arwood who was a guest in the home petitioner shared with his girlfriend, Cynthia Shano, and Shano's two young children. As we recounted in our earlier review of this case, *Sawyer v. Smith*, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990), petitioner and Lane returned to petitioner's home after a night of drinking, and argued with Arwood, accusing her of drugging one of the children. Petitioner and Lane then attacked Arwood, beat her with their fists, kicked her repeatedly, submerged her in the bathtub, and poured scalding water on her before dragging her back into the living room, pouring lighter fluid on her body and igniting it. Arwood lost consciousness sometime during the attack and remained in a coma until she died of her injuries approximately two months later. Shano and her children were in the home during the attack, and Shano testified that petitioner prevented them from leaving.[1]

At trial, the jury failed to credit petitioner's "toxic psychosis" defense, and convicted petitioner of first-degree murder. At the sentencing phase, petitioner testified that he was intoxicated at the time of the murder and remembered only bits and pieces of the events. Petitioner's sister, Glenda White, testified about petitioner's deprived childhood, his affection and care for her children, and that as a teenager petitioner had been confined to a mental hospital for "no reason" where he had undergone shock therapy. 2 App. 505–516. The jury found three statutory aggravating factors, no statutory mitigating factors and sentenced petitioner to death.[2]

Sawyer's conviction and sentence were affirmed on appeal by the Louisiana Su-

1. The facts are more fully recounted in the opinion of the Louisiana Supreme Court affirming petitioner's conviction and sentence. *State v. Sawyer*, 422 So.2d 95, 97–98 (1982).

2. The jury found the following statutory aggravating factors: "(1) that [Sawyer] was engaged in the commission of aggravated arson, (2) that the offense was committed in an especially cruel, atrocious and heinous manner, and (3) that [Sawyer] had previously been convicted of an unrelated murder." *Id.*, at 100. The Louisiana Supreme Court held that the last aggravating circumstance was not supported by the evidence. *Id.*, at 101.

preme Court. *State v. Sawyer*, 422 So.2d 95 (1982). We granted certiorari, and vacated and remanded with instructions to reconsider in light of *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). *Sawyer v. Louisiana*, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). On remand, the Louisiana Supreme Court reaffirmed the sentence. *Sawyer v. State*, 442 So.2d 1136 (1983), cert. denied, 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). Petitioner's first petition for state postconviction relief was denied. *Louisiana ex rel. Sawyer v. Maggio*, 479 So.2d 360, reconsideration denied, 480 So.2d 313 (La.1985).[3] In 1986, Sawyer filed his first federal habeas petition, raising 18 claims, all of which were denied on the merits. See *Sawyer v. Butler*, 848 F.2d 582 (CA5 1988), aff'd on rehearing en banc, 881 F.2d 1273 (CA5 1989). We again granted certiorari and affirmed the Court of Appeals' denial of relief. *Sawyer v. Smith, supra.*[4]

338 Petitioner next filed a second motion for state postconviction relief. The state trial court summarily denied this petition as repetitive and without merit, and the Louisiana Supreme Court denied discretionary review. See 945 F.2d, at 815.

The present petition before this Court arises out of Sawyer's second petition for federal habeas relief. After granting a stay and holding an evidentiary hearing, the District Court denied one of Sawyer's claims on the merits, and held that the others were barred as either abusive or successive. 772 F.Supp. 297 (ED La.1991). The Court of Appeals granted a certificate of probable cause on the issue of whether petitioner had shown that he is actually "innocent of the death penalty" such that a court should reach the merits of the claims contained in this successive petition. 945 F.2d, at 814. The Court of Appeals held that the petitioner had failed to show that he was actually innocent of the death penalty because the evidence he argued had been unconstitutionally kept from the jury failed to show that Sawyer was ineligible for the death penalty under Louisiana law. For the third time we granted Sawyer's petition for certiorari, 502 U.S. ——, 112 S.Ct. 434, 116 L.Ed.2d 453 (1991), and we now affirm.

[2] Unless a habeas petitioner shows cause and prejudice, see *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), a court may not reach the merits of: (a) *successive claims* which raise grounds identical to grounds heard and decided on the merits in a previous petition, *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986); (b) new claims, not previously raised which constitute an *abuse of the writ*, *McCleskey v. Zant*, 499 U.S. ——, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); or (c) *procedurally defaulted claims* in which the petitioner failed to follow applicable state procedural rules in raising the claims. *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). These cases are premised on our concerns for the finality of state judgments of conviction, and the "significant costs of federal habeas review." *McCleskey, supra*, at ——, 111 S.Ct., at ——; see, *e.g.*, *Engle v. Isaac*, 456 U.S. 107, 126–128, 102 S.Ct. 1558, 1570–1572, 71 L.Ed.2d 783 (1982).

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[3, 4] We have previously held that even if a state prisoner cannot meet the cause and prejudice standard a federal court may hear the merits of the successive claims if the failure to hear the claims would constitute a "miscarriage of justice." In a trio of 1986 decisions, we elaborated on the miscarriage of justice, or "actual innocence," exception. As we explained

3. The Louisiana Supreme Court twice remanded to the trial court for hearings on petitioner's ineffective assistance of counsel claim. *Louisiana ex rel. Sawyer v. Maggio*, 450 So.2d 355 (1984); *Louisiana ex rel. Sawyer v. Maggio*, 468 So.2d 554 (1985).

4. In this earlier review, we held that *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), could not be applied retroactively to petitioner's case under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

Kuhlmann v. Wilson, supra, the exception developed from the language of the federal habeas statute which, prior to 1966, allowed successive claims to be denied without a hearing if the judge were "satisfied that the *ends of justice will not be served by such inquiry.*" *Id.*, 477 U.S., at 448, 106 S.Ct., at 2624. We held that despite the removal of this statutory language from 28 U.S.C. § 2244(b) in 1966, the miscarriage of justice exception would allow successive claims to be heard if the petitioner "establish[es] that under the probative evidence he has a colorable claim of factual innocence." *Kuhlmann*, 477 U.S., at 454, 106 S.Ct., at 2627.[5] In the second of these cases we held that the actual innocence exception also applies to procedurally defaulted claims. *Murray v. Carrier, supra.*[6]

In *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986), we found no miscarriage of justice in the failure to examine the merits of procedurally defaulted claims in the capital sentencing context. We emphasized that the miscarriage of justice exception is concerned with actual as compared to legal innocence, and acknowledged that actual innocence "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." *Id.*, at 537, 106 S.Ct., at 2667–2668. We decided that the habeas petitioner in that case had failed to show actual innocence of the death penalty because the "alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." *Id.*, at 538, 106 S.Ct., at 2668.

In subsequent cases, we have emphasized the narrow scope of the fundamental miscarriage of justice exception. In *Dugger v. Adams*, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989), we rejected the petitioner's claim that his procedural default should be excused because he had shown that he was actually innocent. Without endeavoring to define what it meant to be actually innocent of the death penalty, we stated that "[d]emonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received." *Id.*, at 412, n. 6, 109 S.Ct., at 1218, n. 6. Just last Term in *McCleskey v. Zant, supra*, at ——, 111 S.Ct., at ——, we held that the "narrow exception" for miscarriage of justice was of no avail to the petitioner because the constitutional violation, if it occurred, "resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination."

[5] The present case requires us to further amplify the meaning of "actual innocence" in the setting of capital punishment. A prototypical example of "actual innocence" in a colloquial sense is the case where the State has convicted the wrong person of the crime. Such claims are of course regularly made on motions for new trial after conviction in both state and federal courts, and quite regularly denied because the evidence adduced in support of them fails to meet the rigorous standards for granting such motions. But in rare instances it may turn out later, for example, that another person has credibly confessed to the crime, and it is evident that

5. Our standard for determining actual innocence was articulated in *Kuhlmann* as: "[T]he prisoner must 'show a fair probability that, 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, the trier of the facts would have entertained a reasonable doubt of his guilt.'" 477 U.S., at 455, n. 17, 106 S.Ct., at 2673 n. 17, quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142, 160 (1970).

6. We stated that the merits of a defaulted claim could be reached "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent...." *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986).

the law has made a mistake. In the context of a noncapital case, the concept of "actual innocence" is easy to grasp.

It is more difficult to develop an analogous framework when dealing with a defendant who has been sentenced to death. The phrase "innocent of death" is not a natural usage of those words, but we must strive to construct an analog to the simpler situation represented by the case of a noncapital defendant. In defining this analog, we bear in mind that the exception for "actual innocence" is a very narrow exception, and that to make it workable it must be subject to determination by relatively objective standards. 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.[7]

Since our decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), our Eighth Amendment jurisprudence has required those States imposing capital punishment to adopt procedural safeguards protecting against arbitrary and capricious impositions of the death sentence. See, *e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). In response, the States have adopted various narrowing factors ~~which~~ limit the class of offenders upon which the sentencer is authorized to impose the death penalty. For example, the Louisiana statute under which petitioner was convicted defines first-degree murder, a capital offense, as something more than intentional killing.[8] In addition, after a defendant is found guilty in Louisiana of capital murder, the jury must also find at the sentencing phase beyond a reasonable doubt at least one of a list of statutory aggravating factors before it may recommend that the death penalty be imposed.[9]

But once eligibility for the death penalty has been established to the satisfaction of the jury, its deliberations assume a differ-

7. While we recognize this as a fact on the basis of our own experience with applications for stays of execution in capital cases, we regard it as a regrettable fact. We of course do not in the least condone, but instead condemn, any efforts on the part of habeas petitioners to delay their filings until the last minute with a view to obtaining a stay because the district court will lack time to give them the necessary consideration before the scheduled execution. A court may resolve against such a petitioner doubts and uncertainties as to the sufficiency of his submission. See *Gomez v. United States District Court*, 503 U.S. ——, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992) (*per curiam*).

8. La.Rev.Stat.Ann. § 14:30 (West 1986 and Supp.1992) defines first degree murder:
"First degree murder is the killing of a human being:
"(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, first degree robbery or simple robbery;
"(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;
"(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or
"(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.
. . . . .
"Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the determination of the jury."

9. At the time of petitioner's trial La.Code Crim. Proc.Ann., Art. 905.3 (West 1984) provided: "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed."

ent tenor. In a series of cases beginning with *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978), we have held that the defendant must be permitted to introduce a wide variety of mitigating evidence pertaining to his character and background. The emphasis shifts from narrowing the class of eligible defendants by objective factors to individualized consideration of a particular defendant. Consideration of aggravating factors together with mitigating factors, in various combinations and methods dependent upon state law, results in the jury's or judge's ultimate decision as to what penalty shall be imposed.

Considering Louisiana law as an example, then, there are three possible ways in which "actual innocence" might be defined. The strictest definition would be to limit any showing to the elements of the crime which the State has made a capital offense. The showing would have to negate an essential element of that offense. The Solicitor General, filing as *amicus curiae* in support of respondent, urges the Court to adopt this standard. We reject this submission as too narrow, because it is contrary to the statement in *Smith* that the concept of "actual innocence" could be applied to mean "innocent" of the death penalty. 477 U.S., at 537, 106 S.Ct., at 2668. This statement suggested a more expansive meaning to the term of "actual innocence" in a capital case than simply innocence of the capital offense itself.

The most lenient of the three possibilities would be to allow the showing of "actual innocence" to extend not only to the elements of the crime, but also to the existence of aggravating factors, and to mitigating evidence which bore, not on the defendant's eligibility to receive the death penalty, but only on the ultimate discretionary decision between the death penalty and life imprisonment. This, in effect is what petitioner urges upon us. He contends that actual innocence of the death penalty exists where "there is a 'fair probability' that the admission of false evidence, or the preclusion of true mitigating evidence, [caused by a constitutional error] resulted in a sentence of death." Brief for Petitioner 18 (citation and footnote omitted).[10] Although petitioner describes his standard as narrower than that adopted by the Eighth and Ninth Circuit Courts of Appeals,[11] in reality it is only more closely related to the facts of his case in which he alleges that constitutional error kept true mitigating evidence from the jury. The crucial consideration according to petitioner, is whether due to constitutional error the sentencer was presented with "'a *factually inaccurate sentencing profile*'" of the petitioner. Brief for Petitioner 15, n. 21, quoting *Johnson v. Singletary*, 938 F.2d 1166, 1200 (CA11 1991) (en banc) (Anderson, J. dissenting).

Insofar as petitioner's standard would include not merely the elements of the

10. Petitioner's standard derives from language in *Smith v. Murray, supra.* Petitioner maintains that *Smith* holds that if one can show that the error precludes the development of true mitigating evidence, actual innocence has been shown. Brief for Petitioner 21. By emphasizing that in *Smith* the fundamental miscarriage of justice exception had not been met because, *inter alia*, the constitutional error did not lead the jury to consider any false evidence, we did not hold its converse, that is that an error which leads to the consideration of "false" mitigating evidence amounts to a miscarriage of justice.

11. In *Deutscher v. Whitley*, 946 F.2d 1443 (CA9 1991), the Ninth Circuit phrased its test as follows: "To establish a fundamental miscarriage of justice at sentencing, a defendant must establish that constitutional error substantially undermined the accuracy of the capital sentencing determination. This requires a showing that constitutional error infected the sentencing process to such a degree that it is more probable than not that, but for constitutional error, the sentence of death would not have been imposed." *Id.*, at 1446 (citations omitted).

The Eighth Circuit has adopted a similar test: "'In the penalty-phase context, this exception will be available if the federal constitutional error alleged probably resulted in a verdict of death against one whom the jury would otherwise have sentenced to life imprisonment.'" *Stokes v. Armontrout*, 893 F.2d 152, 156 (CA8 1989) (quoting *Smith v. Armontrout*, 888 F.2d 530, 545 (CA8 1989)).

crime itself, but the existence of aggravating circumstances, it broadens the extent of the inquiry but not the type of inquiry. Both the elements of the crime and statutory aggravating circumstances in Louisiana are used to narrow the class of defendants eligible for the death penalty. And proof or disproof of aggravating circumstances, like proof of the elements of the crime, is confined by the statutory definitions to a relatively obvious class of relevant evidence. Sensible meaning is given to the term "innocent of the death penalty" by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met.[12]

But we reject petitioner's submission that the showing should extend beyond these elements of the capital sentence to the existence of additional mitigating evidence. In the first place, such an extension would mean that "actual innocence" amounts to little more than what is already required to show "prejudice," a necessary showing for habeas relief for many constitutional errors. See, *e.g.*, *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985); *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). If federal habeas review of capital sentences is to be at all rational, petitioner must show something more in order for a court to reach the merits of his claims on a successive habeas petition than he would have had to show to obtain relief on his first habeas petition.[13]

But, more importantly, petitioner's standard would so broaden the inquiry as to make it anything but a "narrow" exception to the principle of finality which we have previously described it to be. A federal district judge confronted with a claim of actual innocence may with relative ease determine whether a submission, for example, that a killing was not intentional, consists of credible, noncumulative and admissible evidence negating the element of intent. But it is a far more difficult task to assess how jurors would have reacted to additional showings of mitigating factors, particularly considering the breadth of those factors that a jury under our decisions must be allowed to consider.[14]

The Court of Appeals in this case took the middle ground among these three possi-

12. Louisiana narrows the class of those eligible for the death penalty by limiting the type of offense for which it may be imposed, and by requiring a finding of at least one aggravating circumstance. See *supra*, at 7–8. Statutory provisions for restricting eligibility may, of course, vary from state to state.

13. If a showing of actual innocence were reduced to actual prejudice, it would allow the evasion of the cause and prejudice standard which we have held also acts as an "exception" to a defaulted, abusive or successive claim. In practical terms a petitioner would no longer have to show cause, contrary to our prior cases. *McCleskey v. Zant*, 499 U.S. ——, ——, 111 S.Ct. 1454, ——, 113 L.Ed.2d 517 (1991); *Carrier*, 477 U.S., at 493, 106 S.Ct., at 2648.

14. The "clearly erroneous" standard suggested by Justice STEVENS' opinion concurring in the judgment suffers from this weakness and others as well. The term "clearly erroneous" derives from Federal Rule of Civil Procedure 52(a), which provides that "findings of fact [in actions tried without a jury] shall not be set aside unless clearly erroneous." Justice STEVENS wrenches the term out of this context—where it applies to written factual findings made by a trial judge—and would apply it to the imposition of the death sentence by a jury or judge. Not only is the latter determination different both quantitatively and qualitatively from a finding of fact in a bench trial, but Justice STEVENS would not even bring with the term its established meaning in reviewing factfindings in bench trials. We held in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948), and reaffirmed in *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985), that " '[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " But Justice STEVENS would apparently equate it with the standard traditionally used for review of jury verdicts—that no reasonable sentencer could have imposed the death penalty. *Post*, at 2537. Cf. *Jackson v. Virginia*, 443 U.S. 307, 316–318, 99 S.Ct. 2781, 2787–2788, 61 L.Ed.2d 560 (1979).

bilities for defining "actual innocence" of the death penalty, and adopted this test:

> "[W]e must require the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." 945 F.2d, at 820 (footnotes omitted).

The Court of Appeals standard therefore hones in on the objective factors or conditions which must be shown to exist before a defendant is eligible to have the death penalty imposed. The Eleventh Circuit Court of Appeals has adopted a similar "eligibility" test for determining actual innocence. *Johnson v. Singletary*, 938 F.2d 1166 (CA11 1991), petition for cert. pending, No. 91–6576.[15] We agree with the Courts of Appeals for the Fifth and Eleventh Circuits that the "actual innocence" requirement must focus on those elements which render a defendant eligible for the death penalty, and not on additional mitigating evidence which was prevented from being introduced as a result of a claimed constitutional error.

In the present petition, Sawyer advances two claims, arising from two distinct groups of evidentiary facts which were not considered by the jury which convicted and sentenced Sawyer. The first group of evidence relates to petitioner's role in the offense and consists of affidavits attacking the credibility of Cynthia Shano and an affidavit claiming that one of Shano's sons told a police officer that Sawyer was not responsible for pouring lighter fluid on Arwood and lighting it, and that in fact Sawyer tried to prevent Charles Lane from lighting Arwood on fire. Sawyer claims that the police failed to produce this exculpatory evidence in violation of his due process rights under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The second group consists of medical records from Sawyer's stays as a teenager in two different mental health institutions. Sawyer alleges ineffective assistance of counsel in trial counsel's failure to introduce these records in the sentencing phase of his trial.

The Court of Appeals held that petitioner's failure to assert his *Brady* claim in his first petition constituted an abuse of the writ, and that he had not shown cause for failing to raise the claim earlier under *McCleskey*. 945 F.2d, at 824. The ineffective assistance claim was held by the Court of Appeals to be a successive claim because it was rejected on the merits in Sawyer's first petition, and petitioner failed to show cause for not bringing all the evidence in support of this claim earlier. *Id.*, at 823. Petitioner does not contest these findings of the Court of Appeals. Tr. of Oral Arg. 7. Therefore we must determine if petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under Louisiana law.

[6] Under Louisiana law, petitioner is eligible for the death penalty because he was convicted of first-degree murder—that is, an intentional killing while in the process of committing an aggravated arson—and because at the sentencing phase the jury found two valid aggravating circumstances: that the murder was committed in the course of an aggravated arson, and that the murder was especially cruel, atrocious, and heinous. The psychological

15. The Eleventh Circuit articulated the following test:

> "Thus, a petitioner may make a colorable showing that he is actually innocent of the death penalty by presenting evidence that an alleged constitutional error implicates *all* of the aggravating factors found to be present by the sentencing body. That is, but for the alleged constitutional error, the sentencing body *could not* have found *any* aggravating factors and thus the petitioner was ineligible for the death penalty. In other words, the petitioner must show that absent the alleged constitutional error, the jury would have lacked the discretion to impose the death penalty; that is, that he is *ineligible* for the death penalty." *Johnson v. Singletary*, 938 F.2d 1166, 1183 (CA11 1991) (emphasis in original).

evidence petitioner alleges was kept from the jury due to the ineffective assistance of counsel does not relate to petitioner's guilt or innocence of the crime.[16] Neither does it relate to either of the aggravating factors found by the jury which made petitioner eligible for the death penalty. Even if this evidence had been before the jury, it cannot be said that a reasonable juror would not have found both of the aggravating factors which make petitioner eligible for the death penalty.[17] Therefore, as to this evidence, petitioner has not shown that there would be a fundamental miscarriage of justice for the Court to fail to reexamine the merits of this successive claim.

[7] We are convinced that the evidence allegedly kept from the jury due to an alleged *Brady* violation also fails to show that the petitioner is actually innocent of the death penalty to which he has been sentenced. Much of the evidence goes to the credibility of Shano, suggesting *e.g.*, that contrary to her testimony at trial she knew Charles Lane prior to the day of the murder; that she was drinking the day before the murder; and that she testified under a grant of immunity from the prosecutor. 2 App. 589–608. This sort of latter-day evidence brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of Shano's account of petitioner's actions.

The final bit of evidence petitioner alleges was unconstitutionally kept from the jury due to a *Brady* violation was a statement made by Shano's then 4–year–old son, Wayne, to a police officer the day after the murder. Petitioner has submitted an affidavit from one Diane Thibodeaux stating that she was present when Wayne told a police detective who asked who had lit Arwood on fire that "Daddy [Sawyer] tried to help the lady" and that the "other man" had pushed Sawyer back into a chair. 2 App. 587. The affidavit also states that Wayne showed the officer where to find a cigarette lighter and a can of lighter fluid in the trash. *Ibid.* Because this evidence goes to the jury's finding of aggravated arson, it goes both to petitioner's guilt or innocence of the crime of first-degree murder, and the aggravating circumstance of a murder committed in the course of an aggravated arson. However, we conclude that this affidavit, in view of all the other evidence in the record, does not show that no rational juror would find that petitioner committed both of the aggravating circumstances found by the jury. The murder was especially cruel, atrocious, and heinous based on the undisputed evidence of torture before the jury quite apart from the arson (*e.g.*, beating, scalding with boiling water). As for the finding of aggravated arson, we agree with the Court of Appeals that, even crediting the information in the hearsay affidavit,[18] it cannot be said that no reasonable juror would have found, in light of all the evidence, that petitioner was guilty of the aggravated arson for his participation under the Louisiana law of principals.[19]

16. Petitioner does not allege that his mental condition was such that he could not form criminal intent under Louisiana law. Tr. of Oral Arg. 10.

17. In the same category are the affidavits from petitioner's family members attesting to the deprivation and abuse suffered by petitioner as a child. 2 App. 571–584.

18. Wayne Shano apparently has no clear memory of the crime today. 2 App. 602–603. This fact, together with his tender years at the time of the occurrence, suggests that Wayne himself would not corroborate the affidavit of Diane Thibodeaux, thus suggesting an independent basis for refusing to find that the affidavit showed anything by clear and convincing evidence.

19. La.Rev.Stat.Ann. § 14:24 (West 1986) defines principals as: "All persons concerned in the commission of a crime ... and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals."

Even considering the affidavit of Wayne Shano, it cannot be said that no reasonable juror would have found that petitioner committed the aggravated arson, given Cynthia Shano's testimony as to petitioner's statements to Lane on

We therefore hold that petitioner has failed to show by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty under Louisiana law. The judgment of the Court of Appeals is therefore

Affirmed.

Justice BLACKMUN, concurring in the judgment.

I cannot agree with the majority that a federal court is absolutely barred from reviewing a capital defendant's abusive, successive, or procedurally defaulted claim unless the defendant can show "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Ante*, at 2517. For the reasons stated by Justice STEVENS in his separate opinion, *post*, which I join, I believe that the Court today adopts an unduly cramped view of "actual innocence." I write separately not to discuss the specifics of the Court's standard, but instead to reemphasize my opposition to an implicit premise underlying the Court's decision: that the only "fundamental miscarriage of justice" in a capital proceeding that warrants redress is one where the petitioner can make out a claim of "actual innocence." I also write separately to express my ever-growing skepticism that, with each new decision from this Court constricting the ability of the federal courts to remedy constitutional errors, the death penalty really can be imposed fairly and in accordance with the requirements of the Eighth Amendment.

I

The Court repeatedly has recognized that principles of fundamental fairness underlie the writ of habeas corpus. See *Engle v. Isaac*, 456 U.S. 107, 126, 102 S.Ct. 1558, 1571, 71 L.Ed.2d 783 (1982); *Sanders v. United States*, 373 U.S. 1, 17–18, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963). Even as the Court has erected unprecedented and unwarranted barriers to the federal judiciary's review of the merits of claims that state prisoners failed properly to present to the state courts, or failed to raise in their first federal habeas petitions, or previously presented to the federal courts for resolution, it consistently has acknowledged that exceptions to these rules of unreviewability must exist to prevent violations of fundamental fairness. See *Engle*, 456 U.S., at 135, 102 S.Ct. at 1576 (principles of finality and comity "must yield to the imperative of correcting a fundamentally unjust incarceration"). Thus, the Court has held, federal courts may review procedurally defaulted, abusive, or successive claims absent a showing of cause and prejudice if the failure to do so would thwart the "ends of justice," see *Kuhlmann v. Wilson*, 477 U.S. 436, 455, 106 S.Ct. 2616, 2627, 91 L.Ed.2d 364 (1986) (plurality opinion), or work a "fundamental miscarriage of justice." See *Murray v. Carrier*, 477 U.S. 478, 495–496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986); *Smith v. Murray*, 477 U.S. 527, 537–538, 106 S.Ct. 2661, 2668, 91 L.Ed.2d 434 (1986); *Dugger v. Adams*, 489 U.S. 401, 412, n. 6, 109 S.Ct. 1211, 1217–1218, n. 6, 103 L.Ed.2d 435 (1989); *McCleskey v. Zant*, 499 U.S. ——, ——, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991).

By the traditional understanding of habeas corpus, a "fundamental miscarriage of justice" occurs whenever a conviction or sentence is secured in violation of a federal constitutional right. See 28 U.S.C. § 2254(a) (federal courts "shall entertain" habeas petitions from state prisoners who allege that they are "in custody in violation of the Constitution or laws or treaties of the United States"); *Smith*, 477 U.S., at 543–544, 106 S.Ct., at 2671 (STEVENS, J., dissenting). Justice Holmes explained that the concern of a federal court in reviewing the validity of a conviction and death sentence on a writ of habeas corpus is "solely

the day of the murder, and petitioner's fingerprints on the can of lighter fluid.

the question whether [the petitioner's] constitutional rights have been preserved." *Moore v. Dempsey*, 261 U.S. 86, 88, 43 S.Ct. 265, 265, 67 L.Ed. 543 (1923).

In a trio of 1986 decisions, however, the Court ignored these traditional teachings and, out of a purported concern for state sovereignty, for the preservation of state resources, and for the finality of state court judgments, shifted the focus of federal habeas review of procedurally defaulted, successive, or abusive claims away from the preservation of constitutional rights to a fact-based inquiry into the petitioner's innocence or guilt. See *Wilson*, 477 U.S., at 454, 106 S.Ct., at 2627 (plurality opinion) ("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"); *Carrier*, 477 U.S., at 496, 106 S.Ct., at 2649 ("in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default"); *Smith*, 477 U.S., at 537, 106 S.Ct., at 2668 (applying *Carrier* standard to constitutional error at sentencing phase of capital trial). See also *McCleskey*, 499 U.S., at ——, 111 S.Ct., at 1470 (applying *Carrier* standard in "abuse of the writ" context).

The Court itself has acknowledged that "the concept of 'actual,' as distinct from 'legal,' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." *Smith*, 477 U.S., at 537, 106 S.Ct., at 2668. Undaunted by its own illogic, however, the Court adopted just such an approach in *Smith*. There, the Court was confronted with a claim that the introduction at sentencing of inculpatory statements made by Smith to a court-appointed psychiatrist violated the Fifth Amendment because Smith had not been informed that his statements might be used against him or that he had the right to remain silent and to have counsel present. Although the Court assumed the validity of Smith's Fifth Amendment claim [1] and recognized the potential impact of the statement on the jury, which found the aggravating circumstance of "future dangerousness" satisfied, see *id.*, at 538, 106 S.Ct., at 2668, it nonetheless concluded, remarkably and summarily, that admission of the statement did not "pervert the jury's deliberations concerning the ultimate question whether *in fact* petitioner constituted a continuing threat to society" (emphasis in original). *Ibid.* Because Michael Smith could not demonstrate cause for his procedural default, and because, in the Court's view, he had not made a substantial showing that the alleged constitutional violation "undermined the accuracy of the guilt or sentencing determination," *id.*, at 539, 106 S.Ct., at 2668, his Fifth Amendment claim went unaddressed and he was executed on July 31, 1986.

In *Dugger v. Adams*, the Court continued to equate the notion of a "fundamental miscarriage of justice" in a capital trial with the petitioner's ability to show that he or she "probably is 'actually innocent' of the sentence he or she received," 489 U.S., at 412, n. 6, 109 S.Ct., at 1218, n. 6, but appeared to narrow the inquiry even further. Adams' claim, that the trial judge repeatedly had misinformed the jurors, in violation of the Eighth Amendment and *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), that their sentencing vote was strictly advisory in nature (when in fact Florida law permitted the judge to overturn the jury's sentencing decision only upon a clear and convincing showing that its choice was erroneous), surely satisfied the standard articulated in *Smith*: whether petitioner can make out a "substantial claim that the alleged error undermined the accuracy of the guilt or

1. Justice STEVENS explained in his dissenting opinion in *Smith*, 477 U.S., at 551–553, 106 S.Ct., at 2675–2676, that the introduction of the inculpatory statement clearly violated Smith's rights as established in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

sentencing determination." 477 U.S., at 539, 106 S.Ct., at 2668. In a cryptic discussion relegated to a footnote at the end of its opinion, the Court in *Adams* rejected this obvious application of the *Smith* standard, apparently for no other reason than its belief that Adams' ability to demonstrate a "fundamental miscarriage of justice" in this case somehow would convert an "extraordinary" exception into an "ordinary" one. See 489 U.S., at 412, n. 6, 109 S.Ct., at 1218, n. 6. In rejecting the *Smith* standard, the Court did not even bother to substitute another in its place. See *ibid.* ("We do not undertake here to define what it means to be 'actually innocent' of a death sentence"). The Court refused to address Aubrey Adams' claim of constitutional error, and he was executed on May 4, 1989.

Just last Term, in *McCleskey v. Zant*, the Court again described the "fundamental miscarriage of justice" exception as a " 'safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty,' " 499 U.S., at ——, 111 S.Ct., at 1471 (quoting *Stone v. Powell*, 428 U.S. 465, 491–492, n. 31, 96 S.Ct. 3037, 3051 n. 31, 49 L.Ed.2d 1067 (1976)). Although the District Court granted relief to McCleskey on his claim that state authorities deliberately had elicited inculpatory admissions from him in violation of his Sixth Amendment right to counsel, see *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), and excused his failure to present the claim in his first federal habeas petition because the State had withheld documents and information establishing that claim, see 499 U.S., at 1460–1461, 111 S.Ct., at ——, the Court concluded that McCleskey lacked cause for failing to raise the claim earlier. *Id.*, at ——, 111 S.Ct., at 1474. More important for our purposes, the Court concluded that the "narrow exception" by which federal courts may "exercise [their] equitable discretion to correct a miscarriage of justice" was of "no avail" to McCleskey: the "*Massiah* violation, if it be one, resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination." *Ibid.* The Court refused to address Warren McCleskey's claim of constitutional error, and he was executed on September 24, 1991.

The Court today takes for granted that the foregoing decisions correctly limited the concept of a "fundamental miscarriage of justice" to "actual innocence," even as it struggles, by ignoring the "natural usage of those words" and resorting to "analog[s]," see *ante*, at 2519–2520, to make sense of "actual innocence" in the capital context. I continue to believe, however, that the Court's "exaltation of accuracy as the only characteristic of 'fundamental fairness' is deeply flawed." *Smith*, 477 U.S., at 545, 106 S.Ct., at 2672 (STEVENS, J., dissenting).

As an initial matter, the Court's focus on factual innocence is inconsistent with Congress' grant of habeas corpus jurisdiction, pursuant to which federal courts are instructed to entertain petitions from state prisoners who allege that they are held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The jurisdictional grant contains no support for the Court's decision to narrow the reviewing authority and obligation of the federal courts to claims of factual innocence. See also 28 U.S.C. § 2243 ("The court shall ... dispose of the matter as law and justice require"). In addition, the actual innocence standard requires a reviewing federal court, unnaturally, to "function in much the same capacity as the state trier of fact"; that is, to "make a rough decision on the question of guilt or innocence." *Wilson*, 477 U.S., at 471, n. 7, 106 S.Ct., at 2622, n. 7 (Brennan, J., dissenting).

Most important, however, the focus on innocence assumes, erroneously, that the only value worth protecting through federal habeas review is the accuracy and reliability of the guilt determination. But "[o]ur criminal justice system, and our Constitution, protect other values in addition to the reliability of the guilt or innocence de-

termination, and the statutory duty to serve 'law and justice' should similarly reflect those values." *Smith*, 477 U.S., at 545, 106 S.Ct., at 2672 (STEVENS, J., dissenting). The accusatorial system of justice adopted by the Founders affords a defendant certain process-based protections that do not have accuracy of truth-finding as their primary goal. These protections—including the Fifth Amendment right against compelled self-incrimination, the Eighth Amendment right against the imposition of an arbitrary and capricious sentence, the Fourteenth Amendment right to be tried by an impartial judge, and the Fourteenth Amendment right not to be indicted by a grand jury or tried by a petit jury from which members of the defendant's race have been systematically excluded—are debased, and indeed, rendered largely irrelevant, in a system that values the accuracy of the guilt determination above individual rights.

Nowhere is this single-minded focus on actual innocence more misguided than in a case where a defendant alleges a constitutional error in the sentencing phase of a capital trial. The Court's ongoing struggle to give meaning to "innocence of death" simply reflects the inappropriateness of the inquiry. See *Smith*, 477 U.S., at 537, 106 S.Ct., at 2668; *Adams*, 489 U.S., at 412, n. 6, 109 S.Ct., at 1218, n. 6; *ante*, at 2520. "Guilt or innocence is irrelevant in that context; rather, there is only a decision made by representatives of the community whether the prisoner shall live or die." *Wilson*, 477 U.S., at 471–472, n. 7, 106 S.Ct., at 2636, n. 7 (Brennan, J., dissenting). See also Patchel, The New Habeas, 42 Hastings L.J. 941, 972 (1991).

Only by returning to the federal courts' central and traditional function on habeas review, evaluating claims of constitutional error, can the Court ensure that the ends of justice are served and that fundamental miscarriages of justice do not go unremedied. The Court would do well to heed Justice Black's admonition: "it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution." *Brown v. Allen*, 344 U.S. 443, 554, 73 S.Ct. 397, 434, 97 L.Ed. 469 (1953) (dissenting opinion).[2]

II

A

When I was on the United States Court of Appeals for the Eighth Circuit, I once observed, in the course of reviewing a death sentence on a writ of habeas corpus, that the decisional process in a capital case is "particularly excruciating" for someone "who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent." *Maxwell v. Bishop*, 398 F.2d 138, 153–154 (1968), vacated, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970). At the same time, however, I stated my then belief that "the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature." *Id.*, at 154. Four years later, as a member of this Court, I echoed those sentiments in my separate dissenting opinion in *Furman v. Georgia*, 408 U.S. 238, 405, 92 S.Ct. 2726, 2812, 33 L.Ed.2d 346 (1972). Although I reiterated my personal distaste for the death penalty and my doubt that it performs any meaningful deterrent function, see *id.*, at 405–406, 92 S.Ct., at 2812, I declined to join my Brethren in declaring the state statutes at issue in those cases unconstitutional. See *id.*, at 411, 92 S.Ct., at 2815 ("We should not allow our personal preferences as to the wisdom

2. Notwithstanding my view that the Court has erred in narrowing the concept of a "fundamental miscarriage of justice" to cases of "actual innocence," I have attempted faithfully to apply the "actual innocence" standard in prior cases. See, *e.g.*, *Dugger v. Adams*, 489 U.S. 401, 424, n. 15, 109 S.Ct. 1211, 1224, n. 15, 103 L.Ed.2d 435 (1989) (dissenting opinion). I therefore join Justice STEVENS' analysis of the "actual innocence" standard and his application of that standard to the facts of this case. See *post*.

of legislative and congressional action, or our distaste for such action, to guide our judicial decision.").

My ability in *Maxwell*, *Furman*, and the many other capital cases I have reviewed during my tenure on the federal bench to enforce, notwithstanding my own deep moral reservations, a legislature's considered judgment that capital punishment is an appropriate sanction, has always rested on an understanding that certain procedural safeguards, chief among them the federal judiciary's power to reach and correct claims of constitutional error on federal habeas review, would ensure that death sentences are fairly imposed. Today, more than 20 years later, I wonder what is left of that premise underlying my acceptance of the death penalty.

B

Only last Term I had occasion to lament the Court's continuing "crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims" and its transformation of "the duty to protect federal rights into a self-fashioned abdication." *Coleman v. Thompson*, 501 U.S. ——, ——, ——, 111 S.Ct. 2546, 2569, 2571, 115 L.Ed.2d 640 (1991) (dissenting opinion). This Term has witnessed the continued narrowing of the avenues of relief available to federal habeas petitioners seeking redress of their constitutional claims. See, *e.g.*, *Keeney v. Tamayo-Reyes*, — U.S. ——, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992) (overruling *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), in part). It has witnessed, as well, the execution of two victims of the "new habeas," Warren McCleskey and Roger Keith Coleman.

Warren McCleskey's case seemed the archetypal "fundamental miscarriage of justice" that the federal courts are charged with remedying. As noted above, McCleskey demonstrated that state officials deliberately had elicited inculpatory admissions from him in violation of his Sixth Amendment rights and had withheld information he needed to present his claim for relief. In addition, McCleskey argued convincingly in his final hours that he could not even obtain an impartial clemency hearing because of threats by state officials against the pardons and parole board. That the Court permitted McCleskey to be executed without ever hearing the merits of his claims starkly reveals the Court's skewed value system, in which finality of judgments, conservation of state resources, and expediency of executions seem to receive greater solicitude than justice and human life. See *McCleskey v. Bowers*, — U.S. ——, 112 S.Ct. 37, 115 L.Ed.2d 1117 (1991) (Marshall, J., dissenting from denial of stay of execution).

The execution of Roger Keith Coleman is no less an affront to principles of fundamental fairness. Last Term, the Court refused to review the merits of Coleman's claims by effectively overruling, at Coleman's expense, precedents holding that state court decisions are presumed to be based on the merits (and therefore, are subject to federal habeas review) unless they explicitly reveal that they were based on state procedural grounds. See *Coleman*, 501 U.S., at ——–——, 111 S.Ct., at 2571–2572 (dissenting opinion). Moreover, the Court's refusal last month to grant a temporary stay of execution so that the lower courts could conduct a hearing into Coleman's well-supported claim that he was innocent of the underlying offense demonstrates the resounding hollowness of the Court's professed commitment to employ the "fundamental miscarriage of justice exception" as a "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." *McCleskey v. Zant*, 499 U.S., at ——, 111 S.Ct., at 1471 (internal quotation omitted). See *Coleman v. Thompson*, — U.S. ——, 112 S.Ct. 1845, 119 L.Ed.2d 1 (1992) (opinion dissenting from denial of stay of execution).

As I review the state of this Court's capital jurisprudence, I thus am left to wonder how the ever-shrinking authority of

the federal courts to reach and redress constitutional errors affects the legitimacy of the death penalty itself. Since *Gregg v. Georgia*, the Court has upheld the constitutionality of the death penalty where sufficient procedural safeguards exist to ensure that the State's administration of the penalty is neither arbitrary nor capricious. See 428 U.S. 153, 189, 195, 96 S.Ct. 2909, 2932, 2935, 49 L.Ed.2d 859 (1976) (joint opinion); *Lockett v. Ohio*, 438 U.S. 586, 601, 98 S.Ct. 2954, 2963, 57 L.Ed.2d 973 (1978). At the time those decisions issued, federal courts possessed much broader authority than they do today to address claims of constitutional error on habeas review and, therefore, to examine the adequacy of a State's capital scheme and the fairness and reliability of its decision to impose the death penalty in a particular case. The more the Court constrains the federal courts' power to reach the constitutional claims of those sentenced to death, the more the Court undermines the very legitimacy of capital punishment itself.

Justice STEVENS, with whom Justice BLACKMUN and Justice O'CONNOR join, concurring in the judgment.

Only 10 years ago, the Court reemphasized that "[t]he writ of habeas corpus indisputably holds an honored position in our jurisprudence. Tracing its roots deep into English common law, it claims a place in Art. I of our Constitution. Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness.' *Wainwright v. Sykes*, 433 U.S. [72,] 97 [97 S.Ct. 2497, 2512, 53 L.Ed.2d 594 (1972)] (STEVENS, J., concurring)." *Engle v. Isaac*, 456 U.S. 107, 126, 102 S.Ct. 1558, 1571, 71 L.Ed.2d 783 (1982). It is this centrality of "fundamental fairness" that has led the Court to hold that habeas review of a defaulted, successive, or abusive claim is available, even absent a showing of cause, if failure to consider the claim would result in a fundamental miscarriage of justice. See *Sanders v. United States*, 373 U.S. 1, 17–18, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963); *Engle*, 456 U.S., at 135, 102 S.Ct., at 1576.

In *Murray v. Carrier*, 477 U.S. 478, 495, 496, 106 S.Ct. 2639, 2649, 2650, 91 L.Ed.2d 397 (1986), the Court ruled that the concept of "fundamental miscarriage of justice" applies to those cases in which the defendant was "probably ... actually innocent." The Court held that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Id.*, at 496, 106 S.Ct., at 2649. Having equated the "ends of justice" with "actual innocence," the Court is now confronted with the task of giving meaning to "actual innocence" in the context of a capital sentencing proceeding—hence the phrase "innocence of death."

While the conviction of an innocent person may be the archetypal case of a manifest miscarriage of justice, it is not the only case. There is no reason why "actual innocence" must be both an animating *and the limiting* principle of the work of federal courts in furthering the "ends of justice." As Judge Friendly emphasized, there are contexts in which, irrespective of guilt or innocence, constitutional errors violate fundamental fairness. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142, 151–154 (1970). Fundamental fairness is more than accuracy at trial; justice is more than guilt or innocence.

Nowhere is this more true than in capital sentencing proceedings. Because the death penalty is qualitatively and morally different from any other penalty, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, the consequence of scrupulously fair procedures." *Smith v. Murray*, 477 U.S. 527, 545–546, 106 S.Ct. 2661, 2672, 91 L.Ed.2d 434 (1986) (STEVENS, J., dissenting). Accordingly, the ends of justice dictate that "[w]hen a condemned prisoner raises a sub-

stantial, colorable Eighth Amendment violation, there is a special obligation ... to consider whether the prisoner's claim would render his sentencing proceeding fundamentally unfair." *Id.*, at 546, 106 S.Ct., at 2672.

Thus the Court's first and most basic error today is that it asks the wrong question. Charged with averting manifest miscarriages of justice, the Court instead narrowly recasts its duty as redressing cases of "actual innocence." This error aside, under a proper interpretation of the *Carrier* analysis, the Court's definition of "innocence of death" is plainly wrong because it disregards well-settled law—both the law of habeas corpus and the law of capital punishment.

I

The Court today holds that, absent a showing of cause, a federal court may not review a capital defendant's defaulted, successive, or abusive claims unless the defendant

> "show[s] by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found [him] eligible for the death penalty." *Ante*, at 2517.

This definition of "innocence of the death sentence" deviates from our established jurisprudence in two ways. First, the "clear and convincing evidence" standard departs from a line of decisions defining the "actual innocence" exception to the cause-and-prejudice requirement. Second, and more fundamentally, the Court's focus on *eligibility* for the death penalty conflicts with the very structure of the constitutional law of capital punishment.

As noted above, in *Murray v. Carrier*, the Court held that in those cases in which "a constitutional violation has *probably* resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." 477 U.S., at 496, 106 S.Ct., at 2649 (emphasis supplied). The Court has since frequently confirmed this standard. See, *e.g.*, *Coleman v. Thompson*, 501 U.S. ——, ——, 111 S.Ct. 2546, ——, 115 L.Ed.2d 640 (1991); *Dugger v. Adams*, 489 U.S. 401, 412, n. 6, 109 S.Ct. 1211, 1218, n. 6, 103 L.Ed.2d 435 (1989); *Teague v. Lane*, 489 U.S. 288, 313, 109 S.Ct. 1060, 1076–1077, 103 L.Ed.2d 334 (1989). In subsequent decisions, both those involving "innocence of the offense" and those involving "innocence of the death sentence," the Court has employed the same standard of proof. For example, in *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986), the Court repeated the *Carrier* standard and applied it in a capital sentencing proceeding. The Court ruled that Smith's claim did not present "the risk of a manifest miscarriage of justice" as it was "devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination." *Id.*, at 538–539, 106 S.Ct., at 2668. Similarly, in *Dugger v. Adams*, a case involving "innocence of the death sentence," the Court stated the controlling standard as whether an "individual defendant *probably* is 'actually innocent' of the sentence he or she received." 489 U.S., at 412, n. 6, 109 S.Ct., at 1218, n. 6 (emphasis supplied). In sum, in construing both "innocence of the offense" and "innocence of the death sentence," we have consistently required a defendant to show that the alleged constitutional error has *more likely than not* created a fundamental miscarriage of justice.

As we noted in another context, "[t]his 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. Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence." *Strickland v. Washington*, 466 U.S. 668, 693–694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984).

Equally significant, this "probably resulted" standard is well calibrated to the manifest miscarriage of justice exception. Not only does the standard respect the competing demands of finality and fundamental fairness, it also fits squarely within our habeas jurisprudence. In general, a federal court may entertain a defaulted, successive, or abusive claim if a prisoner demonstrates cause and prejudice. See generally *McCleskey v. Zant*, 499 U.S. ——, ——, 111 S.Ct. 1454, ——, 113 L.Ed.2d 517 (1991). To show "prejudice," a defendant must demonstrate "a reasonable probability that, but for [the alleged] erro[r], the result of the proceeding would have been different." *Strickland*, 466 U.S., at 694, 104 S.Ct., at 2068; see also *United States v. Bagley*, 473 U.S. 667, 682, 685, 105 S.Ct. 3375, 3384, 3385, 87 L.Ed.2d 481 (1985). The "miscarriage of justice" exception to this general rule requires a more substantial showing: The defendant must not simply demonstrate a *reasonable probability* of a different result, he must show that the alleged error *more likely than not* created a manifest miscarriage of justice. This regime makes logical sense. If a defendant cannot show cause and can only show a "reasonable probability" of a different outcome, a federal court should not hear his defaulted, successive, or abusive claim. Only in the "exceptional case" in which a defendant can show that the alleged constitutional error "probably resulted" in the conviction (or sentencing) of one innocent of the offense (or the death sentence) should the court hear the defendant's claim.

The Court today repudiates this established standard of proof and replaces it with a requirement that a defendant "show by *clear and convincing evidence* that ... no reasonable juror would have found [him] eligible for the death penalty." *Ante*, at 2517 (emphasis supplied). I see no reason to reject the established and well-functioning "probably resulted" standard and impose such a severe burden on the capital defendant. Although we have frequently recognized the State's strong interest in finality, we have never suggested that that interest is sufficient to outweigh the individual's claim to innocence. To the contrary, the "actual innocence" exception itself manifests our recognition that the criminal justice system occasionally errs and that, when it does, finality must yield to justice.

"The function of a standard of proof ... is 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.' ... The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979) (citation omitted). Neither of these considerations supports the heightened standard of proof the Court imposes today.

First, there is no basis for requiring a federal court to be virtually certain that the defendant is actually ineligible for the death penalty, before *merely entertaining* his claim. We have required a showing by clear and convincing evidence in several contexts: For example, the medical facts underlying a civil commitment must be established by this standard, *Addington v. Texas*, *supra*, as must "actual malice" in a libel suit brought by a public official. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). And we have required a related showing in cases involving deportation, *Woodby v. INS*, 385 U.S. 276, 285–286, 87 S.Ct. 483, 488, 17 L.Ed.2d 362 (1966), and denaturalization, *Schneiderman v. United States*, 320 U.S. 118, 125, 63 S.Ct. 1333, 1336, 87 L.Ed. 1796 (1943). In each of these contexts, the interests of the nonmoving party were truly substantial: personal liberty in *Addington*, freedom of expression in *New York Times*, residence in *Woodby*, and citizenship in

Schneiderman. In my opinion, the State's interest in finality in a capital prosecution is not nearly as great as any of these interests. Indeed, it is important to remember that "innocence of the death sentence" is not a standard for staying or vacating a death sentence, but merely a standard for determining whether or not a court should reach the merits of a defaulted claim. The State's interest in "finality" in this context certainly does not warrant a "clear and convincing" evidentiary standard.

Nor is there any justification for allocating the risk of error to fall so severely upon the capital defendant or attaching greater importance to the initial sentence than to the issue of whether that sentence is appropriate. The States themselves have declined to attach such weight to capital sentences: most States provide plain-error review for defaulted claims in capital cases. See *Smith v. Murray*, 477 U.S., at 548–550, n. 20, 106 S.Ct., at 2674 n. 20 (collecting authorities). In this regard, the Court's requirement that "innocence of death" must be demonstrated by "clear and convincing evidence" fails to respect the uniqueness of death penalty decisions: Nowhere is the need for accuracy greater than when the State exercises its ultimate authority and takes the life of one of its citizens.

Indeed, the Court's ruling creates a perverse double standard. While a defendant raising defaulted claims in a non-capital case must show that constitutional error "probably resulted" in a miscarriage of justice, a capital defendant must present "clear and convincing evidence" that no reasonable juror would find him eligible for the death penalty. It is heartlessly perverse to impose a more stringent standard of proof to avoid a miscarriage of justice in a capital case than in a noncapital case.

In sum, I see no reason to depart from settled law, which clearly requires a defendant pressing a defaulted, successive, or abusive claim to show that a failure to hear his claim will "probably result" in a fundamental miscarriage of justice. In my opinion, a corresponding standard governs a defaulted, successive, or abusive challenge to a capital sentence: The defendant must show that he is probably—that is, more likely than not—"innocent of the death sentence."

II

The Court recognizes that the proper definition of "innocence of the death sentence" must involve a reweighing of the evidence and must focus on the sentencer's likely evaluation of that evidence. Thus, the Court directs federal courts to look to whether a "reasonable juror *would* have found the petitioner eligible for the death penalty." *Ante*, at 2517 (emphasis added). Nevertheless, the Court inexplicably limits this inquiry in two ways. First, the Court holds that courts should consider *only* evidence concerning aggravating factors. As demonstrated below, this limitation is wholly without foundation and neglects the central role of mitigating evidence in capital sentencing proceedings. Second, the Court requires a petitioner to refute his *eligibility* for the death penalty. This narrow definition of "innocence of the death sentence" fails to recognize that, in rare cases, even though a defendant is eligible for the death penalty, such a sentence may nonetheless constitute a fundamental miscarriage of justice.

It is well established that, "in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." *Hitchcock v. Dugger*, 481 U.S. 393, 394, 107 S.Ct. 1821, 1822, 95 L.Ed.2d 347 (1987) (internal quotations and citations omitted). Yet in ascribing a narrow, eligibility-based meaning to "innocence of the death sentence" the Court neglects this rudimentary principle.

As the Court recognizes, a single general directive animates and informs our capital-punishment jurisprudence: "the death penalty [may not] be imposed under sentencing

procedures that creat[e] a substantial risk that [the death penalty] would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). As applied and developed over the years, this constitutional requirement has yielded two central principles. First, a sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983). Second, the sentencer must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (emphasis in original). Although these principles—one narrowing the relevant class, the other broadening the scope of considered evidence—seemingly point in opposite directions, in fact both serve the same end: ensuring that a capital sentence is the product of individualized and reasoned moral decisionmaking.

Against this backdrop of well-settled law, the Court's ruling is a startling anomaly. The Court holds that "innocence of the death sentence" concerns only "those elements which render a defendant *eligible* for the death penalty, and *not* ... *additional mitigating evidence* which [constitutional error precluded] from being introduced." *Ante*, at 2523 (emphasis added). Stated bluntly, the Court today respects only one of the two bedrock principles of capital-punishment jurisprudence. As such, the Court's impoverished vision of capital sentencing is at odds with both the doctrine and the theory developed in our many decisions concerning capital punishment.

First, the Court implicitly repudiates the requirement that the sentencer be allowed to consider all relevant mitigating evidence, a constitutive element of our Eighth Amendment jurisprudence. We have reiterated and applied this principle in more than a dozen cases over the last 14 years. For example, in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), we overturned a capital sentence because the sentencer refused to consider certain mitigating evidence. Similarly, in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), we ruled that a State cannot preclude consideration of evidence of postincarceration, pretrial good behavior. And in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), we held that Texas' death penalty scheme impermissibly restricted the jury's consideration of the defendant's mental retardation as mitigating evidence.[1]

Moreover, the Court's holding also clashes with the *theory* underlying our capital-punishment jurisprudence. The nonarbitrariness—and therefore the constitutionality—of the death penalty rests on *individualized* sentencing determinations. See generally *California v. Brown*, 479 U.S. 538, 544–546, 107 S.Ct. 837, 840–842, 93 L.Ed.2d 934 (1987) (O'CONNOR, J., concurring). This is the difference between the guided-discretion regime upheld in *Gregg v. Georgia* and the mandatory death-sentence regime invalidated in *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). The *Roberts* scheme was constitutionally infirm because it left no room for individualized moral judgments, because it failed to provide the sentencer with a "meaningful opportunity [to] conside[r the] mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender."

1. See also *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990); *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990); *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988); *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); *Bell v. Ohio*, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978).

Id., at 333–334, 96 S.Ct., at 3006 (opinion of Stewart, Powell, and STEVENS, JJ.). The Court's definition of "innocence of the death sentence" is like the statutory scheme in *Roberts:* it focuses solely on whether the defendant is in a class eligible for the death penalty and disregards the equally important question of whether "'death is the appropriate punishment in [the defendant's] specific case.'" *Zant v. Stephens*, 462 U.S., at 885, 103 S.Ct., at 2747 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)).[2]

The Court's definition of "innocent of the death sentence" is flawed in a second, related, way. The Court's analysis not only neglects errors that preclude a sentencer's consideration of mitigating factors; it also focuses too narrowly on *eligibility.* The Court requires a defendant to call into question *all* of the aggravating factors found by the sentencer and thereby show himself ineligible for the death penalty. Contrary to the Court's suggestion, however, there may be cases in which, although the defendant remains eligible for the death penalty, imposition of a death sentence would constitute a manifest miscarriage of justice. If, for example, the sentencer, in assigning a sentence of death, relied heavily on a finding that the defendant severely tortured the victim, but later it is discovered that another person was responsible for the torture, the elimination of the aggravating circumstance will, in some cases, indicate that the death sentence was a miscarriage of justice. By imposing an "all-or-nothing" eligibility test, the Court's definition of "innocent of the death sentence" fails to acknowledge this important possibility.

In sum, the Court's "innocent of the death sentence" standard is flawed both in its failure to consider constitutional errors implicating mitigating factors, and in its unduly harsh requirement that a defendant's eligibility for the death penalty be disproved.

III

In my opinion, the "innocence of the death sentence" standard must take into account several factors. First, such a standard must reflect *both* of the basic principles of our capital-punishment jurisprudence. The standard must recognize both the need to define narrowly the class of "death-eligible" defendants and the need to define broadly the scope of mitigating evidence permitted the capital sentencer. Second, the "innocence of the death sentence" standard should also recognize the distinctive character of the capital-sentencing decision. While the question of innocence or guilt of the offense is essentially a question of fact, the choice between life imprisonment and capital punishment is both a question of underlying fact and a matter of reasoned moral judgment. Thus, there may be some situations in which, although the defendant remains technically "eligible" for the death sentence, nonetheless, in light of all of the evidence, that sentence constitutes a manifest miscarriage of justice. Finally, the "innocence of the death sentence" standard must also respect the "profound importance of finality in criminal proceedings," *Strickland v. Washington*, 466 U.S., at 693–694, 104 S.Ct., at 2068, and the "heavy burden" that successive habeas petitions place "on scarce federal judicial resources." *McCleskey v. Zant*, 499 U.S., at ——, 111 S.Ct., at ——.

2. The Court rejects the argument that federal courts should also consider *mitigating* evidence because consideration of such evidence involves the "far more difficult task [of] assess[ing] how jurors would have reacted to additional showings." *Ante*, at 2522. I see no such difference between consideration of aggravating and mitigating circumstances; both require the federal courts to reconsider and anticipate a sentencer's decision: by the Court's own standard federal courts must determine whether a "reasonable juror would have found" certain facts. Thus, the Court's reason for barring federal courts from considering mitigating circumstances applies equally to the standard that *it* endorses. Its exclusion of mitigating evidence from consideration is therefore wholly arbitrary.

These requirements are best met by a standard that provides that a defendant is "innocent of the death sentence" only if his capital sentence is *clearly erroneous*. This standard encompasses several types of error. A death sentence is clearly erroneous if, taking into account all of the available evidence, the sentencer lacked the legal authority to impose such a sentence because, under state law, the defendant was not eligible for the death penalty. Similarly, in the case of a "jury override," a death sentence is clearly erroneous if, taking into account all of the evidence, the evidentiary prerequisites for that override (as established by state law) were not met. See, *e.g., Johnson v. Singletary*, 938 F.2d 1166, 1194–1195 (CA11 1991) (Tjoflat, C.J., concurring in part and dissenting in part) (concluding that the sentencing "judge, as a matter of law, could not have sentenced the petitioner to death" because there was insufficient evidence to meet the jury-override standard established in *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975)). A death sentence is also clearly erroneous under a "balancing" regime if, in view of all of the evidence, mitigating circumstances so far outweighed aggravating circumstances that no reasonable sentencer would have imposed the death penalty. Cf. *Jackson v. Virginia*, 443 U.S. 307, 316–318, 99 S.Ct. 2781, 2787–2788, 61 L.Ed.2d 560 (1979). Such a case might arise if constitutional error either precluded the defendant from demonstrating that aggravating circumstances did not obtain or precluded the sentencer's consideration of important mitigating evidence.

372 Unlike the standard suggested by the Court, this standard acknowledges both the "aggravation" and "mitigation" aspects of capital-punishment law. It recognizes that, in the extraordinary case, constitutional error may have precluded consideration of mitigating circumstances so substantial as to warrant a court's review of a defaulted, successive, or abusive claim. It also recognizes that, again in the extraordinary case, constitutional error may have inaccurately demonstrated aggravating circumstances so substantial as to warrant review of a defendant's claims.

Moreover, the "clearly erroneous" standard is duly protective of the State's legitimate interests in finality and respectful of the systemic and institutional costs of successive habeas litigation. The standard is stringent: if the sentence "is plausible in light of the record viewed in its entirety" it is not clearly erroneous "even though [the court is] convinced that had it been sitting as the [sentencer], it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). At the same time, "clearly erroneous" review allows a federal court to entertain a defaulted claim in the rare case in which the "court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

Finally, the clearly erroneous standard is workable. As was true of the cause-and-prejudice standard adopted in *McCleskey v. Zant*, the clear-error standard is "[w]ell-defined in the case law [and] familiar to federal courts.... The standard is an objective one, and can be applied in a manner that comports with the threshold nature of the abuse of the writ inquiry." 499 U.S., at ——, 111 S.Ct. at ——. Federal courts have long applied the "clearly erroneous" standard pursuant to Rule 52 of the Federal Rules of Civil Procedure and have done so "in civil contempt actions, condemnation proceedings, copyright appeals, [and] forfeiture actions for illegal activity." 1 S. Childress & M. Davis, Standards of Review § 2.3 at 29–30 (1986) (citing cases).[3] This 373 workability supports the application of the

3. Courts have also reviewed nonguilt findings of fact made in criminal cases pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure under this standard. See 2 S. Childress & M. Davis, Standards of Review § 10.3 at 73–76 (1986) (citing cases).

clearly erroneous standard to the "innocence of the death sentence" inquiry.

In my opinion, then, the "clearly erroneous" standard is the core of the "innocence of the death sentence" exception. Just as a defendant who presses a defaulted, successive, or abusive claim and who cannot show cause must demonstrate that it is more likely than not that he is actually innocent of the offense, so a capital defendant who presses such a claim and cannot show cause must demonstrate that it is more likely than not that his death sentence was clearly erroneous. Absent such a showing, a federal court may not reach the merits of the defendant's defaulted, successive, or abusive claim.

IV

It remains to apply this standard to the case at hand. As the majority indicates, Sawyer alleges two constitutional errors. First, he contends that the State withheld certain exculpatory evidence, in violation of Sawyer's due process rights as recognized in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Second, Sawyer argues that his trial counsel's failure to uncover and present records from Sawyer's earlier treatments in psychiatric institutions deprived him of effective assistance of counsel as guaranteed by the Sixth Amendment.

As Sawyer failed to assert his *Brady* claim in an earlier habeas petition and as he cannot show cause for that failure, the court may only reach the merits of that "abusive" claim if Sawyer demonstrates that he is probably actually innocent of the offense or that it is more likely than not that his death sentence was clearly erroneous. As Sawyer's ineffective-assistance claim was considered and rejected in an earlier habeas proceeding, the court may only review that "successive" claim upon a similar showing. Upon a review of the record in its entirety, I conclude that Sawyer has failed to make such a showing.

Sawyer points to two pieces of exculpatory evidence allegedly withheld by the State. First, he offers the affidavit of a woman (Diane Thibodeaux) who, on occasion, took care of the small child who witnessed the crime. That account appears to conflict with contemporaneous police reports. While police records indicate that the child implicated Sawyer in the cruel burning of the victim, Thibodeaux avers that the child stated to her that Sawyer's codefendant, Charles Lane, set the victim afire. Second, he offers other affidavits casting doubt on the credibility of Cindy Shano, the State's principal witness. Sawyer emphasizes that Shano testified under a grant of immunity and highlights inaccuracies in her trial testimony. Finally, as part of his Sixth Amendment claim, Sawyer also offers medical records documenting brain damage and retarded mental development.

Viewed as a whole, the record does not demonstrate that failure to reach the merits of Sawyer's claims would constitute a fundamental miscarriage of justice. First, in view of the other evidence in the record, the Thibodeaux affidavit and questions concerning Shano's testimony do not establish that Sawyer is "probably ... actually innocent" of the crime of first-degree murder. At most, Thibodeaux's hearsay statements cast slight doubt on the facts underlying the burning of the victim. Similarly, although the challenges to Shano's testimony raise questions, these affidavits do not demonstrate that Sawyer probably did not commit first-degree murder. Thus, Sawyer has not met the standard "actual innocence" exception.

Second, the affidavits and the new medical records do not convince me that Sawyer's death sentence is clearly erroneous. The jury found two statutory aggravating factors—that the murder was committed in the course of an aggravated arson, and that the murder was especially heinous, atrocious, and cruel. *State v. Sawyer*, 422 So.2d 95, 100 (La.1982). As suggested above, the Thibodeaux affidavit does not show that it is "more likely than not" that Sawyer did not commit aggravated arson.

Moreover, Sawyer offers no evidence to undermine the jury's finding that the murder was especially heinous, atrocious, and cruel. In addition, assuming that the new medical evidence would support a finding of a statutory mitigating factor (diminished capacity due to mental disease or defect),[4] I cannot say that it would be clear error for a sentencer faced with the two unrefuted aggravating circumstances and that single mitigating circumstance to sentence Sawyer to death.

In sum, in my opinion Sawyer has failed to demonstrate that it is more likely than not that his death sentence was clearly erroneous. Accordingly, I conclude that the court below was correct in declining to reach the merits of Sawyer's successive and abusive claims.

V

The Court rejects an "innocence of death" standard that recognizes constitutional errors affecting *mitigating* evidence because such a standard "would so broaden the inquiry as to make it anything but a 'narrow' exception to the principle of finality." *Ante*, at 2522. As the foregoing analysis indicates, however, the Court's concerns are unfounded. Indeed, even when federal courts have applied a less restrictive standard than the standard I propose, those courts have rarely found "innocence of death" and reached the merits of a defaulted, successive, or abusive claim. See *Deutscher v. Whitley*, 946 F.2d 1443 (CA9 1991); *Stokes v. Armontrout*, 893 F.2d 152, 156 (CA8 1989); *Smith v. Armontrout*, 888 F.2d 530, 545 (CA8 1989).

Similarly, I do not share the Court's concern that a standard broader than the eligibility standard creates "a far more difficult task" for federal courts. *Ante*, at 2522. As noted above, both the "probably resulted" standard and the "clearly erroneous" standard have long been applied by federal courts in a variety of contexts. Moreover, to the extent that the clearly erroneous standard is more difficult to apply than the Court's "eligibility" test, I believe that that cost is far outweighed by the importance of making just decisions in the few cases that fit within this narrow exception. To my mind, any added administrative burden is surely justified by the overriding interest in minimizing the risk of error in implementing the sovereign's decision to take the life of one of its citizens. As we observed in *Gardner v. Florida*, 430 U.S. 349, 360, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977), "if the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death."

4. See La.Code Crim.Proc.Ann., Art. 905.5(e) (West 1984) (defining "mitigating circumstances" to include the fact that "the capacity of the offender 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" at the time of the offense).



R.A.V., Petitioner,

v.

CITY OF ST. PAUL, MINNESOTA.

No. 90–7675.

Argued Dec. 4, 1991.

Decided June 22, 1992.

Person was charged with violating city ordinance prohibiting bias-motivated disorderly conduct. The District Court, Ramsey County, Charles A. Flinn, Jr., J., dismissed charge prior to trial on ground that ordinance censored expressive conduct in violation of First Amendment. City appealed. The Minnesota Supreme Court, 464 N.W.2d 507, reversed and remanded. Certiorari was granted. The Supreme Court, Justice

APPENDIX M

473 U.S. 667, 87 L.Ed.2d 481

667UNITED STATES, Petitioner,

v.

Hughes Anderson BAGLEY.

No. 84-48.

Argued March 20, 1985.

Decided July 2, 1985.

Defendant appealed from an order of the United States District Court for the Western District of Washington, Donald S. Voorhees, J., denying his motion to vacate, set aside, or correct sentence received for his narcotics convictions. The United States Court of Appeals for the Ninth Circuit, 719 F.2d 1462, reversed and remanded, and certiorari was granted. The Supreme Court, Justice Blackmun, held that evidence withheld by government is "material," as would require reversal of conviction, only if there is reasonable probability that, had evidence been disclosed to defense, result of proceeding would have been different.

Reversed and remanded.

Justice White filed an opinion concurring in part and concurring in the judgment, in which Chief Justice Burger and Justice Rehnquist joined.

Justice Marshall filed a dissenting opinion in which Justice Brennan joined.

Justice Stevens filed a dissenting opinion.

1. **Criminal Law** ⇐627.5(1), 700(2)

Brady rule does not require prosecutor to deliver his entire file to defense counsel, but only to disclose evidence favorable to accused that, if suppressed, would deprive him of fair trial.

2. **Criminal Law** ⇐627.5(1), 700(4)

Impeachment evidence, as well as exculpatory evidence, falls within *Brady* rule.

3. **Criminal Law** ⇐627.5(1), 700(2), 1166(10.10)

Government's failure to assist defense by disclosing information that might have been helpful in conducting cross-examination amounts to constitutional violation only if it deprives defendant of fair trial; constitutional error occurs, and conviction must be reversed, only if evidence is material in sense that its suppression undermines confidence in outcome of trial.

4. **Criminal Law** ⇐700(2), 1171.1(1)

Evidence withheld by government is "material," as would require reversal of conviction, only if there is reasonable probability that, had evidence been disclosed to defense, result of proceeding would have been different.

See publication Words and Phrases for other judicial constructions and definitions.

Syllabus *

Respondent was indicted on charges of violating federal narcotics and firearms statutes. Before trial, he filed a discovery motion requesting, *inter alia*, "any deals, promises or inducements made to [Government] witnesses in exchange for their testimony." The Government's response did not disclose that any "deals, promises or inducements" had been made to its two principal witnesses, who had assisted the Bureau of Alcohol, Tobacco and Firearms (ATF) in conducting an undercover investigation of respondent. But the Government did produce signed affidavits by these witnesses recounting their undercover dealing with respondent and concluding with the statement that the affidavits were made without any threats or rewards or promises of reward. Respondent waived his right to a jury trial and was tried before the District Court. The two principal Government witnesses testified about both the firearms and narcotics charges, and the court found respondent guilty on the narcotics charges but not guilty on the firearms charges. Subsequently, in response to requests

* 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.

made pursuant to the Freedom of Information Act and the Privacy Act, respondent received copies of ATF contracts signed by the principal Government witnesses during the undercover investigation and stating that the Government would pay money to the witnesses commensurate with the information furnished. Respondent then moved to vacate his sentence, alleging that the Government's failure in response to the discovery motion to disclose these contracts, which he could have used to impeach the witnesses, violated his right to due process under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, which held that the prosecution's suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment. The District Court denied the motion, finding beyond a reasonable doubt that had the existence of the ATF contracts been disclosed to it during trial, the disclosure would not have affected the outcome, because the principal Government witnesses' testimony was primarily devoted to the firearms charges on which respondent was acquitted, and was exculpatory on the narcotics charges. The Court of Appeals reversed, holding that the Government's failure to disclose the requested impeachment evidence that respondent could have used to conduct an effective cross-examination of the Government's principal[668] witnesses required automatic reversal. The Court of Appeals also stated that it "disagree[d]" with the District Court's conclusion that the nondisclosure was harmless beyond a reasonable doubt, noting that the witnesses' testimony was in fact inculpatory on the narcotics charges.

Held: The judgment is reversed, and the case is remanded.

719 F.2d 1462 (CA9 1983) reversed and remanded.

Justice BLACKMUN delivered the opinion of the Court with respect to Parts I and II, concluding that the Court of Appeals erred in holding that the prosecutor's failure to disclose evidence that could have been used effectively to impeach important Government witnesses requires automatic reversal. Such nondisclosure constitutes constitutional error and requires reversal of the conviction only if the evidence is material in the sense that its suppression might have affected the outcome of the trial. Pp. 3379–3381.

Justice BLACKMUN, joined by Justice O'CONNOR, delivered an opinion with respect to Part III, concluding that the nondisclosed evidence at issue is material 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. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. This standard of materiality is sufficiently flexible to cover cases of prosecutorial failure to disclose evidence favorable to the defense regardless of whether the defense makes no request, a general request, or a specific request. Although the prosecutor's failure to respond fully to a specific request may impair the adversary process by having the effect of representing to the defense that certain evidence does not exist, this possibility of impairment does not necessitate a different standard of materiality. Under the standard stated above, the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. Pp. 3381–3385.

Justice WHITE, joined by THE CHIEF JUSTICE and Justice REHNQUIST, being of the view that there is no reason to elaborate on the relevance of the specificity of the defense's request for disclosure, either generally or with respect to this case, concluded that reversal was mandated simply because the Court of Appeals failed to apply the "reasonable probability" standard of materiality to the nondisclosed evidence in question. P. 3385.

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[669]David A. Strauss, Washington, D.C., for petitioner.

Thomas W. Hillier, II, Seattle, Wash., for respondent.

Justice BLACKMUN announced the judgment of the Court and delivered an opinion of the Court except as to Part III.

In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963), 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 punishment." The issue in the present case concerns the standard of materiality to be applied in determining whether a conviction should be reversed because the prosecutor failed to disclose requested evidence that could have been used to impeach Government witnesses.

I

In October 1977, respondent Hughes Anderson Bagley was indicted in the Western District of Washington on 15 charges of violating federal narcotics and firearms statutes. On November 18, 24 days before trial, respondent filed a discovery motion. The sixth paragraph of that motion requested:

> "The names and addresses of witnesses that the government intends to call at trial. Also the prior criminal records of witnesses, and any deals, promises or inducements[670] made to witnesses in exchange for their testimony." App. 18.[1]

The Government's two principal witnesses at the trial were James F. O'Connor and Donald E. Mitchell. O'Connor and Mitchell were state law-enforcement officers employed by the Milwaukee Railroad as private security guards. Between April and June 1977, they assisted the federal Bureau of Alcohol, Tobacco and Firearms (ATF) in conducting an undercover investigation of respondent.

The Government's response to the discovery motion did not disclose that any "deals, promises or inducements" had been made to O'Connor or Mitchell. In apparent reply to a request in the motion's ninth paragraph for "[c]opies of all Jencks Act material," [2] the Government produced a series of affidavits that O'Connor and Mitchell had signed between April 12 and May 4, 1977, while the undercover investigation was in progress. These affidavits recounted in detail the undercover dealings that O'Connor and Mitchell were having at the time with respondent. Each affidavit concluded with the statement, "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it." [3]

Respondent waived his right to a jury trial and was tried before the court in December 1977. At the trial, O'Connor [671]and Mitchell testified about both the firearms and the narcotics charges. On December 23, the court found respondent guilty on the narcotics charges, but not guilty on the firearms charges.

In mid-1980, respondent filed requests for information pursuant to the Freedom of Information Act and to the Privacy Act of 1974, 5 U.S.C. §§ 552 and 552a. He received in response copies of ATF form contracts that O'Connor and Mitchell had signed on May 3, 1977. Each form was entitled "Contract for Purchase of Information and Payment of Lump Sum Therefor." The printed portion of the form stated that the vendor "will provide" informa-

1. In addition, ¶ 10(b) of the motion requested "[p]romises or representations made to any persons the government intends to call as witnesses at trial, including but not limited to promises of no prosecution, immunity, lesser sentence, etc.," and ¶ 11 requested "[a]ll information which would establish the reliability of the Milwaukee Railroad Employees in this case, whose testimony formed the basis for the search warrant." App. 18–19.

2. The Jencks Act, 18 U.S.C. § 3500, requires the prosecutor to disclose, after direct examination of a Government witness and on the defendant's motion, any statement of the witness in the Government's possession that relates to the subject matter of the witness' testimony.

3. Brief for United States 3, quoting Memorandum of Points and Authorities in Support of Pet. for Habeas Corpus, CV-3592-RJK(M) (CD Cal.) Exhibits 1–9.

tion to ATF and that "upon receipt of such information by the Regional Director, Bureau of Alcohol, Tobacco and Firearms, or his representative, and upon the accomplishment of the objective sought to be obtained by the use of such information to the satisfaction of said Regional Director, the United States will pay to said vendor a sum commensurate with services and information rendered." App. 22 and 23. Each form contained the following typewritten description of services:

> "That he will provide information regarding T–I and other violations committed by Hughes A. Bagley, Jr.; that he will purchase evidence for ATF; that he will cut [*sic*] in an undercover capacity for ATF; that he will assist ATF in gathering of evidence and testify against the violator in federal court." *Ibid.*

The figure "$300.00" was handwritten in each form on a line entitled "Sum to Be Paid to Vendor."

Because these contracts had not been disclosed to respondent in response to his pretrial discovery motion,[4] respondent moved under 28 U.S.C. § 2255 to vacate his sentence. He [672] alleged that the Government's failure to disclose the contracts, which he could have used to impeach O'Connor and Mitchell, violated his right to due process under *Brady v. Maryland, supra.*

The motion came before the same District Judge who had presided at respondent's bench trial. An evidentiary hearing was held before a Magistrate. The Magistrate found that the printed form contracts were blank when O'Connor and Mitchell signed them and were not signed by an ATF representative until after the trial. He also found that on January 4, 1978, following the trial and decision in respondent's case, ATF made payments of $300 to both O'Connor and Mitchell pursuant to the contracts.[5] Although the ATF case agent who dealt with O'Connor and Mitchell testified that these payments were compensation for expenses, the Magistrate found that this characterization was not borne out by the record. There was no documentation for expenses in these amounts; Mitchell testified that his payment was not for expenses, and the ATF forms authorizing the payments treated them as rewards.

The District Court adopted each of the Magistrate's findings except for the last one to the effect that "[n]either O'Connor nor Mitchell expected to receive the payment of $300 or any payment from the United States for their testimony." App. to Pet. for Cert. 7a, 12a, 14a. Instead, the court found that it was "probable" that O'Connor and Mitchell expected to receive compensation, in addition to their expenses, for their assistance, "though perhaps not for their testimony." *Id.*, at 7a. The District Court also expressly rejected, *ibid.*, the Magistrate's conclusion, *id.*, at 14a, that:

> [673] "Because neither witness was promised or expected payment for his testimony, the United States did not withhold, during pretrial discovery, information as to any 'deals, promises or inducements' to these witnesses. Nor did the United States suppress evidence favorable to the defendant, in violation of *Brady v. Maryland*, 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] (1963)."

The District Court found beyond a reasonable doubt, however, that had the existence of the agreements been disclosed to it during trial, the disclosure would have had no effect upon its finding that the Govern-

4. The Assistant United States Attorney who prosecuted respondent stated in stipulated testimony that he had not known that the contracts existed and that he would have furnished them to respondent had he known of them. See App. to Pet. for Cert. 13a.

5. The Magistrate found, too, that ATF paid O'Connor and Mitchell, respectively, $90 and $80 in April and May 1977 before trial, but concluded that these payments were intended to reimburse O'Connor and Mitchell for expenses, and would not have provided a basis for impeaching O'Connor's and Mitchell's trial testimony. The District Court adopted this finding and conclusion. *Id.*, at 7a, 13a.

ment had proved beyond a reasonable doubt that respondent was guilty of the offenses for which he had been convicted. *Id.*, at 8a. The District Court reasoned: Almost all of the testimony of both witnesses was devoted to the firearms charges in the indictment. Respondent, however, was acquitted on those charges. The testimony of O'Connor and Mitchell concerning the narcotics charges was relatively very brief. On cross-examination, respondent's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that the controlled substances in question came from supplies that had been prescribed for respondent's personal use. The answers of O'Connor and Mitchell to this line of cross-examination tended to be favorable to respondent. Thus, the claimed impeachment evidence would not have been helpful to respondent and would not have affected the outcome of the trial. Accordingly, the District Court denied respondent's motion to vacate his sentence.

The United States Court of Appeals for the Ninth Circuit reversed. *Bagley v. Lumpkin*, 719 F.2d 1462 (1983). The Court of Appeals began by noting that, according to precedent in the Circuit, prosecutorial failure to respond to a specific *Brady* request is properly analyzed as error, and a resulting conviction must be reversed unless the error is harmless beyond a reasonable doubt. The court noted that the District Judge who had presided over the bench trial [674] concluded beyond a reasonable doubt that disclosure of the ATF agreement would not have affected the outcome. The Court of Appeals, however, stated that it "disagree[d]" with this conclusion. *Id.*, at 1464. In particular, it disagreed with the Government's—and the District Court's—premise that the testimony of O'Connor and Mitchell was exculpatory on the narcotics charges, and that respondent therefore would not have sought to impeach "his own witness." *Id.*, at 1464, n. 1.

The Court of Appeals apparently based its reversal, however, on the theory that the Government's failure to disclose the requested *Brady* information that respondent could have used to conduct an effective cross-examination impaired respondent's right to confront adverse witnesses. The court noted: "In *Davis v. Alaska*, ... the Supreme Court held that the denial of the 'right of *effective* cross-examination' was ' "constitutional error of the first magnitude" ' requiring automatic reversal." 719 F.2d, at 1464 (quoting *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974)) (emphasis added by Court of Appeals). In the last sentence of its opinion, the Court of Appeals concluded: "we hold that the government's failure to provide requested *Brady* information to Bagley so that he could effectively cross-examine two important government witnesses requires an automatic reversal." 719 F.2d, at 1464.

We granted certiorari, 469 U.S. 1016, 105 S.Ct. 427, 83 L.Ed.2d 354 (1984), and we now reverse.

II

The holding in *Brady v. Maryland* requires disclosure only of evidence that is both favorable to the accused and "material either to guilt or to punishment." 373 U.S., at 87, 83 S.Ct., at 1196. See also *Moore v. Illinois*, 408 U.S. 786, 794–795, 92 S.Ct. 2562, 2567–2568, 33 L.Ed.2d 706 (1972). The Court explained in *United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976): "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of [675] the trial." The evidence suppressed in *Brady* would have been admissible only on the issue of punishment and not on the issue of guilt, and therefore could have affected only Brady's sentence and not his conviction. Accordingly, the Court affirmed the lower court's restriction of Brady's new trial to the issue of punishment.

[1] The *Brady* rule is based on the requirement of due process. Its purpose is

not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.[6] Thus, the prosecutor is not required to deliver his entire file to defense counsel,[7] but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial:

> "For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose....
>
> "... But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure[676] unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." 427 U.S., at 108, 96 S.Ct., at 2399.

[2] In *Brady* and *Agurs*, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. See *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Such evidence is "evidence favorable to an accused," *Brady*, 373 U.S., at 87, 83 S.Ct., at 1196, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

The Court of Appeals treated impeachment evidence as constitutionally different from exculpatory evidence. According to that court, failure to disclose impeachment evidence is "even more egregious" than failure to disclose exculpatory evidence "because it threatens the defendant's right to confront adverse witnesses." 719 F.2d, at 1464. Relying on *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Court of Appeals held that the Government's failure to disclose requested impeachment evidence that the defense could use to conduct an effective cross-examination of important prosecution witnesses constitutes " 'constitutional error of the first magnitude' " requiring automatic reversal. 719 F.2d, at 1464 (quoting *Davis v. Alaska, supra*, 415 U.S., at 318, 94 S.Ct., at 1111).

This Court has rejected any such distinction between impeachment evidence and exculpatory evidence. In *Giglio v. United States, supra*, the Government failed to disclose impeachment evidence similar to the evidence at issue in the present case, that is, a promise made to the key Govern-

6. By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... 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, 633, 79 L.Ed. 1314 (1935). See *Brady v. Maryland*, 373 U.S., at 87–88, 83 S.Ct., at 1196–1197.

7. See *United States v. Agurs*, 427 U.S. 97, 106, 111, 96 S.Ct. 2392, 2398, 2401, 49 L.Ed.2d 342 (1976); *Moore v. Illinois*, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972). See also *California v. Trombetta*, 467 U.S. 479, 488, n. 8, 104 S.Ct. 2528, 2534, n. 8, 81 L.Ed.2d 413 (1984). An interpretation of *Brady* to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present systems of criminal justice." *Giles v. Maryland*, 386 U.S. 66, 117, 87 S.Ct. 793, 818, 17 L.Ed.2d 737 (1967) (dissenting opinion). Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments.

ment [677] witness that he would not be prosecuted if he testified for the Government. This Court said:

"When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within th[e] general rule [of *Brady*]. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict....' A finding of materiality of the evidence is required under *Brady*.... A new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury....'" 405 U.S., at 154, 92 S.Ct., at 766 (citations omitted).

Thus, the Court of Appeals' holding is inconsistent with our precedents.

Moreover, the court's reliance on *Davis v. Alaska* for its "automatic reversal" rule is misplaced. In *Davis*, the defense sought to cross-examine a crucial prosecution witness concerning his probationary status as a juvenile delinquent. The defense intended by this cross-examination to show that the witness might have made a faulty identification of the defendant in order to shift suspicion away from himself or because he feared that his probationary status would be jeopardized if he did not satisfactorily assist the police and prosecutor in obtaining a conviction. Pursuant to a state rule of procedure and a state statute making juvenile adjudications inadmissible, the trial judge prohibited the defense from conducting the cross-examination. This Court reversed the defendant's conviction, ruling that the direct restriction on the scope of cross-examination denied the defendant "the right of effective cross-examination which '"would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart v. Janis*, 384 U.S. 1, 3"' [86 S.Ct. 1245, 1246, 16 L.Ed.2d 314]." 415 U.S., at 318, 94 S.Ct., at 1111 (quoting *Smith* [678] *v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 749, 19 L.Ed.2d 956 (1968)). See also *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984).

[3] The present case, in contrast, does not involve any direct restriction on the scope of cross-examination. The defense was free to cross-examine the witnesses on any relevant subject, including possible bias or interest resulting from inducements made by the Government. The constitutional error, if any, in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination. As discussed above, such suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with "our overriding concern with the justice of the finding of guilt," *United States v. Agurs*, 427 U.S., at 112, 96 S.Ct., at 2401, a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.

III

A

It remains to determine the standard of materiality applicable to the nondisclosed evidence at issue in this case. Our starting point is the framework for evaluating the materiality of *Brady* evidence established in *United States v. Agurs*. The Court in *Agurs* distinguished three situations involving the discovery, after trial, of information favorable to the accused that had been known to the prosecution but unknown to the defense. The first situation was the prosecutor's knowing use of perjured testimony or, equivalently, the prosecutor's knowing failure to disclose that testimony used to convict the defendant was false. The Court noted the well-established rule that "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 judgment of the jury." |679427 U.S., at 103, 96 S.Ct., at 2397 (footnote omitted).[8] Although this rule is stated in terms that treat the knowing use of perjured testimony as error subject to harmless-error review,[9] it may as |680easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt. The Court in *Agurs* justified this standard of materiality on the ground that the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves "a corruption of the truth-seeking function of the trial process." *Id.*, at 104, 96 S.Ct., at 2397.

At the other extreme is the situation in *Agurs* itself, where the defendant does not make a *Brady* request and the prosecutor fails to disclose certain evidence favorable to the accused. The Court rejected a harmless-error rule in that situation, because under that rule every nondisclosure is treated as error, thus imposing on the prosecutor a constitutional duty to deliver his entire file to defense counsel.[10] 427 U.S., at 111–112, 96 S.Ct., at 2401. At the same time, the Court rejected a standard that would require the defendant to demonstrate that the evidence if disclosed proba-

8. In fact, the *Brady* rule has its roots in a series of cases dealing with convictions based on the prosecution's knowing use of perjured testimony. In *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935), the Court established the rule that the knowing use by a state prosecutor of perjured testimony to obtain a conviction and the deliberate suppression of evidence that would have impeached and refuted the testimony constitutes a denial of due process. The Court reasoned that "a deliberate deception of court and jury by the presentation of testimony known to be perjured" is inconsistent with "the rudimentary demands of justice." *Id.*, at 112, 55 S.Ct., at 341. The Court reaffirmed this principle in broader terms in *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942), where it held that allegations that the prosecutor had deliberately suppressed evidence favorable to the accused and had knowingly used perjured testimony were sufficient to charge a due process violation.

The Court again reaffirmed this principle in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). In *Napue*, the principal witness for the prosecution falsely testified that he had been promised no consideration for his testimony. The Court held that the knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared. The Court explained that the principle that a State may not knowingly use false testimony to obtain a conviction—even false testimony that goes only to the credibility of the witness—is "implicit in any concept of ordered liberty." *Id.*, at 269, 79 S.Ct., at 1177. Finally, the Court held that it was not 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. The Court conducted its own independent examination of the record and concluded that the false testimony "may have had an effect on the outcome of the trial." *Id.*, at 272, 79 S.Ct., at 1178. Accordingly, the Court reversed the judgment of conviction.

9. The rule that a conviction 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*, 360 U.S. at 271, 79 S.Ct., at 1178. See n. 8, *supra*. See also *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972) (quoting *Napue*, 360 U.S., at 271, 79 S.Ct., at 1178). *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 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86–87, 84 S.Ct. 229, 230–231, 11 L.Ed.2d 171 (1963)). It is therefore clear, as indeed the Government concedes, see Brief for United States 20, and 36–38, 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.

10. This is true only if the nondisclosure is treated as error subject to harmless-error review, and not if the nondisclosure is treated as error only if the evidence is material under a not "harmless beyond a reasonable doubt" standard.

bly would have resulted in acquittal. *Id.*, at 111, 96 S.Ct., at 2401. The Court reasoned: "If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Ibid.* The [681] standard of materiality applicable in the absence of a specific *Brady* request is therefore stricter than the harmless-error standard but more lenient to the defense than the newly-discovered-evidence standard.

The third situation identified by the Court in *Agurs* is where the defense makes a specific request and the prosecutor fails to disclose responsive evidence.[11] The Court did not define the standard of materiality applicable in this situation,[12] but suggested that the standard might be more lenient to the defense than in the situation in which the defense makes no request or only a general request. 427 U.S., at 106, 96 S.Ct., at 2398. The Court also noted: "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Ibid.*

The Court has relied on and reformulated the *Agurs* standard for the materiality of undisclosed evidence in two subsequent cases arising outside the *Brady* context. In neither case did the Court's discussion of the *Agurs* standard distinguish among the three situations described in *Agurs*. In *United States v. Valenzuela-Bernal*, 458 U.S. 858, 874, 102 S.Ct. 3440, 3450, 73 L.Ed.2d 1193 (1982), the Court held that due process is violated when testimony is made unavailable to the defense by Government deportation of witnesses "only if there is a reasonable likelihood that the testimony could have affected the judgment of the [682] trier of fact." And in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Court held that a new trial must be granted when evidence is not introduced because of the incompetence of counsel only if "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., at 2068.[13] The *Strickland* Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Ibid.*

[4] We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material 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. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

The Government suggests that a materiality standard more favorable to the defendant reasonably might be adopted in specific request cases. See Brief for Unit-

11. The Court in *Agurs* identified *Brady* as a case in which specific information was requested by the defense. 427 U.S., at 106, 96 S.Ct., at 2398. The request in *Brady* was for the extrajudicial statements of Brady's accomplice. See 373 U.S., at 84, 83 S.Ct., at 1195.

12. The Court in *Agurs* noted: "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." 427 U.S., at 104, 96 S.Ct., at 2397. Since the *Agurs* Court identified *Brady* as a "specific request" case, see n. 11, *supra*, this language might be taken as indicating the standard of materiality applicable in such a case. It is clear, however, that the language merely explains the meaning of the term "materiality." It does not establish a standard of materiality because it does not indicate what quantum of likelihood there must be that the undisclosed evidence would have affected the outcome.

13. In particular, the Court explained in *Strickland:* "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." 466 U.S., at 695, 104 S.Ct., at 2068–2069.

ed States 31. The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued. *Ibid.*

We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the [683] nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. This possibility of impairment does not necessitate a different standard of materiality, however, for under the *Strickland* formulation the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

B

In the present case, we think that there is a significant likelihood that the prosecutor's response to respondent's discovery motion misleadingly induced defense counsel to believe that O'Connor and Mitchell could not be impeached on the basis of bias or interest arising from inducements offered by the Government. Defense counsel asked the prosecutor to disclose any inducements that had been made to witnesses, and the prosecutor failed to disclose that the possibility of a reward had been held out to O'Connor and Mitchell if the information they supplied led to "the accomplishment of the objective sought to be obtained ... to the satisfaction of [the Government]." App. 22 and 23. This possibility of a reward gave O'Connor and Mitchell a direct, personal stake in respondent's conviction. The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction. Moreover, the prosecutor disclosed affidavits that stated that O'Connor and Mitchell received no promises of reward in return for providing information in the affidavits implicating respondent in [684] criminal activity. In fact, O'Connor and Mitchell signed the last of these affidavits the very day after they signed the ATF contracts. While the Government is technically correct that the blank contracts did not constitute a "promise of reward," the natural effect of these affidavits would be misleadingly to induce defense counsel to believe that O'Connor and Mitchell provided the information in the affidavits, and ultimately their testimony at trial recounting the same information, without any "inducements."

The District Court, nonetheless, found beyond a reasonable doubt that, had the information that the Government held out the possibility of reward to its witnesses been disclosed, the result of the criminal prosecution would not have been different. If this finding were sustained by the Court of Appeals, the information would be immaterial even under the standard of materiality applicable to the prosecutor's knowing use of perjured testimony. Although the express holding of the Court of Appeals was that the nondisclosure in this case required automatic reversal, the Court of Appeals also stated that it "disagreed" with the District Court's finding of harmless error. In particular, the Court of Appeals appears to have disagreed with the factual premise on which this finding expressly was based. The District Court rea-

soned that O'Connor's and Mitchell's testimony was exculpatory on the narcotics charges. The Court of Appeals, however, concluded, after reviewing the record, that O'Connor's and Mitchell's testimony was in fact inculpatory on those charges. 719 F.2d, at 1464, n. 1. Accordingly, we reverse the judgment of the Court of Appeals and remand the case to that court for a determination whether there is a reasonable probability that, had the inducement offered by the Government to O'Connor and Mitchell been disclosed to the defense, the result of the trial would have been different.

It is so ordered.

Justice POWELL took no part in the decision of this case.

[685] Justice WHITE, with whom THE CHIEF JUSTICE and Justice REHNQUIST join, concurring in part and concurring in the judgment.

[4] I agree with the Court that respondent is not entitled to have his conviction overturned unless he can show that the evidence withheld by the Government was "material," and I therefore join Parts I and II of the Court's opinion. I also agree with Justice BLACKMUN that for purposes of this inquiry, "evidence is material 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." *Ante*, at 3383. As the Justice correctly observes, this standard is "sufficiently flexible" to cover all instances of prosecutorial failure to disclose evidence favorable to the accused. *Ibid.* Given the flexibility of the standard and the inherently factbound nature of the cases to which it will be applied, however, I see no reason to attempt to elaborate on the relevance to the inquiry of the specificity of the defense's request for disclosure, either generally or with respect to this case. I would hold simply that the proper standard is one of reasonable probability and that the Court of Appeals' failure to apply this standard necessitates reversal. I therefore concur in the judgment.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

When the Government withholds from a defendant evidence that might impeach the prosecution's *only witnesses*, that failure to disclose cannot be deemed harmless error. Because that is precisely the nature of the undisclosed evidence in this case, I would affirm the judgment of the Court of Appeals and would not remand for further proceedings.

I

The federal grand jury indicted the respondent, Hughes Anderson Bagley, on charges involving possession of firearms[686] and controlled substances with intent to distribute. Following a bench trial, Bagley was found not guilty of the firearms charges, guilty of two counts of knowingly and intentionally distributing Valium, and guilty of several counts of a lesser included offense of possession of controlled substances. He was sentenced to six months' imprisonment and a special parole term of five years on the first count of distribution, and to three years of imprisonment, which were suspended, and five years' probation, on the second distribution count. He received a suspended sentence and five years' probation for the possession convictions.

The record plainly demonstrates that on the two counts for which Bagley received sentences of imprisonment, the Government's entire case hinged on the testimony of two private security guards who aided the Bureau of Alcohol, Tobacco and Firearms (ATF) in its investigation of Bagley. In 1977 the two guards, O'Connor and Mitchell, worked for the Milwaukee Railroad; for about three years, they had been social acquaintances of Bagley, with whom they often shared coffee breaks. 7 Tr. 2–3; 8 Tr. 2a–3a. At trial, they testified that on two separate occasions they had visited Bagley at his home, where Bagley had responded to O'Connor's complaint that he was extremely anxious by giving him Vali-

um pills. In total, Bagley received $8 from O'Connor, representing the cost of the pills. At trial, Bagley testified that he had a prescription for the Valium because he suffered from a bad back, 14 Tr. 963–964. No testimony to the contrary was introduced. O'Connor and Mitchell each testified that they had worn concealed transmitters and body recorders at these meetings, but the tape recordings were insufficiently clear to be admitted at trial and corroborate their testimony.

Before trial, counsel for Bagley had filed a detailed discovery motion requesting, among other things, "any deals, promises or inducements made to witnesses in exchange for their testimony." App. 17–19. In response to the discovery request, the Government had provided affidavits sworn by [1687]O'Connor and Mitchell that had been prepared during their investigation of Bagley. Each affidavit recounted in detail the dealings the witnesses had had with Bagley and closed with the declaration, "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it." Brief for United States 3, quoting Memorandum of Points and Authorities in Support of Pet. for Habeas Corpus, CV80–3592–RJK(M) (CD Cal.) Exhibits 1–9. Both of these agents testified at trial thereafter, and the Government did not disclose the existence of any deals, promises, or inducements. Counsel for Bagley asked O'Connor on cross-examination whether he was testifying in response to pressure or threats from the Government about his job, and O'Connor said he was not. 7 Tr. 89–90. In light of the affidavits, as well as the prosecutor's silence as to the existence of any promises, deals or inducements, counsel did not pursue the issue of bias of either guard.

As it turns out, however, in May 1977, seven months prior to trial, O'Connor and Mitchell each had signed an agreement providing that ATF would pay them for information they provided. The form was entitled "Contract for Purchase of Information and Payment of Lump Sum Therefor," and provided that the Bureau would, "upon the accomplishment of the objective sought to be obtained ... pay to said vendor a sum commensurate with services and information rendered." App. 22–23. It further invited the Bureau's special agent in charge of the investigation, Agent Prins, to recommend an amount to be paid after the information received had proved "worthy of compensation." Agent Prins had personally presented these forms to O'Connor and Mitchell for their signatures. The two witnesses signed the last of their affidavits, which declared the absence of any promise of reward, *the day after they signed the ATF forms.* After trial, Agent Prins requested that O'Connor and Mitchell each be paid $500, but the Bureau reduced these "rewards" to $300 each. App. to [1688]Pet. for Cert. 14a. The District Court Judge concluded that "it appears probable to the Court that O'Connor and Mitchell did expect to receive from the United States some kind of compensation, over and above their expenses, for their assistance, though perhaps not for their testimony." *Id.*, at 7a.

Upon discovering these ATF forms through a Freedom of Information Act request, Bagley sought relief from his conviction. The District Court Judge denied Bagley's motion to vacate his sentence stating that because he was the same judge who had been the original trier of fact, he was able to determine the effect the contracts would have had on his decision, more than four years earlier, to convict Bagley. The judge stated that beyond a reasonable doubt the contracts, if disclosed, would have had no effect upon the convictions:

> "The Court has read in their entirety the transcripts of the testimony of James P. O'Connor and Donald E. Mitchell at the trial.... Almost all of the testimony of both of those witnesses was devoted to the firearm charges in the indictment. The Court found the defendant not guilty of those charges. With respect to the charges against the defendant of distributing controlled substances and possess-

ing controlled substances with the intention of distributing them, the testimony of O'Connor and Mitchell was relatively very brief. With respect to the charges relating to controlled substances cross-examination of those witnesses by defendant's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that the controlled substances in question came from supplies which had been prescribed for defendant's own use. As to that aspect of their testimony, the testimony of O'Connor and Mitchell tended to be favorable to the defendant." *Id.*, at 8a.

[689] The foregoing statement, as to which the Court remands for further consideration, is seriously flawed on its face. First, the testimony that the court describes was in fact the *only inculpatory testimony in the case* as to the two counts for which Bagley received a sentence of imprisonment. If, as the judge claimed, the testimony of the two information "vendors" was "very brief" and in part favorable to the defendant, that fact shows the weakness of the prosecutor's case, not the harmlessness of the error. If the testimony that might have been impeached is weak and also cumulative, corroborative, or tangential, the failure to disclose the impeachment evidence could conceivably be held harmless. But when the testimony is the start and finish of the prosecution's case, and is weak nonetheless, quite a different conclusion must necessarily be drawn.

Second, the court's statement that Bagley did not attempt to discredit the witnesses' testimony, as if to suggest that impeachment evidence would not have been used by the defense, ignores the realities of trial preparation and strategy, and is factually erroneous as well. Initially, the Government's failure to disclose the existence of any inducements to its witnesses, coupled with its disclosure of affidavits stating that no promises had been made, would lead all but the most careless lawyer to step wide and clear of questions about promises or inducements. The combination of nondisclosure and disclosure would simply lead any reasonable attorney to believe that the witness could not be impeached on that basis. Thus, a firm avowal that no payment is being received in return for assistance and testimony, if offered at trial by a witness who is not even a Government employee, could be devastating to the defense. A wise attorney would, of necessity, seek an alternative defense strategy.

Moreover, counsel for Bagley in fact did attempt to discredit O'Connor, by asking him whether two ATF agents had pressured him or had threatened that his job might be in [690] jeopardy, in order to get him to cooperate. 7 Tr. 89–90. But when O'Connor answered in the negative, *ibid.*, counsel stopped this line of questioning. In addition, counsel for Bagley attempted to argue to the District Court, in his closing argument, that O'Connor and Mitchell had "fabricated" their accounts, 14 Tr. 1117, but the court rejected the proposition:

> "Let me say this to you. I would find it hard to believe really that their testimony was fabricated. I think they might have been mistaken. You know, it is possible that they were mistaken. *I really did not get the impression at all that either one or both of those men were trying at least in court here to make a case against the defendant.*" *Id.*, at 1117–1118. (Emphasis added.)

The District Court, in so saying, of course had seen no evidence to suggest that the two witnesses might have any motive for "mak[ing] a case" against Bagley. Yet, as Justice BLACKMUN points out, the possibility of a reward, the size of which is directly related to the Government's success at trial, gave the two witnesses a "personal stake" in the conviction and an "incentive to testify falsely in order to secure a conviction." *Ante*, at 3384.

Nor is this case unique. Whenever the Government fails, in response to a request, to disclose impeachment evidence relating to the credibility of its key witnesses, the truth-finding process of trial is necessarily thrown askew. The failure to disclose evi-

dence affecting the overall credibility of witnesses corrupts the process to some degree in all instances, see *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *United States v. Agurs*, 427 U.S. 97, 121, 96 S.Ct. 2392, 2406, 49 L.Ed.2d 342 (1976) (MARSHALL, J., dissenting), but when "the 'reliability of a given witness may well be determinative of guilt or innocence,'" *Giglio, supra*, 405 U.S., at 154, 92 S.Ct., at 766 (quoting *Napue, supra*, 360 U.S., at 269, 79 S.Ct., at 1177), and when "the Government's case depend[s] almost entirely on" the testimony of a certain witness, 405 U.S., at 154, 92 S.Ct., at 766, evidence of that witness' possible [691] bias simply may not be said to be irrelevant, or its omission harmless. As THE CHIEF JUSTICE said in *Giglio v. United States*, in which the Court ordered a new trial in a case in which a promise to a key witness was not disclosed to the jury:

> "[W]ithout [Taliento's testimony] there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.
>
> "For these reasons, the due process requirements enunciated in *Napue* and other cases cited earlier require a new trial." *Id.*, at 154–155, 92 S.Ct., at 766.

Here, too, witnesses O'Connor and Mitchell were crucial to the Government's case. Here, too, their personal credibility was potentially dispositive, particularly since the allegedly corroborating tape recordings were not audible. It simply cannot be denied that the existence of a contract signed by those witnesses, promising a reward whose size would depend "on the Government's satisfaction with the end result," *ante*, at 3384, might sway the trier of fact, or cast doubt on the truth of all that the witnesses allege. In such a case, the trier of fact is absolutely entitled to know of the contract, and the defense counsel is absolutely entitled to develop his case with an awareness of it. Whatever the applicable standard of materiality, see *infra*, in this instance it undoubtedly is well met.

Indeed, *Giglio* essentially compels this result. The similarities between this case and that one are evident. In both cases, the triers of fact were left unaware of Government inducements to key witnesses. In both cases, the individual trial prosecutors acted in good faith when they failed to disclose the exculpatory evidence. See *Giglio, supra*, 405 U.S., at 151–153, 92 S.Ct., at 764–765; App. to Pet. for Cert. 13a (Magistrate's finding that [692] Bagley prosecutor would have disclosed information had he known of it). The sole difference between the two cases lies in the fact that in *Giglio*, the prosecutor affirmatively stated *to the trier of fact* that no promises had been made. Here, silence in response to a defense request took the place of an affirmative error at trial—although the prosecutor did make an affirmative misrepresentation to the defense in the affidavits. Thus, in each case, the trier of fact was left unaware of powerful reasons to question the credibility of the witnesses. "[T]he truth-seeking process is corrupted by the withholding of evidence favorable to the defense, regardless of whether the evidence is directly contradictory to evidence offered by the prosecution." *Agurs, supra*, 427 U.S., at 120, 96 S.Ct., at 2405 (MARSHALL, J., dissenting). In this case, as in *Giglio*, a new trial is in order, and the Court of Appeals correctly reversed the District Court's denial of such relief.

II

Instead of affirming, the Court today chooses to reverse and remand the case for application of its newly stated standard to the facts of this case. While I believe that the evidence at issue here, which remained undisclosed despite a particular request, undoubtedly was material under the Court's standard, I also have serious doubts whether the Court's definition of

the constitutional right at issue adequately takes account of the interests this Court sought to protect in its decision in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

A

I begin from the fundamental premise, which hardly bears repeating, that "[t]he purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one." *Application of Kapatos*, 208 F.Supp. 883, 888 (SDNY 1962); see *Giles v. Maryland*, 386 U.S. 66, 98, (1967) (Fortas, J., concurring in judgment) ("The State's obligation is not to convict, but to see that, so far as possible, truth emerges"). When evidence favorable to the defendant is known to exist, 1693 disclosure only enhances the quest for truth; it takes no direct toll on that inquiry. Moreover, the existence of any small piece of evidence favorable to the defense may, in a particular case, create just the doubt that prevents the jury from returning a verdict of guilty. The private whys and wherefores of jury deliberations pose an impenetrable barrier to our ability to know just which piece of information might make, or might have made, a difference.

When the state does not disclose information in its possession that might reasonably be considered favorable to the defense, it precludes the trier of fact from gaining access to such information and thereby undermines the reliability of the verdict. Unlike a situation in which exculpatory evidence exists but neither the defense nor the prosecutor has uncovered it, in this situation the state already has, resting in its files, material that would be of assistance to the defendant. With a minimum of effort, the state could improve the real and apparent fairness of the trial enormously, by assuring that the defendant may place before the trier of fact favorable evidence known to the government. This proposition is not new. We have long recognized that, within the limit of the state's ability to identify so-called exculpatory information, the state's concern for a fair verdict precludes it from withholding from the defense evidence favorable to the defendant's case in the prosecutor's files. See, *e.g.*, *Pyle v. Kansas*, 317 U.S. 213, 215–216, 63 S.Ct. 177, 178–179, 87 L.Ed. 214 (1942) (allegation that imprisonment resulted from perjured testimony and deliberate suppression by authorities of evidence favorable to him "charge a deprivation of rights guaranteed by the Federal Constitution").[1]

1694 This recognition no doubt stems in part from the frequently considerable imbalance in resources between most criminal defendants and most prosecutors' offices. Many, perhaps most, criminal defendants in the United States are represented by appointed counsel, who often are paid minimal wages and operate on shoestring budgets. In addition, unlike police, defense counsel generally is not present at the scene of the crime, or at the time of arrest, but instead comes into the case late. Moreover, unlike the government, defense coun-

1. As early as 1807, this Court made clear that prior to trial a defendant must have access to impeachment evidence in the Government's possession. Addressing defendant Aaron Burr's claim that he should have access to the letter of General Wilkinson, a key witness against Burr in his trial for treason, Chief Justice Marshall wrote:

"The application of that letter to the case is shown by the terms in which the communication was made. It is a statement of the conduct of the accused made by the person who is declared to be the essential witness against him. The order for producing this letter is opposed:

"First, because it is not material to the defense. It is a principle, universally acknowledged, that a party has a right to oppose to the testimony of any witness against him, the declarations which that witness has made at other times on the same subject. If he possesses this right, he must bring forward proof of those declarations. This proof must be obtained before he knows positively what the witness will say; for if he waits until the witness has been heard at the trial, it is too late to meet him with his former declarations. Those former declarations, therefore, constitute a mass of testimony, which a party has a right to obtain by way of precaution, and the positive necessity of which can only be decided at the trial." *United States v. Burr*, 25 F.Cas. 30, 36 (No. 14,692d) (CC Va. 1807).

sel is not in the position to make deals with witnesses to gain evidence. Thus, an inexperienced, unskilled, or unaggressive attorney often is unable to amass the factual support necessary to a reasonable defense. When favorable evidence is in the hands of the prosecutor but not disclosed, the result may well be that the defendant is deprived of a fair chance before the trier of fact, and the trier of fact is deprived of the ingredients necessary to a fair decision. This grim reality, of course, poses a direct challenge to the traditional model of the adversary criminal process,[2] and perhaps 1695 because this reality so directly questions the fairness of our longstanding processes, change has been cautious and halting. Thus, the Court has not gone the full road and expressly required that the state provide to the defendant access to the prosecutor's complete files, or investigators who will assure that the defendant has an opportunity to discover every existing piece of helpful evidence. But cf. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (access to assistance of psychiatrist constitutionally required on proper showing of need). Instead, in acknowledgment of the fact that important interests are served when potentially favorable evidence is disclosed, the Court has fashioned a compromise, requiring that the prosecution identify and disclose to the defendant favorable material that it possesses. This requirement is but a small, albeit important; step toward equality of justice.[3]

B

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), of course, established this requirement of disclosure as a fundamental element of a fair trial by holding that a defendant was denied due process if he was not given access to favorable evidence that is material either to guilt or punishment. Since *Brady* was decided, this Court has struggled, in a series of decisions, to define how best to effectuate the right recognized. To my mind, the *Brady* decision, the reasoning that underlay it, and the fundamental interest in a fair trial, combine to give the criminal defendant the right to receive from the prosecutor, and the prosecutor the affirmative duty to turn 1696 over to the defendant, *all* information known to the government that might reasonably be considered favorable to the defendant's case. Formulation of this right, and imposition of this duty, are "the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair." *Moore v. Illinois*, 408 U.S. 786, 809–810, 92 S.Ct. 2562, 2575–2576, 33 L.Ed.2d 706 (1972) (MARSHALL, J., concurring in part and dissenting in part). If that right is denied, or if that duty is shirked, however, I believe a reviewing court should not automatically reverse but instead should apply the harmless-error test the Court has developed for instances of error affecting constitutional rights. See *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

My view is based in significant part on the reality of criminal practice and on the consequently inadequate protection to the defendant that a different rule would offer.

2. See Fortas, The Fifth Amendment: Nemo Tenetur Prodere Seipsum, 25 Clev.B.A.J. 91, 98 (1954) ("The state and [the defendant] could meet, as the law contemplates, in adversary trial, as equals—strength against strength, resource against resource, argument against argument"); see also Babcock, Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel, 34 Stan.L.Rev. 1133, 1142–1145 (1982) (discussing challenge *Brady* poses to traditional adversary model).

3. Indeed, this Court's recent decision stating a stringent standard for demonstrating ineffective assistance of counsel makes an effective *Brady* right even more crucial. Without a real guarantee of effective counsel, the relative abilities of the state and the defendant become even more skewed, and the need for a minimal guarantee of access to potentially favorable information becomes significantly greater. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *id.*, at 712–715, 104 S.Ct., at 2077–2079 (MARSHALL, J., dissenting); Babcock, *supra*, at 1163–1174 (discussing the interplay between the right to *Brady* material and the right to effective assistance of counsel).

To implement *Brady*, courts must of course work within the confines of the criminal process. Our system of criminal justice is animated by two seemingly incompatible notions: the adversary model, and the state's primary concern with justice, not convictions. *Brady*, of course, reflects the latter goal of justice, and is in some ways at odds with the competing model of a sporting event. Our goal, then, must be to integrate the *Brady* right into the harsh, daily reality of this apparently discordant criminal process.

At the trial level, the duty of the state to effectuate *Brady* devolves into the duty of the prosecutor; the dual role that the prosecutor must play poses a serious obstacle to implementing *Brady*. The prosecutor is by trade, if not necessity, a zealous advocate. He is a trained attorney who must aggressively seek convictions in court on behalf of a victimized public. At the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of truth. Thus, for purposes of *Brady*, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the |697 material that could undermine his case. Given this obviously unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence, often in cases in which there is no doubt that the failure to disclose was a result of absolute good faith. Indeed, one need only think of the Fourth Amendment's requirement of a neutral intermediary, who tests the strength of the policeman-advocate's facts, to recognize the curious status *Brady* imposes on a prosecutor. One telling example, offered by Judge Newman when he was a United States Attorney, suffices:

> "I recently had occasion to discuss *[Brady]* at a PLI Conference in New York City before a large group of State prosecutors.... I put to them this case: You are prosecuting a bank robbery. You have talked to two or three of the tellers and one or two of the customers at the time of the robbery. They have all taken a look at your defendant in a line-up, and they have said, 'This is the man.' In the course of your investigation you also have found another customer who was in the bank that day, who viewed the suspect, and came back and said, 'This is *not* the man.'
>
> "The question I put to these prosecutors was, do you believe you should disclose to the defense the name of the witness who, when he viewed the suspect, said 'that is not the man'? In a room of prosecutors not quite as large as this group but almost as large, only two hands went up. There were only two prosecutors in that group who felt they should disclose or would disclose that information. Yet I was putting to them what I thought was the easiest case—the clearest case for disclosure of exculpatory information!" J. Newman, A Panel Discussion before the Judicial Conference of the Second Judicial Circuit (Sept. 8, 1967), reprinted in Discovery in Criminal Cases, 44 F.R.D. 481, 500–501 (1968) (hereafter Newman).

|698 While familiarity with *Brady* no doubt has increased since 1967, the dual role that the prosecutor must play, and the very real pressures that role creates, have not changed.

The prosecutor surely greets the moment at which he must turn over *Brady* material with little enthusiasm. In perusing his files, he must make the often difficult decision as to whether evidence is favorable, and must decide on which side to err when faced with doubt. In his role as advocate, the answers are clear. In his role as representative of the state, the answers should be equally clear, and often to the contrary. Evidence that is of doubtful worth in the eyes of the prosecutor could be of inestimable value to the defense, and might make the difference to the trier of fact.

Once the prosecutor suspects that certain information might have favorable implications for the defense, either because it is potentially exculpatory or relevant to credi-

bility, I see no reason why he should not be required to disclose it. After all, favorable evidence indisputably enhances the truth-seeking process at trial. And it is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence. In addition, to require disclosure of all evidence that might reasonably be considered favorable to the defendant would have the precautionary effect of assuring that no information of potential consequence is mistakenly overlooked. By requiring full disclosure of favorable evidence in this way, courts could begin to assure that a possibly dispositive piece of information is not withheld from the trier of fact by a prosecutor who is torn between the two roles he must play. A clear rule of this kind, coupled with a presumption in favor of disclosure, also would facilitate the prosecutor's admittedly difficult task by removing a substantial amount of unguided discretion.

If a trial will thereby be more just, due process would seem to require such a rule absent a countervailing interest. I see little reason for the government to keep such information [699] from the defendant. Its interest in nondisclosure at the trial stage is at best slight: the government apparently seeks to avoid the administrative hassle of disclosure, and to prevent disclosure of inculpatory evidence that might result in witness intimidation and manufactured rebuttal evidence.[4] Neither of these concerns, however, counsels in favor of a rule of nondisclosure in close or ambiguous cases. To the contrary, a rule simplifying the disclosure decision by definition does not make that decision more complex. Nor does disclosure of favorable evidence inevitably lead to disclosure of inculpatory evidence, as might an open file policy, or to the anticipated wrongdoings of defendants and their lawyers, if indeed such fears are warranted. We have other mechanisms for disciplining unscrupulous defense counsel; hamstringing their clients need not be one of them. I simply do not find any state interest that warrants withholding from a presumptively innocent defendant, whose liberty is at stake in the proceeding, information that bears on his case and that might enable him to defend himself.

Under the foregoing analysis, the prosecutor's duty is quite straightforward: he must divulge all evidence that reasonably appears favorable to the defendant, erring on the side of disclosure.

C

The Court, however, offers a complex alternative. It defines the right not by reference to the possible usefulness of the particular evidence in preparing and presenting the case, but retrospectively, by reference to the likely effect the evidence will have on the outcome of the trial. Thus, the Court holds that due process does not require the prosecutor to turn over evidence unless the evidence is "material," and the [700] Court states that evidence is "material" "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." *Ante,* at 3383. Although this looks like a post-trial standard of review, see, *e.g., Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (adopting this standard of review), it is not. Instead, the Court relies on this review standard to define the contours of the defendant's constitutional right to certain material prior to trial. By adhering to the view articulated in *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)—that there is no constitutional duty to disclose evidence unless nondisclosure would have a certain impact on the trial—the Court permits prosecutors to withhold with impunity large amounts of undeniably favorable evidence, and it imposes on pros-

4. See Newman, 44 F.R.D., at 499 (describing the "serious" problem of witness intimidation that arises from prosecutor's disclosure of witnesses). But see Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash.U.L.Q. 279, 289–290 (disputing a similar argument).

ecutors the burden to identify and disclose evidence pursuant to a pretrial standard that virtually defies definition.

The standard for disclosure that the Court articulates today enables prosecutors to avoid disclosing obviously exculpatory evidence while acting well within the bounds of their constitutional obligation. Numerous lower court cases provide examples of evidence that is undoubtedly favorable but not necessarily "material" under the Court's definition, and that consequently would not have to be disclosed to the defendant under the Court's view. See, *e.g., United States v. Sperling,* 726 F.2d 69, 71–72 (CA2 1984) (prior statement disclosing motive of key Government witness to testify), cert. denied, 467 U.S. 1243, 104 S.Ct. 3516, 82 L.Ed.2d 824 (1984); *King v. Ponte,* 717 F.2d 635 (CA1 1983) (prior inconsistent statements of Government witness); see also *United States v. Oxman,* 740 F.2d 1298, 1311 (CA3 1984) (addressing "disturbing" prosecutorial tendency to withhold information because of later opportunity to argue, with the benefit of hindsight, that information was not "material"), cert. pending *sub nom. United States v. Pflaumer,* No. 84–1033. The result is to veer sharply away from the basic notion that the fairness of a trial increases [701]with the amount of existing favorable evidence to which the defendant has access, and to disavow the ideal of full disclosure.

The Court's definition poses other, serious problems. Besides legitimizing the nondisclosure of clearly favorable evidence, the standard set out by the Court also asks the prosecutor to predict what effect various pieces of evidence will have on the trial. He must evaluate his case and the case of the defendant—of which he presumably knows very little—and perform the impossible task of deciding whether a certain piece of information will have a significant impact on the trial, bearing in mind that a defendant will later shoulder the heavy burden of proving how it would have affected the outcome. At best, this standard places on the prosecutor a responsibility to speculate, at times without foundation, since the prosecutor will not normally know what strategy the defense will pursue or what evidence the defense will find useful. At worst, the standard invites a prosecutor, whose interests are conflicting, to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive. One Court of Appeals has recently vented its frustration at these unfortunate consequences:

> "It seems clear that those tests [for materiality] have a tendency to encourage unilateral decision-making by prosecutors with respect to disclosure.... [T]he root of the problem is the prosecutor's tendency to adopt a retrospective view of materiality. Before trial, the prosecutor cannot know whether, after trial, particular evidence will prove to have been material.... Following their adversarial instincts, some prosecutors have determined unilaterally that evidence will not be material and, often in good faith, have disclosed it neither to defense counsel nor to the court. If and when the evidence emerges after trial, the prosecutor can always argue, [702]with the benefit of hindsight, that it was not material." *United States v. Oxman, supra,* at 1310.

The Court's standard also encourages the prosecutor to assume the role of the jury, and to decide whether certain evidence will make a difference. In our system of justice, that decision properly and wholly belongs to the jury. The prosecutor, convinced of the guilt of the defendant and of the truthfulness of his witnesses, may all too easily view as irrelevant or unpersuasive evidence that draws his own judgments into question. Accordingly he will decide the evidence need not be disclosed. But the ideally neutral trier of fact, who approaches the case from a wholly different perspective, is by the prosecutor's decision denied the opportunity to consider the evidence. The reviewing court, faced with a verdict of guilty, evidence to support that verdict, and pressures, again understandable, to finalize criminal judg-

ments, is in little better position to review the withheld evidence than the prosecutor.

I simply cannot agree with the Court that the due process right to favorable evidence recognized in *Brady* was intended to become entangled in prosecutorial determinations of the likelihood that particular information would affect the outcome of trial. Almost a decade of lower court practice with *Agurs* convinces me that courts and prosecutors have come to pay "too much deference to the federal common law policy of discouraging discovery in criminal cases, and too little regard to due process of law for defendants." *United States v. Oxman, supra,* at 1310–1311. Apparently anxious to assure that reversals are handed out sparingly, the Court has defined a rigorous test of materiality. Eager to apply the "materiality" standard at the pretrial stage, as the Court permits them to do, prosecutors lose sight of the basic principles underlying the doctrine. I would return to the original theory and promise of *Brady* and reassert the duty of the prosecutor to disclose all evidence in his files that might reasonably be considered favorable to the defendant's case. No [1703] prosecutor can know prior to trial whether such evidence *will* be of consequence at trial; the mere fact that it might be, however, suffices to mandate disclosure.[5]

5. *Brady* not only stated the rule that suppression by the prosecution of evidence favorable to the defendant "violates due process where the evidence is material either to guilt or to punishment," 373 U.S., at 87, 83 S.Ct., at 1196, but also observed that two decisions of the Court of Appeals for the Third Circuit "state the correct constitutional rule." *Id.,* at 86, 83 S.Ct., at 1196. Neither of those decisions limited the right only to evidence that is "material" within the meaning that the Court today articulates. Instead, they provide strong evidence that *Brady* might have used the word in its evidentiary sense, to mean, essentially, germane to the points at issue.

In *United States ex rel. Almeida v. Baldi,* 195 F.2d 815 (CA3 1952), cert. denied, 345 U.S. 904, 73 S.Ct. 639, 97 L.Ed. 1341 (1953), the appeals court granted a petition for habeas corpus in a case in which the State had withheld from the defendant evidence that might have mitigated his punishment. After describing the withheld evidence as "relevant" and "pertinent," 195 F.2d, at 819, the court concluded: "We think that the conduct of the Commonwealth as outlined in the instant case is in conflict with our fundamental principles of liberty and justice. The suppression of evidence favorable to Almeida was a denial of due process." *Id.,* at 820. Similarly, in *United States ex rel. Thompson v. Dye,* 221 F.2d 763, 765 (CA3), cert. denied, 350 U.S. 875, 76 S.Ct. 120, 100 L.Ed. 773 (1955), the District Court had denied a petition for habeas corpus after finding that certain evidence of defendant's drunkenness at the time of the offense in question was not "vital" to the defense and did not require disclosure. 123 F.Supp. 759, 762 (WD Pa.1954). The Court of Appeals reversed, observing that whether or not the jury ultimately would credit the evidence at issue, the evidence was substantial and the State's failure to disclose it cannot "be held as a matter of law to be unimportant to the defense here." 221 F.2d, at 767.

It is clear that the term "material" has an evidentiary meaning quite distinct from that which the Court attributes to it. Judge Weinstein, for example, defines as synonymous the words "ultimate fact," "operative fact," "material fact," and "consequential fact," each of which, he states, means "a 'fact that is of consequence to the determination of the action.'" 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 401[03], n. 1 (1982) (quoting Fed. Rule Evid. 401). Similarly, another treatise on evidence explains that there are two components to relevance—materiality and probative value. "Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial." E. Cleary, McCormick on Evidence § 185 (3d ed. 1984). "Probative value" addresses the tendency of the evidence to establish a "material" proposition. *Ibid.* See also 1 J. Wigmore, Evidence § 2 (P. Tillers rev. 1982). There is nothing in *Brady* to suggest that the Court intended anything other than a rule that favorable evidence need only relate to a proposition at issue in the case in order to merit disclosure.

Even if the Court did not use the term "material" simply to refer to favorable evidence that might be relevant, however, I still believe that due process requires that prosecutors have the duty to disclose all such evidence. The inherent difficulty in applying, prior to trial, a definition that relates to the outcome of the trial, and that is based on speculation and not knowledge, means that a considerable amount of potentially consequential material might slip through the Court's standard. Given the experience of the past decade with *Agurs,* and the practical problem that inevitably exists because the evidence must be disclosed prior to trial to be of any use, I can only conclude that all potentially favorable evidence must be disclosed. Of course, I

[704]D

In so saying, I recognize that a failure to divulge favorable information should not result in reversal in all cases. It may be that a conviction should be affirmed on appeal despite the prosecutor's failure to disclose evidence that reasonably might have been deemed potentially favorable prior to trial. The state's interest in nondisclosure at trial is minimal, and should therefore yield to the readily apparent benefit that full disclosure would convey to the search for truth. After trial, however, the benefits of disclosure may at times be tempered by the state's legitimate desire to avoid retrial when error has been harmless. However, in making the determination of harmlessness, I would apply our normal constitutional error test and reverse unless it is clear beyond a reasonable doubt that the withheld evidence would not have affected the outcome of the trial. See *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also *Agurs*, 427 U.S., at 119–120, 96 S.Ct., at 2405 (MARSHALL, J., dissenting).[6]

[705]Any rule other than automatic reversal, of course, dilutes the *Brady* right to some extent and offers the prosecutor an incentive not to turn over all information. In practical effect, it might be argued, there is little difference between the rule I propose—that a prosecutor must disclose all favorable evidence in his files, subject to harmless-error review—and the rule the Court adopts—that the prosecutor must disclose only the favorable information that might affect the outcome of the trial. According to this argument, if a constitutional right to all favorable evidence leads to reversal only when the withheld evidence might have affected the outcome of the trial, the result will be the same as with a constitutional right only to evidence that will affect the trial outcome. See Capra, Access to Exculpatory Evidence: Avoiding the *Agurs* Problems of Prosecutorial Discretion and Retrospective Review, 53 Ford. L.Rev. 391, 409–410, n. 117 (1984). For several reasons, however, I disagree. First, I have faith that a prosecutor would treat a rule requiring disclosure of all information of a certain kind differently from a rule requiring disclosure only of some of that information. Second, persistent or egregious failure to comply with the constitutional duty could lead to disciplinary actions by the courts. Third, the standard of harmlessness I adopt is more protective of the defendant than that chosen by the Court, placing the burden on the prosecutor, rather than the defendant, to prove the harmlessness of his actions. It would be a foolish prosecutor who gambled too glibly with that standard of review. And finally, it is unrealistic to ignore the fact that at the appellate stage the state has an interest in avoiding retrial where the error is harmless beyond a reasonable doubt. That interest counsels against requiring a new trial in every case.

[706]Thus, while I believe that some review for harmlessness is in order, I disagree with the Court's standard, even were it merely a standard for review and not a definition of "materiality." First, I see no significant difference for truth-seeking purposes between the *Giglio* situation and this one; for the same reasons I believe the result must therefore be the same here as in *Giglio*, see *supra*, at 3388, I also believe the standard for reversal should be the same. The defendant's entitlement to a new trial ought to be no different in the two cases, and the burden he faces on appeal should also be the same. *Giglio* remains the law for a class of cases, and I

agree with courts that have allowed exceptions to this rule on a showing of exigent circumstances based on security and law enforcement needs.

6. In a case of deliberate prosecutorial misconduct, automatic reversal might well be proper. Certain kinds of constitutional error so infect the system of justice as to require reversal in all cases, such as discrimination in jury selection. See, *e.g.*, *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972). A deliberate effort of the prosecutor to undermine the search for truth clearly is in the category of offenses antithetical to our most basic vision of the role of the state in the criminal process.

reaffirm my belief that the same standard applies to this case as well. See *Agurs*, 427 U.S., at 119–120, 96 S.Ct., at 2405 (MARSHALL, J., dissenting).

Second, only a strict appellate standard, which places on the prosecutor a burden to defend his decisions, will remove the incentive to gamble on a finding of harmlessness. Any lesser standard, and especially one in which the defendant bears the burden of proof, provides the prosecutor with ample room to withhold favorable evidence, and provides a reviewing court with a simple means to affirm whenever in its view the correct result was reached. This is especially true given the speculative nature of retrospective review:

> "The appellate court's review of 'what might have been' is extremely difficult in the context of an adversarial system. Evidence is not introduced in a vacuum; rather, it is built upon. The absence of certain evidence may thus affect the usefulness, and hence the use, of other evidence to which defense counsel does have access. Indeed, the absence of a piece of evidence may affect the entire trial strategy of defense counsel." Capra, *supra*, at 412.

As a consequence, the appellate court no less than the prosecutor must substitute its judgment for that of the trier of fact under an inherently slippery test. Given such factors as a reviewing court's natural inclination to affirm a judgment [707] that appears "correct" and that court's obvious inability to know what a jury ever will do, only a strict and narrow test that places the burden of proof on the prosecutor will begin to prevent affirmances in cases in which the withheld evidence might have had an impact.

Even under the most protective standard of review, however, courts must be careful to focus on the nature of the evidence that was not made available to the defendant and not simply on the quantity of the evidence against the defendant separate from the withheld evidence. Otherwise, as the Court today acknowledges, the reviewing court risks overlooking the fact that a failure to disclose has a direct effect on the entire course of trial.

Without doubt, defense counsel develops his trial strategy based on the available evidence. A missing piece of information may well preclude the attorney from pursuing a strategy that potentially would be effective. His client might consequently be convicted even though nondisclosed information might have offered an additional or alternative defense, if not pure exculpation. Under such circumstances, a reviewing court must be sure not to focus on the amount of evidence supporting the verdict to determine whether the trier of fact reasonably would reach the same conclusion. Instead, the court must decide whether the prosecution has shown beyond a reasonable doubt that the new evidence, if disclosed and developed by reasonably competent counsel, would not have affected the outcome of trial.[7]

7. For example, in *United States ex rel. Butler v. Maroney*, 319 F.2d 622 (CA3 1963), the defendant was convicted of first-degree murder. Trial counsel based his defense on temporary insanity at the time of the murder. During trial, testimony suggested that the shooting might have been the accidental result of a struggle, but defense counsel did not develop that defense. It later turned out that an eyewitness to the shooting had given police a statement that the victim and Butler had struggled prior to the murder. If defense counsel had known before trial what the eyewitness had seen, he might have relied on an additional defense, and he might have emphasized the struggle. See Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136, 145 (1964). Unless the same information already was known to counsel before trial, the failure to disclose evidence of that kind simply cannot be harmless because reasonably competent counsel might have utilized it to yield a different outcome. No matter how overwhelming the evidence that Butler committed the murder, he had a right to go before a trier of fact and present his best available defense.

Similarly, in *Ashley v. Texas*, 319 F.2d 80 (CA5), cert. denied, 375 U.S. 931, 84 S.Ct. 331, 11 L.Ed.2d 263 (1963), the defendant was sentenced to death for murder. The prosecutor disclosed to the defense a psychiatrist's report indicating that the defendant was sane, but he failed to disclose the reports of a psychiatrist and a psychologist indicating that the defendant

[708]In this case, it is readily apparent that the undisclosed information would have had an impact on the defense presented at trial, and perhaps on the judgment. Counsel for Bagley argued to the trial judge that the Government's two key witnesses had fabricated their accounts of the drug distributions, but the trial judge rejected the argument for lack of any evidence of motive. See *supra*, at 3387–3388. These key witnesses, it turned out, were each to receive monetary rewards whose size was contingent on the usefulness of their assistance. These rewards "served only to strengthen any incentive to testify falsely in order to secure a conviction." *Ante*, at 3384. To my mind, no more need be said; this nondisclosure[709] could not have been harmless. I would affirm the judgment of the Court of Appeals.

Justice STEVENS, dissenting.

This case involves a straightforward application of the rule announced in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), a case involving nondisclosure of material evidence by the prosecution in response to a specific request from the defense. I agree that the Court of Appeals misdescribed that rule, see *ante*, at 3379–3381, but I respectfully dissent from the Court's unwarranted decision to rewrite the rule itself.

As the Court correctly notes at the outset of its opinion, *ante*, at 3377, the holding in *Brady* was 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." 373 U.S., at 87, 83 S.Ct., at 1196. We noted in *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976), that the rule of *Brady* arguably might apply in three different situations involving the discovery, after trial, of evidence that had been known prior to trial to the prosecution but not to the defense. Our holding in *Agurs* was that the *Brady* rule applies in two of the situations, but not in the third.

The two situations in which the rule applies are those demonstrating the prosecution's knowing use of perjured testimony, exemplified by *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935), and the prosecution's suppression of favorable evidence specifically requested by the defendant, exemplified by *Brady* itself. In both situations, the prosecution's deliberate nondisclosure constitutes constitutional error—the conviction must be set aside if the suppressed or perjured evidence was "material" and there was "any reasonable likelihood" that it "could have affected" the outcome of the trial. 427 U.S., at 103, 96 S.Ct., at 2397.[1] See *Brady*, *supra*, 373

was insane. The nondisclosed information did not relate to the trial defense of self-defense. But the failure to disclose the evidence clearly prevented defense counsel from developing the possibly dispositive defense that he might have developed through further psychiatric examinations and presentation at trial. The nondisclosed evidence obviously threw off the entire course of trial preparation, and a new trial was in order. In such a case, there simply is no need to consider—in light of the evidence that actually was presented and the quantity of evidence to support the verdict returned—the possible effect of the information on the particular jury that heard the case. Indeed, to make such an evaluation would be to substitute the reviewing court's judgment of the facts, including the previously undisclosed evidence, for that of the jury, and to do so without the benefit of competent counsel's development of the information.

See also Field, Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale, 125 U.Pa.L.Rev. 15 (1976) (discussing application of harmless-error test).

1. I do not agree with the Court's reference to the "constitutional error, *if any*, in this case," see *ante*, at 3381 (emphasis added), because I believe a violation of the *Brady* rule is by definition constitutional error. Cf. *United States v. Agurs*, 427 U.S., at 112, 96 S.Ct., at 2401 (rejecting rule making "every nondisclosure ... automatic error" outside the *Brady* specific request or perjury contexts). As written, the *Brady* rule states that the Due Process Clause is violated when favorable evidence is not turned over "upon request" and "the evidence is material either to guilt or punishment." *Brady v. Maryland*, 373 U.S., at 87, 83 S.Ct., at 1196. As JUSTICE MARSHALL's explication of the record in this case demonstrates, *ante*, at 3385–3388, the suppressed evidence here was not only favorable to Bagley, but also unquestionably material to the issue of his guilt or innocence.

U.S., at 88, 83 S.Ct., at 1197 ("would tend to exculpate"); [710]accord, *United States v. Valenzuela-Bernal*, 458 U.S. 858, 874, 102 S.Ct. 3440, 3450, 73 L.Ed.2d 1193 (1982) ("reasonable likelihood"); *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972) ("reasonable likelihood"); *Napue v. Illinois*, 360 U.S. 264, 272, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959) ("may have had an effect on the outcome"). The combination of willful prosecutorial suppression of evidence and, "more importantly," the potential "corruption of the truth-seeking function of the trial process" requires that result. 427 U.S., at 104, 106, 96 S.Ct., at 2397, 2398.[2]

In *Brady*, the suppressed confession was *inadmissible* as to guilt and "could not have affected the outcome" on that issue. 427 U.S., at 106, 96 S.Ct., at 2398. However, the evidence "could have affected Brady's punishment," and was, therefore, "material on the latter issue but not on the former." *Ibid.* Materiality[711] was thus used to describe admissible evidence that "could have affected" a dispositive issue in the trial.

The question in *Agurs* was whether the *Brady* rule should be *extended*, to cover a case in which there had been neither perjury nor a specific request—that is, whether the prosecution has some constitutional duty to search its files and disclose automatically, or in response to a general request, all evidence that "might have helped the defense, or might have affected the outcome." 427 U.S., at 110, 96 S.Ct., at 2400.[3] Such evidence would, of course, be covered by the *Brady* formulation if it were specifically requested. We noted in *Agurs*, however, that because there had been no specific defense request for the later-discovered evidence, there was no notice to the prosecution that the defense did not already have that evidence or that it considered the evidence to be of particular value. 427 U.S., at 106–107, 96 S.Ct., at 2398–2399. Consequently, we stated that in the absence of a request the prosecution has a constitutional duty to volunteer only "obviously exculpatory ... evidence." *Id.*, at 107, 96 S.Ct., at 2399. Because this constitutional duty to disclose is *different* from the duty described in *Brady*, it is not surprising that we developed a different standard of materiality in the *Agurs* context. Necessarily describing the "inevitably imprecise" standard in terms appropriate to post-trial review, we held that no constitutional violation occurs in the absence of a specific request unless "the omitted evidence creates a reasonable doubt that did not otherwise exist." *Id.*, at 108, 112, 96 S.Ct., at 2399, 2401.[4]

The two witnesses who had signed the undisclosed "Contract[s] for Purchase of Information" were the only trial witnesses as to the two distribution counts on which Bagley was convicted. On cross-examination defense counsel attempted to undercut the witnesses' credibility, obviously a central issue, but had little factual basis for so doing. When defense counsel suggested a lack of credibility during final argument in the bench trial, the trial judge demurred, because "I really did not get the impression at all that either one or both of these men were trying at least in court here to make a case against the defendant." A finding that evidence showing that the witnesses in fact had a "direct, personal stake in respondent's conviction," *ante*, at 3384, was nevertheless not "material" would be egregiously erroneous under any standard.

2. "A prosecution that withholds evidence on demand of an accused which, if made available, 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...." *Brady, supra*, 373 U.S., at 87–88, 83 S.Ct., at 1196–1197.

3. "[W]e conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request at all....

"We now consider whether the prosecutor has any constitutional duty to volunteer exculpatory matter to the defense, and if so, what standard of materiality gives rise to that duty." 427 U.S., at 107, 96 S.Ct., at 2399.

4. "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a

[712] What the Court ignores with regard to *Agurs* is that its analysis was restricted entirely to the general or no-request context.[5] The "standard of materiality" we fashioned for the purpose of determining whether a prosecutor's failure to *volunteer* exculpatory evidence amounted to constitutional error was and is unnecessary with regard to the two categories of prosecutorial suppression already covered by the *Brady* rule. The specific situation in *Agurs*, as well as the circumstances of *United States v. Valenzuela-Bernal*, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982) and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), simply falls "outside the *Brady* context." *Ante*, at 3383.

But the *Brady* rule itself unquestionably applies to this case, because the Government failed to disclose favorable evidence that was clearly responsive to the defendant's specific [713] request. Bagley's conviction therefore must be set aside if the suppressed evidence was "material"—and it obviously was, see n. 1, *supra*—and if there is "any reasonable likelihood" that it could have affected the judgment of the trier of fact. Our choice, therefore, should be merely whether to affirm for the reasons stated in Part I of Justice *MARSHALL*'s dissent, or to remand to the Court of Appeals for further review under the standard stated in *Brady*. I would follow the latter course, not because I disagree with Justice MARSHALL's analysis of the record, but because I do not believe this Court should perform the task of reviewing trial transcripts in the first instance. See *United States v. Hasting*, 461 U.S. 499, 516–517, 103 S.Ct. 1974, 1984–1985, 76 L.Ed.2d 96 (1983) (STEVENS, J., concurring in judgment). I am confident that the Court of Appeals would reach the appropriate result if it applied the proper standard.

The Court, however, today sets out a reformulation of the *Brady* rule in which I have no such confidence. Even though the prosecution suppressed evidence that was specifically requested, apparently the Court of Appeals may now reverse only if there is a "reasonable probability" that the suppressed evidence "would" have altered "the result of the [trial]." *Ante*, at 3383, 3385. According to the Court this single rule is "sufficiently flexible" to cover specific as well as general or no-request instances of nondisclosure, *ante*, at 3383, because, at least in the view of Justice BLACKMUN and Justice O'CONNOR, a reviewing court can "consider directly" under this standard the more threatening effect that nondisclosure in response to a specific defense request will generally have on the truth-seeking function of the adversary process. *Ante*, at 3384 (opinion of

reasonable doubt that did not otherwise exist, constitutional error has been committed." *Id.*, at 112, 96 S.Ct., at 2401 (footnote omitted).

We also held in *Agurs* that when no request for particular information is made, post-trial determination of whether a failure voluntarily to disclose exculpatory evidence amounts to constitutional error depends on the "character of the evidence, not the character of the prosecutor." *Id.*, at 110, 96 S.Ct., at 2400. Nevertheless, implicitly acknowledging the broad discretion that trial and appellate courts must have to ensure fairness in this area, we noted that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.*, at 108, 96 S.Ct., at 2399. Finally, we noted that the post-trial determination of reasonable doubt will vary even in the no-request context, depending on all the circumstances of each case. For example, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.*, at 113, 96 S.Ct., at 2402.

5. See *ante*, at 3381 ("Our starting point is the framework for evaluating the materiality of *Brady* evidence established in *United States v. Agurs*"); *ante*, at 3383 (referring generally to "the *Agurs* standard for the materiality of undisclosed evidence"); *ante*, at 3392 (MARSHALL, J., dissenting) (describing *Agurs* as stating a general rule that "there is no constitutional duty to disclose evidence unless nondisclosure would have a certain impact on the trial"). But see Babcock, Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel, 34 Stan.L.Rev. 1133, 1148 (1982) (*Agurs* "distinguished" between no-request situations and the other two *Brady* contexts "where a pro-defense standard ... would continue").

BLACKMUN, J.).[6]

[7][14]I cannot agree. The Court's approach stretches the concept of "materiality" beyond any recognizable scope, transforming it from merely an evidentiary concept as used in *Brady* and *Agurs*, which required that material evidence be admissible and probative of guilt or innocence in the context of a specific request, into a result-focused standard that seems to include an independent weight in favor of affirming convictions despite evidentiary suppression. Evidence favorable to an accused and relevant to the dispositive issue of guilt apparently may still be found not "material," and hence suppressible by prosecutors prior to trial, unless there is a reasonable probability that its use would result in an acquittal. Justice MARSHALL rightly criticizes the incentives such a standard creates for prosecutors "to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive." *Ante*, at 3393.

Moreover, the Court's analysis reduces the significance of deliberate prosecutorial suppression of potentially exculpatory evidence to that merely of one of numerous factors that "may" be considered by a reviewing court. *Ante*, at 3384 (opinion of BLACKMUN, J.). This is not faithful to our statement in *Agurs* that "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." 427 U.S., at 106, 96 S.Ct., at 2398. Such suppression is far more serious than mere nondisclosure of evidence in which the defense has expressed no particular interest. A reviewing court should attach great significance to silence in the face of a specific request, when responsive evidence is later shown to have been in the Government's possession. Such silence actively misleads in the same way as would an affirmative representation that exculpatory evidence does not exist when, in fact, it does (*i.e.*, perjury)—indeed, the two situations are aptly described as "sides of a single coin." Babcock, Fair Play: Evidence Favorable to [7][15]an Accused and Effective Assistance of Counsel, 34 Stan.L.Rev. 1133, 1151 (1982).

Accordingly, although the judgment of the Court of Appeals should be vacated and the case should be remanded for further proceedings, I disagree with the Court's statement of the correct standard to be applied. I therefore respectfully dissent from the judgment that the case be remanded for determination under the Court's new standard.



6. I of course agree with Justice BLACKMUN, *ante*, at 3382, n. 9, and 3385, and Justice MARSHALL, *ante*, at 3395–3396, that our long line of precedents establishing the "reasonable likelihood" standard for use of perjured testimony remains intact. I also note that the Court plainly envisions that reversal of Bagley's conviction would be possible on remand even under the new standard formulated today for specific-request cases. See *ante*, at 3384–3385.

APPENDIX N

an Immigration Judge ... that is pending when an appeal [to the BIA] is filed ... shall be deemed a motion to remand [the administrative appeal] for further proceedings before the Immigration Judge.... Such motion ... shall be consolidated with, and considered by the Board [later] in connection with, the appeal to the Board...." 59 Fed.Reg. 29386, 29388 (1994) (proposed new 8 CFR § 3.2(c)(4)). See also 59 Fed.Reg., at 29387 (proposed new § 3.2(b) (parallel provision for motions to reconsider)). This approach, which is comparable to the *Locomotive Engineers* tolling rule, would govern the interaction of administrative appeals and motions to reopen the decision of an Immigration Judge. It seems logical that Congress might want the same rule to govern the analogous situation concerning the interaction of petitions for judicial review and motions to reconsider or reopen a decision of the BIA.

One final point. The INS argues that the Court should defer to one of its regulations, 8 CFR § 243.1 (1994), which, it says, interprets INA § 106(a) as eliminating the tolling rule. See, *e.g.*, *Shalala v. Guernsey Memorial Hospital*, 514 U.S. ——, ——-——, 115 S.Ct. 1232, 1236–1237, 131 L.Ed.2d 106 (1995) (slip op., at 6–7); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781–2782, 81 L.Ed.2d 694 (1984). The regulation in question, however, says nothing about tolling. To the contrary, it simply defines "final order of deportation," using language very similar to the language this Court, in *Locomotive Engineers*, interpreted as embodying the tolling rule. Compare the regulation here at issue, 8 CFR § 243.1 (1994) ("[A]n order of deportation ... shall become final upon [the BIA's] dismissal of an appeal" from the order of a single immigration judge), with the language at issue in *Locomotive Engineers*, 49 U.S.C. § 10327(i) ("[A]n action of the [Interstate Commerce] Commission ... is final on the date on which it is served"). A lawyer reading the regulation simply would not realize that the INS intended to create an unmentioned exception to a critically important technical procedure. Moreover, the INS itself has apparently interpreted the regulation somewhat differently at different times. Compare Brief for Respondent 13–17 (arguing that the regulation embodies a no-tolling rule), with *Chu v. INS*, 875 F.2d 777, 779 (CA9 1989) (in which INS argued that a reconsideration motion makes the initial order nonfinal, and thereby implies tolling). See, *e.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. ——, ——-——, 114 S.Ct. 2381, 2393–2394, 129 L.Ed.2d 405 (1994) (slip op., at 10–11) (inconsistent interpretation entitled to "considerably less deference" than consistently held agency view). For these reasons, I do not accept the INS's claim that its silent regulation creates a "no tolling" rule.

I would reverse the judgment of the Court of Appeals.



514 U.S. 419

Curtis Lee KYLES, Petitioner,

v.

John P. WHITLEY, Warden.

No. 93–7927.

Argued Nov. 7, 1994.

Decided April 19, 1995.

Petitioner, whose capital murder conviction and death sentence had been affirmed on direct appeal, 513 So.2d 265, filed petition for habeas corpus. The United States District Court for the Eastern District of Louisiana, George Arceneaux, Jr., J., denied petition, and the Court of Appeals for the Fifth Circuit, 5 F.3d 806, affirmed. Certiorari was granted. The Supreme Court, Justice Souter, held that: (1) in determining whether evidence not disclosed by state was "material," in violation of *Brady*, cumulative effect of all suppressed evidence favorable to the defendant is considered, rather than considering each item of evidence individually, and (2) favorable evidence state failed to disclose to defendant would have made a different result "reasonably probable" in capital murder

prosecution, and thus, nondisclosure of evidence was *Brady* violation.

Reversed and remanded.

Justice Stevens filed concurring opinion in which Justices Ginsburg and Breyer joined.

Justice Scalia filed dissenting opinion in which Chief Justice Rehnquist and Justices Kennedy and Thomas joined.

1. Constitutional Law ⇐268(5)

Suppression by prosecution of evidence favorable to defendant upon request violates due process, where evidence is material either to guilt or punishment, irrespective of good faith or bad faith of prosecution. U.S.C.A. Const.Amends. 5, 14.

2. Criminal Law ⇐700(3)

Defendant's failure to request favorable evidence does not leave government free of all obligation to disclose such evidence to defendant, under *Brady*. U.S.C.A. Const. Amends. 5, 14.

3. Criminal Law ⇐700(3)

Three situations in which *Brady* claim might arise despite defendant's failure to request favorable evidence are: where previously undisclosed evidence revealed that prosecution introduced trial testimony that it knew or should have known was perjured; where government failed to accede to defense request for disclosure of some specific kind of exculpatory evidence; or where government failed to volunteer exculpatory evidence never requested or requested only in general way, if suppression of evidence would be of sufficient significance to result in denial of defendant's right to fair trial. U.S.C.A. Const.Amends. 5, 14.

4. Criminal Law ⇐700(2.1)

Although constitutional duty of government to disclose favorable evidence to defendant is triggered by potential impact of favorable but undisclosed evidence, showing of "materiality" as required under *Brady* does not require demonstration by preponderance that disclosure of suppressed evidence would have resulted ultimately in defendant's acquittal; rather, touchstone of materiality is "reasonable probability" of different result. U.S.C.A. Const.Amends. 5, 14.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⇐700(2.1)

In determining whether evidence that government failed to disclose to defendant satisfied "materiality" test of *Brady*, question is not whether defendant would more likely than not have received different verdict with evidence, but whether in its absence he received "fair trial," understood as a trial resulting in verdict worthy of confidence; "reasonable probability" of different result is accordingly shown when government's evidentiary suppression undermines confidence in outcome of trial. U.S.C.A. Const.Amends. 5, 14.

See publication Words and Phrases for other judicial constructions and definitions.

6. Criminal Law ⇐700(2.1)

"Materiality" test for determining whether government's nondisclosure of favorable evidence to defendant violates *Brady* is not sufficiency of evidence test, and defendant need not demonstrate that, after discounting inculpatory evidence in light of undisclosed evidence, there would not have been enough left to convict; possibility of acquittal on criminal charge does not imply insufficient evidentiary basis to convict. U.S.C.A. Const.Amends. 5, 14.

7. Criminal Law ⇐700(2.1)

One does not show *Brady* violation in withholding favorable evidence by demonstrating that some of inculpatory evidence should have been excluded, but by showing that favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in verdict. U.S.C.A. Const.Amends. 5, 14.

8. Criminal Law ⇐1162

Once reviewing court applying *Bagley* test, in determining whether nondisclosure of favorable evidence to defendant violates due process, has found constitutional error, there is no need for further harmless error review. U.S.C.A. Const.Amends. 5, 14.

9. Criminal Law ⇐700(2.1)

Evidence that government failed to disclose to defendant is considered collectively, not item-by-item, in determining whether "materiality" requirement of *Brady* violation has been satisfied. U.S.C.A. Const.Amends. 5, 14; ABA Rules of Prof.Conduct, Rule 3.8(d).

10. Constitutional Law ⇐268(5)
Criminal Law ⇐700(3)

It is not due process violation every time government fails or chooses not to disclose evidence that might prove helpful to defendant; *Brady* requires less of prosecution than ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate. U.S.C.A. Const.Amends. 5, 14; ABA Rules of Prof.Conduct, Rule 3.8(d).

11. Criminal Law ⇐700(2.1)

While definition of "materiality" for purpose of *Brady* violation in terms of cumulative effect of suppression leaves government with degree of discretion, it also imposes corresponding burden; prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge likely net effect of all such evidence and make disclosure when point of "reasonable probability" is reached. U.S.C.A. Const. Amends. 5, 14.

12. Criminal Law ⇐700(2.1, 7)

Individual prosecutor has duty to learn of any favorable evidence known to others acting on government's behalf in case, including police, in order to avoid *Brady* violation, but whether prosecutor succeeds or fails in meeting such obligation prosecution's responsibility for failing to disclose known, material evidence rising to material level of importance is inescapable. U.S.C.A. Const. Amends. 5, 14.

13. Criminal Law ⇐700(6, 7)

Prosecutor remains responsible for duty under *Brady* to disclose favorable evidence to defendant, regardless of whether police investigators failed to inform prosecutor of evidence, as prosecutor can establish procedures and regulations to insure communication of all relevant information on each case to every lawyer who deals with it. U.S.C.A. Const.Amends. 5, 14.

14. Habeas Corpus ⇐823

Record on appeal in habeas proceeding, in which Court of Appeals found no *Brady* violation, was unclear as to whether majority of Court of Appeals properly assessed cumulative effect of evidence, in determining materiality, or made a series of independent materiality evaluations; although majority concluded by referring to "any or all of the undisclosed materials," opinion also contained repeated references dismissing particular items of evidence as immaterial. U.S.C.A. Const.Amends. 5, 14.

15. Criminal Law ⇐700(3, 4)

Favorable evidence state failed to disclose to defendant was "material," as it would have made a different result "reasonably probable" in capital murder prosecution, and thus, nondisclosure of evidence was *Brady* violation; among undisclosed evidence was statement by prosecution's "best" witness that assailant was about five foot four or five foot five and medium build, matching description of key informer and not defendant, who was six feet tall and thin, statement by another eyewitness, who described struggle and shooting with clarity at trial, indicating that witness had not seen actual murder and had not seen assailant outside vehicle, and undisclosed statements by key informer that were inconsistent, implied that informer was anxious to see defendant arrested for victim's murder, and raised suspicions that informer planted both murder weapon and victim's purse in places where they were found. U.S.C.A. Const.Amends. 5, 14.

See publication Words and Phrases for other judicial constructions and definitions.

16. Criminal Law ⇐700(3)

When probative force of evidence depends on circumstances under which it was obtained and those circumstances raise possibility of fraud, indication of conscientious police work will enhance probative force and slovenly work will diminish it, for purpose of determining whether nondisclosed evidence of sloppiness of police investigation is materi-

al, as required for *Brady* violation. U.S.C.A. Const.Amends. 5, 14.

17. **Criminal Law** ⇐700(3, 4)

Although prosecution's list of cars in parking lot near scene of murder at midevening after murder did not rank with failure to disclose other evidence, such eyewitnesses' statements, it would have had some value as exculpation and impeachment, and thus, nondisclosure of such list was required to be considered in determining whether "materiality" requirement for *Brady* violation was satisfied; on police assumption that killer drove to lot and left his car there during heat of investigation, list without defendant's registration would have helped defendant and would have had some value in countering prosecution's argument that grainy enlargement of photograph of crime scene showed defendant's car in background. U.S.C.A. Const.Amends. 5, 14.

Syllabus *

Petitioner Kyles was convicted of first-degree murder by a Louisiana jury and sentenced to death. Following the affirmance of his conviction and sentence on direct appeal, it was revealed on state collateral review that the State had never disclosed certain evidence favorable to him. That evidence included, *inter alia*, (1) contemporaneous eyewitness statements taken by the police following the murder; (2) various statements made to the police by an informant known as "Beanie," who was never called to testify; and (3) a computer print-out of license numbers of cars parked at the crime scene on the night of the murder, which did not list the number of Kyles's car. The state trial court nevertheless denied relief, and the State Supreme Court denied Kyles's application for discretionary review. He then sought relief on federal habeas, claiming, among other things, that his conviction was obtained in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196–1197, 10 L.Ed.2d 215, which held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment. The Federal District Court denied relief, and the Fifth Circuit affirmed.

Held:

1. Under *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481, four aspects of materiality for *Brady* purposes bear emphasis. First, favorable evidence is material, and constitutional error results from its suppression by the government, if there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Thus, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. 473 U.S., at 682, 685, 105 S.Ct., at 3383–3384, 3385. *United States v. Agurs*, 427 U.S. 97, 112–113, 96 S.Ct. 2392, 2401–2402, 49 L.Ed.2d 342, distinguished. Second, *Bagley* materiality is not a sufficiency of evidence test. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Third, contrary to the Fifth Circuit's assumption, once a reviewing court applying *Bagley* has found constitutional error, there is no need for further harmless-error review, since the constitutional standard for materiality under *Bagley* imposes a higher burden than the harmless-error standard of *Brecht v. Abrahamson*, 507 U.S. ——, ——, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353. Fourth, the state's disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item-by-item. 473 U.S., at 675, 105 S.Ct., at 3380, and n. 7. Thus, the prosecutor, who alone can know what is undisclosed, must be assigned the responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached.

* 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.

Moreover, that responsibility remains regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. To hold otherwise would amount to a serious change of course from the *Brady* line of cases. As the more likely reading of the Fifth Circuit's opinion shows a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*, it is questionable whether that court evaluated the significance of the undisclosed evidence in this case under the correct standard. Pp. 1565–1569.

2. Because the net effect of the state-suppressed evidence favoring Kyles raises a reasonable probability that its disclosure would have produced a different result at trial, the conviction cannot stand, and Kyles is entitled to a new trial. Pp. 1569–1576.

(a) A review of the suppressed statements of eyewitnesses—whose testimony identifying Kyles as the killer was the essence of the State's case—reveals that their disclosure not only would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense, but also would have substantially reduced or destroyed the value of the State's two best witnesses. Pp. 1569–1571.

(b) Similarly, a recapitulation of the suppressed statements made to the police by Beanie—who, by the State's own admission, was essential to its investigation and, indeed, "made the case" against Kyles—reveals that they were replete with significant inconsistencies and affirmatively self-incriminating assertions, that Beanie was anxious to see Kyles arrested for the murder, and that the police had a remarkably uncritical attitude toward Beanie. Disclosure would therefore have raised opportunities for the defense to attack the thoroughness and even the good faith of the investigation, and would also have allowed the defense to question the probative value of certain crucial physical evidence. Pp. 1571–1573.

(c) While the suppression of the prosecution's list of the cars at the crime scene after the murder does not rank with the failure to disclose the other evidence herein discussed, the list would have had some value as exculpation of Kyles, whose license plate was not included thereon, and as impeachment of the prosecution's arguments to the jury that the killer left his car at the scene during the investigation and that a grainy 421 photograph of the scene showed Kyles's car in the background. It would also have lent support to an argument that the police were irresponsible in relying on inconsistent statements made by Beanie. Pp. 1573–1574.

(d) Although not every item of the State's case would have been directly undercut if the foregoing *Brady* evidence had been disclosed, it is significant that the physical evidence remaining unscathed would, by the State's own admission, hardly have amounted to overwhelming proof that Kyles was the murderer. While the inconclusiveness of that evidence does not prove Kyles's innocence, and the jury might have found the unimpeached eyewitness testimony sufficient to convict, confidence that the verdict would have been the same cannot survive a recap of the suppressed evidence and its significance for the prosecution. Pp. 1574–1576.

5 F.3d 806 (CA5 1993), reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., joined.

STEVENS, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined.

SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., and KENNEDY and THOMAS, JJ., joined.

James S. Liebman, New York City, for petitioner.

Jack Peebles, New Orleans, LA, for respondent.

For U.S. Supreme Court briefs, see:

1994 WL 285116 (Pet.Brief)

1994 WL 386177 (Resp.Brief)

1994 WL 496367 (Reply.Brief)

Justice SOUTER delivered the opinion of the Court.

After his first trial in 1984 ended in a hung jury, petitioner Curtis Lee Kyles was tried

again, convicted of first-degree murder, and sentenced to death. On habeas review, we follow the established rule that the state's obligation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government, and we hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. Because the net effect of the evidence withheld by the State in this case raises a reasonable probability that its disclosure would have produced a different result, Kyles is entitled to a new trial.

I

Following the mistrial when the jury was unable to reach a verdict, Kyles's subsequent conviction and sentence of death were affirmed on direct appeal. *State v. Kyles*, 513 So.2d 265 (La.1987), cert. denied, 486 U.S. 1027, 108 S.Ct. 2005, 100 L.Ed.2d 236 (1988). On state collateral review, the trial court denied relief, but the Supreme Court of Louisiana remanded for an evidentiary hearing on Kyles's claims of newly discovered evidence. During this state-court proceeding the defense was first able to present certain evidence, favorable to Kyles, that the State had failed to disclose before or during trial. The state trial court nevertheless denied relief, and the State Supreme Court denied Kyles's application for discretionary review. *State ex rel. Kyles v. Butler*, 566 So.2d 386 (La. 1990).

Kyles then filed a petition for habeas corpus in the United States District Court for the Eastern District of Louisiana, which denied the petition. The Court of Appeals for the Fifth Circuit affirmed by a divided vote. 5 F.3d 806 (CA5 1993). As we explain, *infra*, at 1569, there is reason to question whether the Court of Appeals evaluated the significance of undisclosed evidence under the correct standard. Because "[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case," *Burger v. Kemp*, 483 U.S. 776, 785, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987),[1] we granted certiorari, 511 U.S. ——, 114 S.Ct. 1610, 128 L.Ed.2d 338 (1994), and now reverse.

II

A

The record indicates that, at about 2:20 p.m. on Thursday, September 20, 1984, 60–year–old Dolores Dye left the Schwegmann Brothers' store (Schwegmann's) on Old Gentilly Road in New Orleans after doing some food shopping. As she put her grocery bags into the trunk of her red Ford LTD, a man accosted her and after a short struggle drew a revolver, fired into her left temple, and killed her. The gunman took Dye's keys and drove away in the LTD.

New Orleans police took statements from six eyewitnesses,[2] who offered various descriptions of the gunman. They agreed that he was a black man, and four of them said that he had braided hair. The witnesses differed significantly, however, in their descriptions of height, age, weight, build, and hair length. Two reported seeing a man of 17 or 18, while another described the gunman as looking as old as 28. One witness described him as 5'4" or 5'5", medium build, 140–150 pounds; another described the man as slim and close to six feet. One witness

1. The dissent suggests that *Burger* is not authority for error correction in capital cases, at least when two previous reviewing courts have found no error. *Post*, at 1576–1577. We explain, *infra*, at 1569, that this is not a case of simple error correction. As for the significance of prior review, *Burger* cautions that this Court should not "substitute speculation" for the "considered opinions" of two lower courts. 483 U.S., at 785, 107 S.Ct., at 3121. No one could disagree that "speculative" claims do not carry much weight against careful evidentiary review by two prior courts. There is nothing speculative, however, about Kyles's *Brady* claim.

2. The record reveals that statements were taken from Edward Williams and Lionel Plick, both waiting for a bus nearby; Isaac Smallwood, Willie Jones, and Henry Williams, all working in the Schwegmann's parking lot at the time of the murder; and Robert Territo, driving a truck waiting at a nearby traffic light at the moment of the shooting, who gave a statement to police on Friday, the day after the murder.

said he had a mustache; none of the others spoke of any facial hair at all. One witness said the murderer had shoulder-length hair; another described the hair as "short."

Since the police believed the killer might have driven his own car to Schwegmann's and left it there when he drove off in Dye's LTD, they recorded the license numbers of the cars remaining in the parking lots around the store at 9:15 p.m. on the evening of the murder. Matching these numbers with registration records produced the names and addresses of the owners of the cars, with a notation of any owner's police record. Despite this list and the eyewitness descriptions, the police had no lead to the gunman until the Saturday evening after the shooting.

At 5:30 p.m., on September 23, a man identifying himself as James Joseph called the police and reported that on the day of the murder he had bought a red Thunderbird from a friend named Curtis, whom he later identified as petitioner, Curtis Kyles. He said that he had subsequently read about Dye's murder in the newspapers and feared that the car he purchased was the victim's. He agreed to meet with the police.

A few hours later, the informant met New Orleans detective John Miller, who was wired with a hidden body microphone, through which the ensuing conversation was recorded. See App. 221–257 (transcript). The informant now said his name was Joseph Banks and that he was called Beanie. His actual name was Joseph Wallace.[3]

His story, as well as his name, had changed since his earlier call. In place of his original account of buying a Thunderbird from Kyles on Thursday, Beanie told Miller that he had not seen Kyles at all on Thursday, *id.*, at 249–250, and had bought a red LTD the previous day, Friday, *id.*, at 221–222, 225. Beanie led Miller to the parking lot of a nearby bar, where he had left the red LTD, later identified as Dye's.

Beanie told Miller that he lived with Kyles's brother-in-law (later identified as Johnny Burns),[4] whom Beanie repeatedly called his "partner." *Id.*, at 221. Beanie described Kyles as slim, about 6 feet tall, 24 or 25 years old, with a "bush" hairstyle. *Id.*, at 226, 252. When asked if Kyles ever wore his hair in plaits, Beanie said that he did but that he "had a bush" when Beanie bought the car. *Id.*, at 249.

During the conversation, Beanie repeatedly expressed concern that he might himself be a suspect in the murder. He explained that he had been seen driving Dye's car on Friday evening in the French Quarter, admitted that he had changed its license plates, and worried that he "could have been charged" with the murder on the basis of his possession of the LTD. *Id.*, at 231, 246, 250. He asked if he would be put in jail. *Id.*, at 235, 246. Miller acknowledged that Beanie's possession of the car would have looked suspicious, *id.*, at 247, but reassured him that he "didn't do anything wrong," *id.*, at 235.

Beanie seemed eager to cast suspicion on Kyles, who allegedly made his living by "robbing people," and had tried to kill Beanie at some prior time. *Id.*, at 228, 245, 251. Beanie said that Kyles regularly carried two pistols, a .38 and a .32, and that if the police could "set him up good," they could "get that same gun" used to kill Dye. *Id.*, at 228–229. Beanie rode with Miller and Miller's supervisor, Sgt. James Eaton, in an unmarked squad car to Desire Street, where he pointed out the building containing Kyles's apartment. *Id.*, at 244–246.

Beanie told the officers that after he bought the car, he and his "partner" (Burns) drove Kyles to Schwegmann's about 9 p.m. on Friday evening to pick up Kyles's car, described as an orange four-door Ford.[5] *Id.*,

3. Because the informant had so many aliases, we will follow the convention of the court below and refer to him throughout this opinion as Beanie.

4. Johnny Burns is the brother of a woman known as Pinky Burns. A number of trial witnesses referred to the relationship between Kyles and Pinky Burns as a common-law marriage (Louisiana's civil law notwithstanding). Kyles is the father of several of Pinky Burns's children.

5. According to photographs later introduced at trial, Kyles's car was actually a Mercury and, according to trial testimony, a two-door model. Tr. 210 (Dec. 7, 1984).

at 221, 223, 231–232, 242. When asked where Kyles's car had been parked, Beanie replied that it had been "[o]n the same side [of the lot] where the woman was killed at." *Id.*, at 231. The officers later drove Beanie to Schwegmann's, where he indicated the space where he claimed Kyles's car had been parked. Beanie went on to say that when he and Burns had brought Kyles to pick up the car, Kyles had gone to some nearby bushes to retrieve a brown purse, *id.*, at 253–255, which Kyles subsequently hid in a wardrobe at his apartment. Beanie said that Kyles had "a lot of groceries" in Schwegmann's bags and a new baby's potty "in the car." *Id.*, at 254–255. Beanie told Eaton that Kyles's garbage would go out the next day and that if Kyles was "smart" he would "put [the purse] in [the] garbage." *Id.*, at 257. Beanie made it clear that he expected some reward for his help, saying at one point that he was not "doing all of this for nothing." *Id.*, at 246. The police repeatedly assured Beanie that he would not lose the $400 he paid for the car. *Id.*, at 243, 246.

After the visit to Schwegmann's, Eaton and Miller took Beanie to a police station where Miller interviewed him again on the record, which was transcribed and signed by Beanie, using his alias "Joseph Banks." See App. 214–220 (transcript). This statement, Beanie's third (the telephone call being the first, then the recorded conversation), repeats some of the essentials of the second one: that Beanie had purchased a red Ford LTD from Kyles for $400 on Friday evening; that Kyles had his hair "combed out" at the time of the sale; and that Kyles carried a .32 and a .38 with him "all the time."

Portions of the third statement, however, embellished or contradicted Beanie's preceding story and were even internally inconsistent. Beanie reported that after the sale, he and Kyles unloaded Schwegmann's grocery bags from the trunk and back seat of the LTD and placed them in Kyles's own car. Beanie said that Kyles took a brown purse from the front seat of the LTD and that they then drove in separate cars to Kyles's apartment, where they unloaded the groceries. *Id.*, at 216–217. Beanie also claimed that, a few hours later, he and his "partner" Burns went with Kyles to Schwegmann's, where they recovered Kyles's car and a "big brown pocket book" from "next to a building." *Id.*, at 218. Beanie did not explain how Kyles could have picked up his car and recovered the purse at Schwegmann's, after Beanie had seen Kyles with both just a few hours earlier. The police neither noted the inconsistencies nor questioned Beanie about them.

Although the police did not thereafter put Kyles under surveillance, Tr. 94 (Dec. 6, 1984), they learned about events at his apartment from Beanie, who went there twice on Sunday. According to a fourth statement by Beanie, this one given to the chief prosecutor in November (between the first and second trials), he first went to the apartment about 2 p.m., after a telephone conversation with a police officer who asked whether Kyles had the gun that was used to kill Dye. Beanie stayed in Kyles's apartment until about 5 p.m., when he left to call Detective John Miller. Then he returned about 7 p.m. and stayed until about 9:30 p.m., when he left to meet Miller, who also asked about the gun. According to this fourth statement, Beanie "rode around" with Miller until 3 a.m. on Monday, September 24. Sometime during those same early morning hours, detectives were sent at Sgt. Eaton's behest to pick up the rubbish outside Kyles's building. As Sgt. Eaton wrote in an interoffice memorandum, he had "reason to believe the victims *[sic]* personal papers and the Schwegmann's bags will be in the trash." Defendant's Exh. 17.

At 10:40 a.m., Kyles was arrested as he left the apartment, which was then searched under a warrant. Behind the kitchen stove, the police found a .32 calibre revolver containing five live rounds and one spent cartridge. Ballistics tests later showed that this pistol was used to murder Dye. In a wardrobe in a hallway leading to the kitchen, the officers found a homemade shoulder holster that fit the murder weapon. In a bedroom dresser drawer, they discovered two boxes of ammunition, one containing several .32 calibre rounds of the same brand as those found in the pistol. Back in the kitchen, various cans of cat and dog food, some of them of the brands Dye typically purchased, were found in Schwegmann's sacks. No other groceries

were identified as possibly being Dye's, and no potty was found. Later that afternoon at the police station, police opened the rubbish bags and found the victim's purse, identification, and other personal belongings wrapped in a Schwegmann's sack.

The gun, the LTD, the purse, and the cans of pet food were dusted for fingerprints. The gun had been wiped clean. Several prints were found on the purse and on the LTD, but none was identified as Kyles's. Dye's prints were not found on any of the cans of pet food. Kyles's prints were found, however, on a small piece of paper taken from the front passenger-side floorboard of the LTD. The crime laboratory recorded the paper as a Schwegmann's sales slip, but without noting what had been printed on it, which was obliterated in the chemical process of lifting the fingerprints. A second Schwegmann's receipt was found in the trunk of the LTD, but Kyles's prints were not found on it. Beanie's fingerprints were not compared to any of the fingerprints found. Tr. 97 (Dec. 6, 1984).

The lead detective on the case, John Dillman, put together a photo lineup that included a photograph of Kyles (but not of Beanie) and showed the array to five of the six eyewitnesses who had given statements. Three of them picked the photograph of Kyles; the other two could not confidently identify Kyles as Dye's assailant.

B

Kyles was indicted for first-degree murder. Before trial, his counsel filed a lengthy motion for disclosure by the State of any exculpatory or impeachment evidence. The prosecution responded that there was "no exculpatory evidence of any nature," despite the government's knowledge of the following evidentiary items: (1) the six contemporaneous eyewitness statements taken by police following the murder; (2) records of Beanie's initial call to the police; (3) the tape recording of the Saturday conversation between Beanie and officers Eaton and Miller; (4) the typed and signed statement given by Beanie on Sunday morning; (5) the computer printout of license numbers of cars parked at Schwegmann's on the night of the murder, which did not list the number of Kyles's car; (6) the internal police memorandum calling for the seizure of the rubbish after Beanie had suggested that the purse might be found there; and (7) evidence linking Beanie to other crimes at Schwegmann's and to the unrelated murder of one Patricia Leidenheimer, committed in January before the Dye murder.

At the first trial, in November, the heart of the State's case was eyewitness testimony from four people who were at the scene of the crime (three of whom had previously picked Kyles from the photo lineup). Kyles maintained his innocence, offered supporting witnesses, and supplied an alibi that he had been picking up his children from school at the time of the murder. The theory of the defense was that Kyles had been framed by Beanie, who had planted evidence in Kyles's apartment and his rubbish for the purposes of shifting suspicion away from himself, removing an impediment to romance with Pinky Burns, and obtaining reward money. Beanie did not testify as a witness for either the defense or the prosecution.

Because the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested. Even so, after four hours of deliberation, the jury became deadlocked on the issue of guilt, and a mistrial was declared.

After the mistrial, the chief trial prosecutor, Cliff Strider, interviewed Beanie. See App. 258–262 (notes of interview). Strider's notes show that Beanie again changed important elements of his story. He said that he went with Kyles to retrieve Kyles's car from the Schwegmann's lot on Thursday, the day of the murder, at some time between 5 and 7:30 p.m., not on Friday, at 9 p.m., as he had said in his second and third statements. (Indeed, in his second statement, Beanie said that he had not seen Kyles at all on Thursday. *Id.*, at 249–250.) He also said, for the first time, that when they had picked up the car they were accompanied not only by Johnny Burns but also by Kevin Black, who had testified for the defense at the first trial. Beanie now claimed that after getting Kyles's

car they went to Black's house, retrieved a number of bags of groceries, a child's potty, and a brown purse, all of which they took to Kyles's apartment. Beanie also stated that on the Sunday after the murder he had been at Kyles's apartment two separate times. Notwithstanding the many inconsistencies and variations among Beanie's statements, neither Strider's notes nor any of the other notes and transcripts were given to the defense.

In December 1984, Kyles was tried a second time. Again, the heart of the State's case was the testimony of four eyewitnesses who positively identified Kyles in front of the jury. The prosecution also offered a blown-up photograph taken at the crime scene soon after the murder, on the basis of which the prosecutors argued that a seemingly two-toned car in the background of the photograph was Kyles's. They repeatedly suggested during cross-examination of defense witnesses that Kyles had left his own car at Schwegmann's on the day of the murder and had retrieved it later, a theory for which they offered no evidence beyond the blown-up photograph. Once again, Beanie did not testify.

As in the first trial, the defense contended that the eyewitnesses were mistaken. Kyles's counsel called several individuals, including Kevin Black, who testified to seeing Beanie, with his hair in plaits, driving a red car similar to the victim's about an hour after the killing. Tr. 209 (Dec. 7, 1984). Another witness testified that Beanie, with his hair in braids, had tried to sell him the car on Thursday evening, shortly after the murder. *Id.*, at 234–235. Another witness testified that Beanie, with his hair in a "Jheri curl," had attempted to sell him the car on Friday. *Id.*, at 249–251. One witness, Beanie's "partner," Burns, testified that he had seen Beanie on Sunday at Kyles's apartment, stooping down near the stove where the gun was eventually found, and the defense presented testimony that Beanie was romantically interested in Pinky Burns. To explain the pet food found in Kyles's apartment, there was testimony that Kyles's family kept a dog and cat and often fed stray animals in the neighborhood.

Finally, Kyles again took the stand. Denying any involvement in the shooting, he explained his fingerprints on the cash register receipt found in Dye's car by saying that Beanie had picked him up in a red car on Friday, September 21, and had taken him to Schwegmann's, where he purchased transmission fluid and a pack of cigarettes. He suggested that the receipt may have fallen from the bag when he removed the cigarettes.

On rebuttal, the prosecutor had Beanie brought into the courtroom. All of the testifying eyewitnesses, after viewing Beanie standing next to Kyles, reaffirmed their previous identifications of Kyles as the murderer. Kyles was convicted of first-degree murder and sentenced to death. Beanie received a total of $1,600 in reward money. See Tr. of Hearing on Post–Conviction Relief 19–20 (Feb. 24, 1989); *id.*, at 114 (Feb. 20, 1989).

Following direct appeal, it was revealed in the course of state collateral review that the State had failed to disclose evidence favorable to the defense. After exhausting state remedies, Kyles sought relief on federal habeas, claiming, among other things, that the evidence withheld was material to his defense and that his conviction was thus obtained in violation of *Brady*. Although the United States District Court denied relief and the Fifth Circuit affirmed,[6] Judge King dissent-

6. Pending appeal, Kyles filed a motion under Federal Rules of Civil Procedure 60(b)(2) and (6) to reopen the District Court judgment. In that motion, he charged that one of the eyewitnesses who testified against him at trial committed perjury. In the witness's accompanying affidavit, Darlene Kersh (formerly Cahill), the only such witness who had not given a contemporaneous statement, swears that she told the prosecutors and detectives she did not have an opportunity to view the assailant's face and could not identify him. Nevertheless, Kersh identified Kyles untruthfully, she says, after being "told by some people ... [who] I think ... were district attorneys and police, that the murderer would be the guy seated at the table with the attorney and that that was the one I should identify as the murderer. One of the people there was at the D.A.'s table at the trial. To the best of my knowledge there was only one black man sitting at the counsel table and I pointed him out as the one I had seen shoot the lady." Kersh claims to have agreed to the State's wishes only after the police

ed, writing that "[f]or the first time in my fourteen years on this court ... I have serious reservations about whether the State has sentenced to death the right man." 5 F.3d, at 820.

III

[1–3] The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). See *id.*, at 86, 83 S.Ct., at 1196 (relying on *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 341–342, 79 L.Ed. 791 (1935), and *Pyle v. Kansas*, 317 U.S. 213, 215–216, 63 S.Ct. 177, 178–179, 87 L.Ed. 214 (1942)). *Brady* 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." 373 U.S., at 87, 83 S.Ct., at 1196–1197; see *Moore v. Illinois*, 408 U.S. 786, 794–795, 92 S.Ct. 2562, 2567–2568, 33 L.Ed.2d 706 (1972). 433 In *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), however, it became clear that a defendant's failure to request favorable evidence did not leave the Government free of all obligation. There, the Court distinguished three situations in which a *Brady* claim might arise: first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured, 427 U.S., at 103–104, 96 S.Ct., at 2397–2398;[7] second, where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence, *id.*, at 104–107, 96 S.Ct., at 2398–2399; and third, where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way. The Court found a duty on the part of the Government even in this last situation, though only when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id.*, at 108, 96 S.Ct., at 2400.

In the third prominent case on the way to current *Brady* law, *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs* circumstances, *i.e.*, the "specific-request" and "general- or no-request" situations. *Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S., at 682, 105 S.Ct., at 3383 (opinion of Blackmun, J.); *id.*, at 685, 105 S.Ct., at 3385 (White, J., concurring in part and concurring in judgment). 434

[4, 5] Four aspects of materiality under *Bagley* bear emphasis. Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence,

and district attorneys assured her that "all the other evidence pointed to [Kyles] as the killer." Affidavit of Darlene Kersh 5, 7.

The District Court denied the motion as an abuse of the writ, although its order was vacated by the Court of Appeals for the Fifth Circuit with instructions to deny the motion on the ground that a petitioner may not use a Rule 60(b) motion to raise constitutional claims not included in the original habeas petition. That ruling is not before us. After denial of his Rule 60(b) motion, Kyles again sought state collateral review on the basis of Kersh's affidavit. The Supreme Court of Louisiana granted discretionary review and ordered the trial court to conduct an evidentiary hearing; all state proceedings are currently stayed pending our review of Kyles's federal habeas petition.

7. The Court noted that "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 judgment of the jury." *Agurs*, 427 U.S., at 103, 96 S.Ct., at 2397 (footnote omitted). As the ruling pertaining to Kersh's affidavit is not before us, we do not consider the question of whether Kyles's conviction was obtained by the knowing use of perjured testimony and our decision today does not address any claim under the first *Agurs* category. See n. 6, *supra*.

a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). *Id.*, at 682, 105 S.Ct., at 3383–3384 (opinion of Blackmun, J.) (adopting formulation announced in *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984)); *Bagley, supra*, 473 U.S., at 685, 105 S.Ct., at 3385 (White, J., concurring in part and concurring in judgment) (same); see *id.*, at 680, 105 S.Ct., at 3382–3383 (opinion of Blackmun, J.) (*Agurs* "rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal"); cf. *Strickland, supra*, 466 U.S., at 693, 104 S.Ct., at 2068 ("[W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case"); *Nix v. Whiteside*, 475 U.S. 157, 175, 106 S.Ct. 988, 998, 89 L.Ed.2d 123 (1986) ("[A] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*"). *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the 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 he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial." *Bagley*, 473 U.S., at 678, 105 S.Ct., at 3381.

[6, 7] The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.[8]

[8] Third, we note that, contrary to the assumption made by the Court of Appeals, 5 F.3d, at 818, once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review. Assuming *arguendo* that a harmless error enquiry were to apply, a *Bagley* error could not be treated as harmless, since "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," 473 U.S., at 682, 105 S.Ct., at 3383 (opinion of Blackmun, J.); *id.*, at 685, 105 S.Ct., at 3385 (White, J., concurring in part and concurring in judgment), necessarily entails the conclusion that the suppression must have had " 'substantial and injurious effect or influence in determining the jury's verdict,' " *Brecht v. Abrahamson*, 507 U.S. ——, ——, 113 S.Ct. 1710, 1712, 123 L.Ed.2d 353 (1993), quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946). This is amply confirmed by the development of the respective governing standards. Although *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), held that a conviction tainted by constitutional error must be set aside unless the error

8. This rule is clear, and none of the *Brady* cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone. And yet the dissent appears to assume that Kyles must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed. See *post*, at 1579–1580 (possibility that Beanie planted evidence "is perfectly consistent" with Kyles's guilt), 1580 ("the jury could well have believed [portions of the defense theory] and yet have condemned petitioner because it could not believe that *all four* of the eyewitnesses were similarly mistaken"), 1582 (the *Brady* evidence would have left two prosecution witnesses "totally untouched"), 1583 (*Brady* evidence "can be logically separated from the incriminating evidence that would have remained unaffected").

complained of "was harmless beyond a reasonable doubt," we held in *Brecht* that the standard of harmlessness generally to be applied in habeas cases is the *Kotteakos* formulation (previously applicable only in reviewing nonconstitutional errors on direct appeal), *Brecht, supra*, 507 U.S., at ——, 113 S.Ct., at 1713–1714. Under *Kotteakos* a conviction may be set aside only if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos, supra*, 328 U.S., at 776, 66 S.Ct., at 1253. *Agurs*, however, had previously rejected *Kotteakos* as the standard governing constitutional disclosure claims, reasoning that "the constitutional standard of materiality must impose a higher burden on the defendant." *Agurs*, 427 U.S., at 112, 96 S.Ct., at 2401. *Agurs* thus opted for its formulation of materiality, later adopted as the test for prejudice in *Strickland*, only after expressly noting that this standard would recognize reversible constitutional error only when the harm to the defendant was greater than the harm sufficient for reversal under *Kotteakos*. In sum, once there has been *Bagley* error as claimed in this case, it cannot subsequently be found harmless under *Brecht*.[9]

[9, 10] The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item.[10] As Justice Blackmun emphasized in the portion of his opinion written for the Court, the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. *Id.*, 473 U.S., at 675, 105 S.Ct., at 3380 and n. 7. We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate. See ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3–3.11(a) (3d ed. 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d) (1984) ("The prosecutor in a criminal case shall ... make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

[11, 12] While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady*, 373 U.S., at 87, 83 S.Ct., at 1196–1197), the prosecution's responsibility for failing to disclose known, fa-

9. See also *Hill v. Lockhart*, 28 F.3d 832, 839 (CA8 1994) ("[I]t is unnecessary to add a separate layer of harmless-error analysis to an evaluation of whether a petitioner in a habeas case has presented a constitutionally significant claim for ineffective assistance of counsel").

10. The dissent accuses us of overlooking this point and of assuming that the favorable significance of a given item of undisclosed evidence is enough to demonstrate a *Brady* violation. We evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately and at the end of the discussion, at Part IV–D, *infra*.

vorable evidence rising to a material level of importance is inescapable.

[13] The State of Louisiana would prefer an even more lenient rule. It pleads that some of the favorable evidence in issue here was not disclosed even to the prosecutor until after trial, Brief for Respondent 25, 27, 30, 31, and it suggested below that it should not be held accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor.[11] To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases. In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Since, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

Short of doing that, we were asked at oral argument to raise the threshold of materiality because the *Bagley* standard "makes it difficult . . . to know" from the "perspective [of the prosecutor at] trial . . . exactly what might become important later on." Tr. of Oral Arg. 33. The State asks for "a certain amount of leeway in making a judgment call" as to the disclosure of any given piece of evidence. *Ibid.* 439

Uncertainty about the degree of further "leeway" that might satisfy the State's request for a "certain amount" of it is the least of the reasons to deny the request. At bottom, what the State fails to recognize is that, with or without more leeway, the prosecution cannot be subject to any disclosure obligation without at some point having the responsibility to determine when it must act. Indeed, even if due process were thought to be violated by every failure to disclose an item of exculpatory or impeachment evidence (leaving harmless error as the government's only fallback), the prosecutor would still be forced to make judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record. Since the prosecutor would have to exercise some judgment even if the State were subject to this most stringent disclosure obligation, it is hard to find merit in the State's complaint over the responsibility for judgment under the existing system, which does not tax the prosecutor with error for any failure to disclose, absent a further showing of materiality. Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.

This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. See *Agurs*, 427 U.S., at 108, 96 S.Ct., at 2399–2400 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure"). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative . . . of a sovereignty . . . whose interest . . . 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, 633, 79 L.Ed. 1314 (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. *See Rose v. Clark*, 478 440

11. The State's counsel retreated from this suggestion at oral argument, conceding that the State is "held to a disclosure standard based on what all State officers at the time knew." Tr. of Oral Arg. 40.

U.S. 570, 577–578, 106 S.Ct. 3101, 3105–3106, 92 L.Ed.2d 460 (1986); *Estes v. Texas*, 381 U.S. 532, 540, 85 S.Ct. 1628, 1631, 14 L.Ed.2d 543 (1965); *United States v. Leon*, 468 U.S. 897, 900–901, 104 S.Ct. 3405, 3409, 82 L.Ed.2d 677 (1984) (recognizing general goal of establishing "procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth' ") (quoting *Alderman v. United States*, 394 U.S. 165, 175, 89 S.Ct. 961, 967, 22 L.Ed.2d 176 (1969)). The prudence of the careful prosecutor should not therefore be discouraged.

[14] There is room to debate whether the two judges in the majority in the Court of Appeals made an assessment of the cumulative effect of the evidence. Although the majority's *Brady* discussion concludes with the statement that the court was not persuaded of the reasonable probability that Kyles would have obtained a favorable verdict if the jury had been "exposed to any or all of the undisclosed materials," 5 F.3d, at 817, the opinion also contains repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone. See, *e.g.*, *id.*, at 812 ("we do not agree that this statement made the transcript material and so mandated disclosure ... Beanie's statement ... is itself not decisive"), 814 ("the nondisclosure of this much of the transcript was insignificant"), 815 ("Kyles has not shown on this basis that the three statements were material"), 815 ("In light of the entire record ... we cannot conclude that [police reports relating to discovery of the purse in the trash] would, in reasonable probability, have moved the jury to embrace the theory it otherwise discounted"), 816 ("we are not persuaded that these notes [relating to discovery of the gun] were material"), 816 ("we are not persuaded that [the printout of the license plate numbers] would, in reasonable probability, have induced reasonable doubt where the jury did not find it.... the rebuttal of the photograph would have made no difference"). The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*, as the ensuing discussion will show.

IV

[15] In this case, disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable.

A

As the District Court put it, "the essence of the State's case" was the testimony of eyewitnesses, who identified Kyles as Dye's killer. 5 F.3d, at 853 (Appendix A). Disclosure of their statements would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense. To begin with, the value of two of those witnesses would have been substantially reduced or destroyed.

The State rated Henry Williams as its best witness, who testified that he had seen the struggle and the actual shooting by Kyles. The jury would have found it helpful to probe this conclusion in the light of Williams's contemporaneous statement, in which he told the police that the assailant was "a black male, about 19 or 20 years old, about 5'4" or 5"5", 140 to 150 pounds, medium build" and that "his hair looked like it was platted." App. 197. If cross-examined on this description, Williams would have had trouble explaining how he could have described Kyles, 6–feet tall and thin, as a man more than half a foot shorter with a medium build.[12] Indeed, since Beanie was 22 years old, 5'5" tall, and 159 pounds, the defense would have had a compelling argument that Williams's description pointed to Beanie but not to Kyles.[13]

12. The record makes numerous references to Kyles being approximately six feet tall and slender; photographs in the record tend to confirm these descriptions. The description of Beanie in the text comes from his police file. Record photographs of Beanie also depict a man possessing a medium build.

13. The defense could have further underscored the possibility that Beanie was Dye's killer through cross-examination of the police on their failure to direct any investigation against Beanie. If the police had disclosed Beanie's statements, they would have been forced to admit that their informant Beanie described Kyles as generally

The trial testimony of a second eyewitness, Isaac Smallwood, was equally damning to Kyles. He testified that Kyles was the assailant, and that he saw him struggle with Dye. He said he saw Kyles take a ".32, a small black gun" out of his right pocket, shoot Dye in the head, and drive off in her LTD. When the prosecutor asked him whether he actually saw Kyles shoot Dye, Smallwood answered "Yeah." Tr. 41–48 (Dec. 6, 1984).

Smallwood's statement taken at the parking lot, however, was vastly different. Immediately after the crime, Smallwood claimed 443 that he had not seen the actual murder and had not seen the assailant outside the vehicle. "I heard a lound *[sic]* pop," he said. "When I looked around I saw a lady laying on the ground, and there was a red car coming toward me." App. 189. Smallwood said that he got a look at the culprit, a black teenage male with a mustache and shoulder-length braided hair, as the victim's red Thunderbird passed where he was standing. When a police investigator specifically asked him whether he had seen the assailant outside the car, Smallwood answered that he had not; the gunman "was already in the car and coming toward me." *Id.*, at 188–190.

A jury would reasonably have been troubled by the adjustments to Smallwood's original story by the time of the second trial. The struggle and shooting, which earlier he had not seen, he was able to describe with such detailed clarity as to identify the murder weapon as a small black .32 calibre pistol, which, of course, was the type of weapon used. His description of the victim's car had gone from a "Thunderbird" to an "LTD"; and he saw fit to say nothing about the assailant's shoulder-length hair and moustache, details noted by no other eyewitness. These developments would have fueled a withering cross-examination, destroying confidence in Smallwood's story and raising a substantial implication that the prosecutor had coached him to give it.[14] 444

wearing his hair in a "bush" style (and so wearing it when he sold the car to Beanie), whereas Beanie wore his in plaits. There was a considerable amount of such *Brady* evidence on which the defense could have attacked the investigation as shoddy. The police failed to disclose that Beanie had charges pending against him for a theft at the same Schwegmann's store and was a primary suspect in the January 1984 murder of Patricia Leidenheimer, who, like Dye, was an older woman shot once in the head during an armed robbery. (Even though Beanie was a primary suspect in the Leidenheimer murder as early as September, he was not interviewed by the police about it until after Kyles's second trial in December. Beanie confessed his involvement in the murder, but was never charged in connection with it.) These were additional reasons for Beanie to ingratiate himself with the police and for the police to treat him with a suspicion they did not show. Indeed, notwithstanding Justice SCALIA's suggestion that Beanie would have been "stupid" to inject himself into the investigation, post, at 1579, the *Brady* evidence would have revealed at least two motives for Beanie to come forward: he was interested in reward money and he was worried that he was already a suspect in Dye's murder (indeed, he had been seen driving the victim's car, which had been the subject of newspaper and television reports). See *supra*, at 1578. For a discussion of further *Brady* evidence to attack the investigation, see especially Part IV–B, *infra*.

14. The implication of coaching would have been complemented by the fact that Smallwood's testimony at the second trial was much more precise and incriminating than his testimony at the first, which produced a hung jury. At the first trial, Smallwood testified that he looked around only after he heard something go off, that Dye was already on the ground, and that he "watched the guy get in the car." Tr. 50–51 (Nov. 26, 1984). When asked to describe the killer, Smallwood stated that he "just got a glance of him from the side" and "couldn't even get a look in the face." *Id.*, at 52, 54.

The State contends that this change actually cuts in its favor under *Brady*, since it provided Kyles's defense with grounds for impeachment without any need to disclose Smallwood's statement. Brief for Respondent 17–18. This is true, but not true enough; inconsistencies between the two bodies of trial testimony provided opportunities for chipping away on cross-examination but not for the assault that was warranted. While Smallwood's testimony at the first trial was similar to his contemporaneous account in some respects, (for example, he said he looked around only after he heard the gunshot and that Dye was already on the ground), it differed in one of the most important: Smallwood's version at the first trial already included his observation of the gunman outside the car. Defense counsel was not, therefore, clearly put on notice that Smallwood's capacity to identify the killer's body type was open to serious attack; even less was he informed that Smallwood had answered "no" when asked if he had seen the killer outside the car. If Smallwood had in fact seen the gunman only after the assailant had entered Dye's car, as

Since the evolution over time of a given eyewitness's description can be fatal to its reliability, cf. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977) (reliability depends in part on the accuracy of prior description); *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972) (reliability of identification following impermissibly suggestive line-up depends in part on accuracy of witness's prior description), the Smallwood and Williams identifications would have been severely undermined by use of their suppressed statements. The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that Smallwood and Williams were the State's two best witnesses. See Tr. of Closing Arg. 49 (Dec. 7, 1984) (After discussing Territo's and Kersh's testimony: "Isaac Smallwood, have you ever seen a better witness[?] ... What's better than that is Henry Williams.... Henry Williams was the closest of them all right here"). Nor, of course, would the harm to the State's case on identity have been confined to their testimony alone. The fact that neither Williams nor Smallwood could have provided a consistent eyewitness description pointing to Kyles would have undercut the prosecution all the more because the remaining eyewitnesses called to testify (Territo and Kersh) had their best views of the gunman only as he fled the scene with his body partly concealed in Dye's car. And even aside from such important details, the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before. See *Agurs*, 427 U.S., at 112–113, n. 21, 96 S.Ct., at 2401–2402, n. 21.

B

Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for Beanie's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well. By the State's own admission, Beanie was essential to its investigation and, indeed, "made the case" against Kyles. Tr. of Closing Art. 13 (Dec. 7, 1984). Contrary to what one might hope for from such a source, however, Beanie's statements to the police were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for Dye's murder. Their disclosure would have revealed a remarkably uncritical attitude on the part of the police.

If the defense had called Beanie as an adverse witness, he could not have said anything of any significance without being trapped by his inconsistencies. A short recapitulation of some of them will make the point. In Beanie's initial meeting with the police, and in his signed statement, he said he bought Dye's LTD and helped Kyles retrieve his car from the Schwegmann's lot on Friday. In his first call to the police, he said he bought the LTD on Thursday, and in his conversation with the prosecutor between trials it was again on Thursday that he said he helped Kyles retrieve Kyles's car. Although none of the first three versions of this story mentioned Kevin Black as taking part in the retrieval of the car and transfer of groceries, after Black implicated Beanie by his testimony for the defense at the first trial, Beanie changed his story to include Black as a participant. In Beanie's several accounts, Dye's purse first shows up variously next to a building, in some bushes, in Kyles's car, and at Black's house.

[16] Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense

he said in his original statement, it would have been difficult if not impossible for him to notice two key characteristics distinguishing Kyles from Beanie, their heights and builds. Moreover, in the first trial, Smallwood specifically stated that the killer's hair was "kind of like short ... knotted up on his head." Tr. 60 (Nov. 26, 1984). This description was not inconsistent with his testimony at the second trial but directly contradicted his statement at the scene of the murder that the killer had shoulder-length hair. The dissent says that Smallwood's testimony would have been "barely affected" by the expected impeachment, *post*, at 1582; that would have been a brave jury argument.

could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted. See, *e.g., Bowen v. Maynard*, 799 F.2d 593, 613 (CA10 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation"); *Lindsey v. King*, 769 F.2d 1034, 1042 (CA5 1985) (awarding new trial of prisoner convicted in Louisiana state court because withheld *Brady* evidence "carried within it the potential ... for the ... discrediting ... of the police methods employed in assembling the case").[15]

By demonstrating the detectives' knowledge of Beanie's affirmatively self-incriminating statements, the defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence. In his initial meeting with police, Beanie admitted twice that he changed the license plates on the LTD. This admission enhanced the suspiciousness of his possession of the car; the defense could have argued persuasively that he was no bona fide purchaser. And when combined with his police record, evidence of prior criminal activity near Schwegmann's, and his status as a suspect in another murder, his devious behavior gave reason to believe that he had done more than buy a stolen car. There was further self-incrimination in Beanie's statement that Kyles's car was parked in the same part of the Schwegmann's lot where Dye was killed. Beanie's apparent awareness of the specific location of the murder could have been based, as the State contends, on television or newspaper reports, but perhaps it was not. Cf. App. 215 (Beanie saying that he knew about the murder because his brother-in-law had seen it "on T.V. and in the paper" and had told Beanie). Since the police admittedly never treated Beanie as a suspect, the defense could thus have used his statements to throw the reliability of the investigation into doubt and to sully the credibility of Detective Dillman, who testified that Beanie was never a suspect, Tr. 103–105, 107 (Dec. 6, 1984), and that he had "no knowledge" that Beanie had changed the license plate, *id.*, at 95.

The admitted failure of the police to pursue these pointers toward Beanie's possible guilt could only have magnified the effect on the jury of explaining how the purse and the gun happened to be recovered. In Beanie's original recorded statement, he told the police that "[Kyles's] garbage goes out tomorrow," and that "if he's smart he'll put [the purse] in [the] garbage." App. 257. These statements, along with the internal memorandum stating that the police had "reason to believe" Dye's personal effects and Schwegmann's bags would be in the garbage, would have supported the defense's theory that Beanie was no mere observer, but was determining the investigation's direction and success. The potential for damage from using Beanie's statement to undermine the ostensible integrity of the investigation is only confirmed by the prosecutor's admission at one of Kyles's postconviction hearings, that he did not recall a single instance before this case when police had searched and seized garbage on the street in front of a residence, Tr. of Hearing on Post–Conviction Relief 113 (Feb. 20, 1989), and by Detective John Miller's admission at the same hearing that he thought at the time that it "was a possibility" that Beanie had planted the incriminating evidence in the garbage, Tr. of Hearing on Post–Conviction Relief 51 (Feb. 24, 1989). If a police officer thought so, a juror would have, too.[16]

15. The dissent, *post*, at 1580, suggests that for jurors to count the sloppiness of the investigation against the probative force of the State's evidence would have been irrational, but of course it would have been no such thing. When, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it. See discussion of purse and gun, *infra*, at 1572–1573.

16. The dissent, rightly, does not contend that Beanie would have had a hard time planting the purse in Kyles's garbage. See *post*, at 1583 (arguing that it would have been difficult for Beanie to plant the gun and homemade holster).

To the same effect would have been an enquiry based on Beanie's apparently revealing remark to police that "if you can set [Kyles] up good, you can get that same gun." [17] App. 228–229. While the jury might have understood that Beanie meant simply that if the police investigated Kyles, they would probably find the murder weapon, the jury could also have taken Beanie to have been making the more sinister suggestion that the police "set up" Kyles, and the defense could have argued that the police accepted the invitation. The prosecutor's notes of his interview with Beanie would have shown that police officers were asking Beanie the whereabouts of the gun all day Sunday, the very day when he was twice at Kyles's apartment and was allegedly seen by Johnny Burns lurking near the stove, where the gun was later found.[18] Beanie's same statement, indeed, could have been used to cap an attack on the integrity of the investigation and on the reliability of Detective Dillman, who testified on cross-examination that he did not know if Beanie had been at Kyles's apartment on Sunday. Tr. 93, 101 (Dec. 6, 1984).[19]

C

[17] Next to be considered is the prosecution's list of the cars in the Schwegmann's parking lot at mid-evening after the murder. While its suppression does not rank with the failure to disclose the other evidence discussed here, it would have had some value as exculpation and impeachment, and it counts accordingly in determining whether *Bagley*'s standard of materiality is satisfied. On the police's assumption, argued to the jury, that the killer drove to the lot and left his car there during the heat of the investigation, the list without Kyles's registration would

All that would have been needed was for Beanie to put the purse into a trash bag out on the curb. See Tr. 97, 101 (Dec. 6, 1984) (testimony of Detective Dillman; garbage bags were seized from "a common garbage area" on the street in "the early morning hours when there wouldn't be anyone on the street").

17. The dissent, *post*, at 1579, argues that it would have been stupid for Beanie to have tantalized the police with the prospect of finding the gun one day before he may have planted it. It is odd that the dissent thinks the *Brady* reassessment requires the assumption that Beanie was shrewd and sophisticated: the suppressed evidence indicates that within a period of a few hours after he first called police Beanie gave three different accounts of Kyles's recovery of the purse (and gave yet another about a month later).

18. The dissent would rule out any suspicion because Beanie was said to have worn a "tank-top" shirt during his visits to the apartment, *post*, at 1583; we suppose that a small handgun could have been carried in a man's trousers, just as a witness for the State claimed the killer had carried it, Tr. 52 (Dec. 6, 1984) (Williams). Similarly, the record photograph of the homemade holster indicates that the jury could have found it to be constructed of insubstantial leather or cloth, duct tape, and string, concealable in a pocket.

19. In evaluating the weight of all these evidentiary items, it bears mention that they would not have functioned as mere isolated bits of good luck for Kyles. Their combined force in attacking the process by which the police gathered evidence and assembled the case would have complemented, and have been complemented by, the testimony actually offered by Kyles's friends and family to show that Beanie had framed Kyles. Exposure to Beanie's own words, even through cross-examination of the police officers, would have made the defense's case more plausible and reduced its vulnerability to credibility attack. Johnny Burns, for example, was subjected to sharp cross-examination after testifying that he had seen Beanie change the license plate on the LTD, that he walked in on Beanie stooping near the stove in Kyles's kitchen, that he had seen Beanie with handguns of various calibres, including a .32, and that he was testifying for the defense even though Beanie was his "best friend." Tr. 260, 262–263, 279, 280 (Dec. 7, 1984). On each of these points, Burns's testimony would have been consistent with the withheld evidence: that Beanie had spoken of Burns to the police as his "partner," had admitted to changing the LTD's license plate, had attended Sunday dinner at Kyles's apartment, and had a history of violent crime, rendering his use of guns more likely. With this information, the defense could have challenged the prosecution's good faith on at least some of the points of cross-examination mentioned and could have elicited police testimony to blunt the effect of the attack on Burns.

Justice SCALIA suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's post-conviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. *Post*, at 1583–1584. Of course neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

obviously have helped Kyles and would have had some value in countering an argument by the prosecution that a grainy enlargement of a photograph of the crime scene showed Kyles's car in the background. The list would also have shown that the police either knew that it was inconsistent with their informant's second and third statements (in which Beanie described retrieving Kyles's car after the time the list was compiled) or never even bothered to check the informant's story against known fact. Either way, the defense would have had further support for arguing that the police were irresponsible in relying on Beanie to tip them off to the location of evidence damaging to Kyles.

The State argues that the list was neither impeachment nor exculpatory evidence because Kyles could have moved his car before the list was created and because the list does not purport to be a comprehensive listing of all the cars in the Schwegmann's lot. Such argument, however, confuses the weight of the evidence with its favorable tendency, and even if accepted would work against the State, not for it. If the police had testified that the list was incomplete, they would simply have underscored the unreliability of the investigation and complemented the defense's attack on the failure to treat Beanie as a suspect and his statements with a presumption of fallibility. But however the evidence would have been used, it would have had some weight and its tendency would have been favorable to Kyles.

D

In assessing the significance of the evidence withheld, one must of course bear in mind that not every item of the State's case would have been directly undercut if the *Brady* evidence had been disclosed. It is significant, however, that the physical evidence remaining unscathed would, by the State's own admission, hardly have amounted to overwhelming proof that Kyles was the murderer. See Tr. of Oral Arg. 56 ("The heart of the State's case was eye-witness identification"); see also Tr. of Hearing on Post-Conviction Relief 117 (Feb. 20, 1989) (testimony of chief prosecutor Strider) ("The crux of the case was the four eye-witnesses"). Ammunition and a holster were found in Kyles's apartment, but if the jury had suspected the gun had been planted the significance of these items might have been left in doubt. The fact that pet food was found in Kyles's apartment was consistent with the testimony of several defense witnesses that Kyles owned a dog and that his children fed stray cats. The brands of pet food found were only two of the brands that Dye typically bought, and these two were common, whereas the one specialty brand that was found in Dye's apartment after her murder, Tr. 180 (Dec. 7, 1984), was not found in Kyles's apartment, *id.*, at 188. Although Kyles was wrong in describing the cat food as being on sale the day he said he bought it, he was right in describing the way it was priced at Schwegmann's market, where he commonly shopped.[20]

Similarly undispositive is the small Schwegmann's receipt on the front passenger floorboard of the LTD, the only physical evidence that bore a fingerprint identified as Kyles's. Kyles explained that Beanie had driven him to Schwegmann's on Friday to

20. Kyles testified that he believed the pet food to have been on sale because "they had a little sign there that said three for such and such, two for such and such at a cheaper price. It wasn't even over a dollar." Tr. 341 (Dec. 7, 1984). When asked about the sign, Kyles said it "wasn't big ... [i]t was a little bitty piece of slip ... on the shelf." *Id.*, at 342. Subsequently, the prices were revealed as in fact being "[t]hree for 89 [cents]" and "two for 77 [cents]," *id.*, at 343, which comported exactly with Kyles's earlier description. The director of advertising at Schwegmann's testified that the items purchased by Kyles had not been on sale, but also explained that the multiple pricing was thought to make the products "more attractive" to the customer. *Id.*, at 396. The advertising director stated that store policy was to not have signs on the shelves, but he also admitted that salespeople sometimes disregarded the policy and put signs up anyway, and that he could not say for sure whether there were signs up on the day Kyles said he bought the pet food. *Id.*, at 398–399. The dissent suggests, *post*, at 1584–1585, that Kyles must have been so "very poor" as to be unable to purchase the pet food. The total cost of the fifteen cans of pet food found in Kyles's apartment would have been $5.67. See *id.*, at 188, 395. Rather than being "damning," *post*, at 1584, the pet food evidence was thus equivocal and, in any event, was not the crux of the prosecution's case, as the State has conceded. See *supra*, at 1574.

buy cigarettes and transmission fluid, and he theorized that the slip must have fallen out of the bag when he removed the cigarettes. This explanation is consistent with the location of the slip when found and with its small size. The State cannot very well argue that the fingerprint ties Kyles to the killing without also explaining how the 2–inch–long register slip could have been the receipt for a week's worth of groceries, which Dye had gone to Schwegmann's to purchase, *id.*, at 181–182.[21] 453

The inconclusiveness of the physical evidence does not, to be sure, prove Kyles's innocence, and the jury might have found the eyewitness testimony of Territo and Kersh sufficient to convict, even though less damning to Kyles than that of Smallwood and Williams.[22] But the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution. The jury would have been entitled to find

(a) that the investigation was limited by the police's uncritical readiness to accept the story and suggestions of an informant whose accounts were inconsistent to the point, for example, of including four different versions of the discovery of the victim's purse, and whose own behavior was enough to raise suspicions of guilt;

(b) that the lead police detective who testified was either less than wholly candid or less than fully informed;

(c) that the informant's behavior raised suspicions that he had planted both the murder weapon and the victim's purse in the places they were found;

(d) that one of the four eyewitnesses crucial to the State's case had given a description that did not match the defendant and better described the informant;

(e) that another eyewitness had been coached, since he had first stated that he had not seen the killer outside the getaway car, or the killing itself, whereas at trial he 454 claimed to have seen the shooting, described the murder weapon exactly, and omitted portions of his initial description that would have been troublesome for the case;

(f) that there was no consistency to eyewitness descriptions of the killer's height, build, age, facial hair, or hair length.

Since all of these possible findings were precluded by the prosecution's failure to disclose the evidence that would have supported them, "fairness" cannot be stretched to the point of calling this a fair trial. Perhaps, confidence that the verdict would have been the same could survive the evidence impeaching even two eyewitnesses if the discoveries of gun and purse were above suspicion. Perhaps those suspicious circumstances would not defeat confidence in the verdict if the eyewitnesses had generally agreed on a description and were free of impeachment. But confidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion, that the investigation that produced it was insufficiently probing, and that the principal police witness was insufficiently informed or candid. This is not the "massive" case envisioned by the dissent, *post*, at 1585; it is a significantly weaker case than the one heard by the first jury, which could not even reach a verdict.

21. The State's counsel admitted at oral argument that its case depended on the facially implausible notion that Dye had not made her typical weekly grocery purchases on the day of the murder (if she had, the receipt would have been longer), but that she had indeed made her typical weekly purchases of pet food (hence the presence of the pet food in Kyles's apartment, which the State claimed were Dye's). Tr. of Oral Arg. 53–54.

22. See *supra*, at 1571. On remand, of course, the State's case will be weaker still, since the prosecution is unlikely to rely on Kersh, who now swears that she committed perjury at the two trials when she identified Kyles as the murderer. See n. 6, *supra* at 1564.

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 STEVENS, with whom Justice GINSBURG and Justice BREYER join, concurring.

As the Court has explained, this case presents an important legal issue. See *ante*, at 1569. Because Justice SCALIA so emphatically disagrees, I add this brief response to his criticism of the Court's decision to grant certiorari.

Proper management of our certiorari docket, as Justice SCALIA notes, see *post*, at 1576–1578, precludes us from hearing argument on the merits of even a "substantial percentage" of the capital cases that confront us. Compare *Coleman v. Balkcom*, 451 U.S. 949, 101 S.Ct. 2031, 68 L.Ed.2d 334 (1981) (STEVENS, J., concurring in denial of certiorari), with *id.*, at 956, 101 S.Ct., at 2035 (REHNQUIST, C.J., dissenting). Even aside from its legal importance, however, this case merits "favored treatment," cf. *post*, at 1577, for at least three reasons. First, the fact that the jury was unable to reach a verdict at the conclusion of the first trial provides strong reason to believe the significant errors that occurred at the second trial were prejudicial. Second, cases in which the record reveals so many instances of the state's failure to disclose exculpatory evidence are extremely rare. Even if I shared Justice SCALIA's appraisal of the evidence in this case—which I do not—I would still believe we should independently review the record to ensure that the prosecution's blatant and repeated violations of a well-settled constitutional obligation did not deprive petitioner of a fair trial. Third, despite my high regard for the diligence and craftsmanship of the author of the majority opinion in the Court of Appeals, my independent review of the case left me with the same degree of doubt about petitioner's guilt expressed by the dissenting judge in that court.

Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law. The current popularity of capital punishment makes this "generalizable principle," *post*, at 1578, especially important. Cf. *Harris v. Alabama*, 513 U.S. ——, ——, 115 S.Ct. 1031, 1039, 130 L.Ed.2d 1004 and n. 5 (1995) (STEVENS, J., dissenting). I wish such review were unnecessary, but I cannot agree that our position in the judicial hierarchy makes it inappropriate. Sometimes the performance of an unpleasant duty conveys a message more significant than even the most penetrating legal analysis.

Justice SCALIA, with whom the Chief Justice, Justice KENNEDY, and Justice THOMAS join, dissenting.

In a sensible system of criminal justice, wrongful conviction is avoided by establishing, at the trial level, lines of procedural legality that leave ample margins of safety (for example, the requirement that guilt be proved beyond a reasonable doubt)—not by providing recurrent and repetitive appellate review of whether the facts in the record show those lines to have been narrowly crossed. The defect of the latter system was described, with characteristic candor, by Justice Jackson:

> "Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done." *Brown v. Allen*, 344 U.S. 443, 540, 73 S.Ct. 397, 427, 97 L.Ed. 469 (1953) (Jackson, J., concurring).

Since this Court has long shared Justice Jackson's view, today's opinion—which considers a fact-bound claim of error rejected by every court, state and federal, that previously heard it—is, so far as I can tell, wholly unprecedented. The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally (*i.e.*, except in cases of the plainest error) be denied. *United States v. Johnston*, 268 U.S. 220, 227, 45

S.Ct. 496, 496, 69 L.Ed. 925 (1925). That policy has been observed even when the fact-bound assessment of the federal court of appeals has differed from that of the district court, *Sumner v. Mata*, 449 U.S. 539, 543, 101 S.Ct. 764, 767, 66 L.Ed.2d 722 (1981); and under what we have called the "two-court rule," the policy has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires. See, *e.g.*, *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 537, 93 L.Ed. 672 (1949). How much the more should the policy be honored in this case, a federal habeas proceeding where not only both lower federal courts but also the state courts on postconviction review have all reviewed and rejected precisely the fact-specific claim before us. Cf. 28 U.S.C. § 2254(d) (requiring federal habeas courts to accord a presumption of correctness to state-court findings of fact); *Sumner*, *supra*, at 550, n. 3, 101 S.Ct., at 770, n. 3. Instead, however, the Court not only grants certiorari to consider whether the Court of Appeals (and all the previous courts that agreed with it) was correct as to what the facts showed in a case where the answer is far from clear, but in the process of such consideration renders new findings of fact and judgments of credibility appropriate to a trial court of original jurisdiction. See, *e.g.*, *ante*, at 1561 ("Beanie seemed eager to cast suspicion on Kyles"); *ante*, at 1569, n. 12 ("Record photographs of Beanie ... depict a man possessing a medium build"); *ante*, at 1573, n. 18 ("the record photograph of the homemade holster indicates ...").

The Court says that we granted certiorari "[b]ecause '[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case,' *Burger v. Kemp*, 483 U.S. 776, 785, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987)." *Ante*, at 1560. The citation is perverse, for the reader who looks up the quoted opinion will discover that the very next sentence confirms the traditional practice from which the Court today glaringly departs: "Nevertheless, when the lower courts have found that [no constitutional error occurred], ... deference to the shared conclusion of two reviewing courts prevent[s] us from substituting speculation for their considered opinions." *Burger v. Kemp*, 483 U.S. 776, 785, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987).

The greatest puzzle of today's decision is what could have caused *this* capital case to be singled out for favored treatment. Perhaps it has been randomly selected as a symbol, to reassure America that the United States Supreme Court is reviewing capital convictions to make sure no factual error has been made. If so, it is a false symbol, for we assuredly do not do that. At, and during the week preceding, our February 24 Conference, for example, we considered and disposed of 10 petitions in capital cases, from seven States. We carefully considered whether the convictions and sentences in those cases had been obtained in reliance upon correct principles of federal law; but if we had tried to consider, in addition, whether those correct principles had been applied, not merely plausibly, but *accurately*, to the particular facts of each case, we would have done nothing else for the week. The reality is that responsibility for factual accuracy, in capital cases as in other cases, rests elsewhere—with trial judges and juries, state appellate courts, and the lower federal courts; we do nothing but encourage foolish reliance to pretend otherwise.

Straining to suggest a legal error in the decision below that might warrant review, the Court asserts that "[t]here is room to debate whether the two judges in the majority in the Court of Appeals made an assessment of the cumulative effect of the evidence," *ante*, at 1569. In support of this it quotes isolated sentences of the opinion below that supposedly "dismiss[ed] particular items of evidence as immaterial," *ibid.* This claim of legal error does not withstand minimal scrutiny. The Court of Appeals employed *precisely* the same legal standard that the Court does. Compare 5 F.3d 806, 811 (CA5 1993) ("We apply the [*United States* v.] *Bagley* [473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)] standard here by examining whether it is reasonably probable that, had the undisclosed information been available to Kyles, the result would have been different") with *ante*, at 1569 ("In this case,

disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable"). Nor did the Court of Appeals announce a rule of law, that might have precedential force in later cases, to the effect that *Bagley* requires a series of independent materiality evaluations; in fact, the court said just the contrary. See 5 F.3d, at 817 ("We are not persuaded that it is reasonably probable that the jury would have found in Kyles' *[sic]* favor if exposed to any *or all* of the undisclosed materials") (emphasis added). If the decision is read, shall we say, cumulatively, it is clear beyond cavil that the court assessed the cumulative effect of the *Brady* evidence in the context of the whole record. See 5 F.3d, at 807 (basing its rejection of petitioner's claim on "a complete reading of the record"); *id.*, at 811 ("Rather than reviewing the alleged *Brady* materials in the abstract, we will examine the evidence presented at trial and how the extra materials would have fit"); *id.*, at 813 ("We must bear [the eyewitness testimony] in mind while assessing the probable effect of other undisclosed information"). It is, in other words, the Court itself which errs in the manner that it accuses the Court of Appeals of erring: failing to consider the material under review as a whole. The isolated snippets it quotes from the decision merely do what the Court's own opinion acknowledges must be done: to "evaluate the tendency and force of the undisclosed evidence item by item; there is no other way." *Ante*, at 1567, n. 10. Finally, the Court falls back on this: "The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*," *ante*, at 1569. In other words, even though the Fifth Circuit plainly enunciated the *correct* legal rule, since the outcome it reached would not properly follow from that rule, the Fifth Circuit must in fact (and unbeknownst to itself) have been applying an *incorrect* legal rule. This effectively eliminates all distinction between mistake in law and mistake in application.

What the Court granted certiorari to review, then, is not a decision on an issue of federal law that conflicts with a decision of another federal or state court; nor even a decision announcing a rule of federal law that because of its novelty or importance might warrant review despite the lack of a conflict; nor yet even a decision that *patently* errs in its application of an old rule. What we have here is an intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err—precisely the type of case in which we are *most* inclined to deny certiorari. But despite all of that, I would not have dissented on the ground that the writ of certiorari should be dismissed as improvidently granted. Since the majority is as aware of the limits of our capacity as I am, there is little fear that the grant of certiorari in a case of this sort will often be repeated—which is to say little fear that today's grant has any generalizable principle behind it. I am still forced to dissent, however, because, having improvidently decided to review the facts of this case, the Court goes on to get the facts wrong. Its findings are in my view clearly erroneous, cf. Fed.R.Civ.Proc. 52(a), and the Court's verdict would be reversed if there were somewhere further to appeal.

I

Before proceeding to detailed consideration of the evidence, a few general observations about the Court's methodology are appropriate. It is fundamental to the discovery rule of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that the materiality of a failure to disclose favorable evidence "must be evaluated in the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976). It is simply not enough to show that the undisclosed evidence would have allowed the defense to weaken, or even to "destro[y]," *ante*, at 1569, the *particular* prosecution witnesses or items of prosecution evidence to which the undisclosed evidence relates. 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. See *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87

L.Ed.2d 481 (1985); *Agurs*, *supra*, at 112–113, 96 S.Ct., at 2401–2402. The Court's opinion fails almost entirely to take this principle into account. Having spent many pages assessing the effect of the *Brady* material on two prosecution witnesses and a few items of prosecution evidence, *ante*, at 1569–1574, it dismisses the remainder of the evidence against Kyles in a quick page-and-a-half, *ante*, at 1574–1575. This partiality is confirmed in the Court's attempt to "recap ... *the suppressed evidence* and its significance for the prosecution," *ante*, at 1575 (emphasis added), which omits the required comparison between that evidence and the evidence that was disclosed. My discussion of the record will present the half of the analysis that the Court omits, emphasizing the evidence concededly unaffected by the *Brady* violation which demonstrates the immateriality of the violation.

In any analysis of this case, the desperate implausibility of the theory that petitioner put before the jury must be kept firmly in mind. The first half of that theory—designed to neutralize the physical evidence (Mrs. Dye's purse in his garbage, the murder weapon behind his stove)—was that petitioner was the victim of a "frame-up" by the police informer and evil genius, Beanie. Now it is not unusual for a guilty person who knows that he is suspected of a crime to try to shift blame to someone else; and it is less common, but not unheard-of, for a guilty person who is neither suspected nor subject to suspicion (because he has established a perfect alibi), to call attention to himself by coming forward to point the finger at an innocent person. But petitioner's theory is that the guilty Beanie, who *could* plausibly be accused of the crime (as petitioner's brief amply demonstrates), but who was *not* a suspect any more than Kyles was (the police as yet had no leads, see *ante*, at 1561), injected both Kyles and himself into the investigation in order to get the innocent Kyles convicted.[1] If this were not stupid enough, the wicked Beanie is supposed to have suggested that the police search his victim's premises *a full day before he got around to planting the incriminating evidence on the premises.*

The second half of petitioner's theory was that he was the victim of a quadruple coincidence, in which four eyewitnesses to the crime mistakenly identified him as the murderer—three picking him out of a photo-array without hesitation, and all four affirming their identification in open court after comparing him with Beanie. The extraordinary mistake petitioner had to persuade the jury these four witnesses made was not simply to mistake the real killer, Beanie, for the very same innocent third party (hard enough to believe), but in addition to mistake him *for the very man Beanie had chosen to frame*—the last and most incredible level of coincidence. However small the chance that the jury would believe any one of those improbable scenarios, the likelihood that it would believe them all together is far smaller. The Court concludes that it is "reasonably probable" the undisclosed witness interviews would have persuaded the jury of petitioner's implausible theory of mistaken eyewitness testimony, and then argues that it is "reasonably probable" the undisclosed information regarding Beanie would have persuaded the jury of petitioner's implausible theory regarding the incriminating physical evidence. I think neither of those conclusions is remotely true, but even if they were the Court would still be guilty of a fallacy in declaring victory on each implausibility in turn, and thus victory on the whole, without considering the infinitesimal probability of the jury's swallowing the entire concoction of implausibility squared.

This basic error of approaching the evidence piecemeal is also what accounts for the

1. The Court tries to explain all this by saying that Beanie mistakenly thought that he had become a suspect. The only support it provides for this is the fact that, *after having come forward with the admission that he had driven the dead woman's car*, Beanie repeatedly inquired whether he himself was a suspect. See *ante*, at 1569, n. 13. Of course at that point he well *should* have been worried about being a suspect. But there is no evidence that he erroneously considered himself a suspect beforehand. Moreover, even if he did, the notion that, a guilty person would, on the basis of such an erroneous belief, come forward for the reward or in order to "frame" Kyles (rather than waiting for the police to approach him first) is quite simply implausible.

Court's obsessive focus on the credibility or culpability of Beanie, who did not even testify at trial and whose credibility or innocence the State has never once avowed. The Court's opinion reads as if either petitioner or Beanie must be telling the truth, and any evidence tending to inculpate or undermine the credibility of the one would exculpate or enhance the credibility of the other. But the jury verdict in this case said only that petitioner was guilty of the murder. That is perfectly consistent with the possibilities that Beanie repeatedly lied, *ante*, at 1571, that he was an accessory after the fact, cf. *ibid*, or even that he planted evidence against petitioner, *ante*, at 1572–1573. Even if the undisclosed evidence would have allowed the defense to thoroughly impeach Beanie and to suggest the above possibilities, the jury could well have believed *all* of those things and yet have condemned petitioner because it could not believe that *all four* of the eyewitnesses were similarly mistaken.[2]

Of course even that much rests on the premise that competent counsel would run the terrible risk of calling Beanie, a witness whose "testimony almost certainly would have inculpated [petitioner]" and whom "any reasonable attorney would perceive ... as a 'loose cannon.'" 5 F.3d, at 818. Perhaps because that premise seems so implausible, the Court retreats to the possibility that petitioner's counsel, even if not calling Beanie to the stand, could have used the evidence relating to Beanie to attack "the reliability of the investigation." *Ante*, at 1571. But that is distinctly less effective than substantive evidence bearing on the guilt or innocence of the accused. In evaluating *Brady* claims, we assume jury conduct that is both rational and obedient to the law. We do not assume that even though the whole mass of the evidence, both disclosed and undisclosed, shows petitioner guilty beyond a reasonable doubt, the jury will punish sloppy investigative techniques by setting the defendant free. Neither Beanie nor the police were on trial in this case. Petitioner was, and no amount of collateral evidence could have enabled his counsel to move the mountain of direct evidence against him.

II

The undisclosed evidence does not create a "'reasonable probability' of a different result." *Ante*, at 1566 (quoting *United States v. Bagley*, 473 U.S., at 682, 105 S.Ct., at 3383). To begin with the eyewitness testimony: Petitioner's basic theory at trial was that the State's four eyewitnesses happened to mistake Beanie, the real killer, for petitioner, the man whom Beanie was simultaneously trying to frame. Police officers testified to the jury, and petitioner has never disputed, that three of the four eyewitnesses (Territo, Smallwood, and Williams) were shown a photo lineup of six young men four days after the shooting and, without aid or duress, identified petitioner as the murderer; and that all of them, plus the fourth eyewitness, Kersh, reaffirmed their identifications at trial after petitioner and Beanie were made to stand side-by-side.

Territo, the first eyewitness called by the State, was waiting at a red light in a truck 30 or 40 yards from the Schwegmann's parking lot. He saw petitioner shoot Mrs. Dye, start her car, drive out onto the road and pull up just behind Territo's truck. When the light turned green petitioner pulled beside Territo and stopped while waiting to make a turn. Petitioner looked Territo full in the face. Territo testified, "I got a good look at him. If I had been in the passenger seat of the little truck, I could have reached out and not even stretched my arm out, I could have grabbed hold of him." Tr. 13–14 (Dec. 6, 1984). Territo also testified that a detective had shown him a picture of Beanie and asked him if the picture "could have been the guy that did it. I told him no." *Id.*, at 24. The second eyewitness, Kersh, also saw petitioner shoot Mrs. Dye. When asked whether she

2. There is no basis in anything I have said for the Court's charge that "the dissent appears to assume that Kyles must lose because there would still have been adequate [*i.e.* sufficient] evidence to convict even if the favorable evidence had been disclosed." *Ante*, at 1566, n. 8. I do assume, indeed I expressly argue, that petitioner must lose because there was, is, and will be *overwhelming* evidence to convict, so much evidence that disclosure would not "have made a different result reasonably probable." *Ante*, at 1569.

got "a good look" at him as he drove away, she answered "yes." *Id.*, at 32. She also answered "yes" to the question whether she "got to see the side of his face," *id.*, at 31, and said that while petitioner was stopped she had driven to within reaching distance of the driver's-side door of Mrs. Dye's car and stopped there. *Id.*, at 34. The third eyewitness, Smallwood, testified that he saw petitioner shoot Mrs. Dye, walk to the car, and drive away. *Id.*, at 42. Petitioner drove slowly by, within a distance of 15 or 25 feet, *id.*, at 43–45, and Smallwood saw his face from the side. *Id.*, at 43. The fourth eyewitness, Williams, who had been working outside the parking lot, testified that "the gentleman came up the side of the car," struggled with Mrs. Dye, shot her, walked around to the driver's side of the car, and drove away. *Id.*, at 52. Williams not only "saw him before he shot her," *id.*, at 54, but watched petitioner drive slowly by "within less than ten feet." *Ibid.* When asked "[d]id you get an opportunity to look at him good?", Williams said, "I did." *Id.*, at 55.

The Court attempts to dispose of this direct, unqualified and consistent eyewitness testimony in two ways. First, by relying on a theory so implausible that it was apparently not suggested by petitioner's counsel until the oral-argument-*cum*-evidentiary-hearing held before us, perhaps because it is a theory that only the most removed appellate court could love. This theory is, that there is a reasonable probability that the jury would have changed its mind about the eyewitness identification because the *Brady* material would have permitted the defense to argue that the eyewitnesses only got a good look at the killer when he was sitting in Mrs. Dye's car, and thus could identify him, not by his height and build, but *only by his face.* Never mind, for the moment, that this is factually false, since the *Brady* material showed that only *one* of the four eyewitnesses, Smallwood, did not see the killer outside the car.[3] And never mind, also, the dubious premise that the build of a man six feet tall (like petitioner) is indistinguishable, when seated behind the wheel, from that of a man less than five and one-half feet tall (like Beanie). To assert that unhesitant and categorical identification by four witnesses who viewed the killer, close-up and with the sun high in the sky, would not eliminate reasonable doubt if it were based *only* on *facial* characteristics, and not on height and build, is quite simply absurd. Facial features are *the primary means* by which human beings recognize one another. That is why police departments distribute "mug" shots of wanted felons, rather than Ivy-League-type posture pictures; it is why bank robbers wear stockings over their faces instead of floor-length capes over their shoulders; it is why the Lone Ranger wears a mask instead of a poncho; and it is why a criminal defense lawyer who seeks to destroy an identifying witness by asking "You admit that you saw only the killer's face?" will be laughed out of the courtroom.

It would be different, of course, if there were evidence that Kyles's and Beanie's faces looked like twins, or at least bore an unusual degree of resemblance. That facial resemblance *would* explain why, if Beanie committed the crime, all four witnesses picked out Kyles at first (though not why they continued to pick him out when he and Beanie stood side-by-side in court), and would render their failure to observe the height and build of the killer relevant. But without evidence of facial similarity, the question "You admit that you saw only the killer's face?" draws no blood; it does not explain *any* witness's identification of petitioner as the killer. While the assumption of facial resemblance between Kyles and Beanie underlies all of the Court's repeated refer-

3. Smallwood and Williams were the only eyewitnesses whose testimony was affected by the *Brady* material, and Williams's was affected not because it showed he did not observe the killer standing up, but to the contrary because it showed that his estimates of height and weight based on that observation did not match Kyles. The other two witnesses did observe the killer in full. Territo testified that he saw the killer running up to Mrs. Dye before the struggle began, and that after the struggle he watched the killer bend down, stand back up, and then "stru[t]" over to the car. Tr. 12 (Dec. 6, 1984). Kersh too had a clear opportunity to observe the killer's body type; she testified that she saw the killer and Mrs. Dye arguing, and that she watched him walk around the back of the car after Mrs. Dye had fallen. *Id.*, at 29–30.

ences to the partial concealment of the killer's body from view, see, *e.g.*, *ante*, at 1570, 1570, n. 14, 1571, 1575, the Court never actually says that such resemblance exists. That is because there is not the slightest basis for such a statement in the record. *No* court has found that Kyles and Beanie bear any facial resemblance. In fact, quite the opposite: *every* federal and state court that has reviewed the record photographs, or seen the two men, has found that they do not resemble each other in any respect. See 5 F.3d, at 813 ("Comparing photographs of Kyles and Beanie, it is evident that the former is taller, thinner, and has a narrower face"); App. 181 (District Court opinion) ("The court examined all of the pictures used in the photographic line-up and compared Kyles' and Beanie's pictures; it finds that they did not resemble one another"); *id.*, at 36 (state trial court findings on postconviction review) ("[Beanie] clearly and distinctly did *not resemble* the defendant in this case") (emphasis in original). The District Court's finding controls because it is not clearly erroneous, Fed.R.Civ.Proc. 52(a), and the state court's finding, because fairly supported by the record, must be presumed correct on habeas review. See 28 U.S.C. § 2254(d).

The Court's second means of seeking to neutralize the impressive and unanimous eyewitness testimony uses the same "build-is-everything" theory to exaggerate the effect of the State's failure to disclose the contemporaneous statement of Henry Williams. That statement would assuredly have permitted a sharp cross-examination, since it contained estimations of height and weight that fit Beanie better than petitioner. *Ante*, at 1569–1570. But I think it is hyperbole to say that the statement would have "substantially reduced or destroyed" the value of Williams' testimony. *Id.*, at 1569. Williams saw the murderer drive slowly by less than 10 feet away, Tr. 54, and unhesitatingly picked him out of the photo lineup. The jury might well choose to give greater credence to the simple fact of identification than to the difficult estimation of height and weight.

The Court spends considerable time, see *ante*, at 1570–1571, showing how Smallwood's testimony could have been discredited to such a degree as to "rais[e] a substantial implication that the prosecutor had coached him to give it." *Ibid.* Perhaps so, but that is all irrelevant to this appeal, since *all* of that impeaching material (except the "facial identification" point I have discussed above) was available to the defense independently of the *Brady* material. See *ante*, at 1570, n. 14. In sum, the undisclosed statements, credited with everything they could possibly have provided to the defense, leave two prosecution witnesses (Territo and Kersh) totally untouched; one prosecution witness (Smallwood) barely affected (he saw "only" the killer's face); and one prosecution witness (Williams) somewhat impaired (his description of the killer's height and weight did not match Kyles). We must keep all this in due perspective, remembering that the relevant question in the materiality inquiry is not how many points the defense could have scored off the prosecution witnesses, but whether it is reasonably probable that the new evidence would have caused the jury to accept the basic thesis that all four witnesses were mistaken. I think it plainly is not. *No* witness involved in the case ever identified *anyone* but petitioner as the murderer. Their views of the crime and the escaping criminal were obtained in bright daylight from close at hand; and their identifications were reaffirmed before the jury. After the side-by-side comparison between Beanie and Kyles, the jury heard Territo say that there was "[n]o doubt in my mind" that petitioner was the murderer, Tr. 378 (Dec. 7, 1984); heard Kersh say "I know it was him.... I seen his face and I know the color of his skin. I know it. I know it's him," *id.*, at 383; heard Smallwood say "I'm positive ... [b]ecause that's the man who I seen kill that woman," *id.*, at 387; and heard Williams say "[n]o doubt in my mind." *Id.*, at 391. With or without the *Brady* evidence, there could be no doubt in the mind of the jury either.

There remains the argument that is the major contribution of today's opinion to *Brady* litigation; with our endorsement, it will surely be trolled past appellate courts in all future failure-to-disclose cases. The Court argues that "the effective impeachment of

one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before." *Ante*, at 1571 (citing *Agurs v. United States*, 427 U.S., at 112–113, n. 21, 96 S.Ct., at 2401–2402, n. 21). It would be startling if we *had* "said [this] before," since it assumes irrational jury conduct. The weakening of one witness's testimony does not weaken the unconnected testimony of another witness; and to entertain the possibility that the jury will give it such an effect is incompatible with the whole idea of a materiality standard, which presumes that the incriminating evidence that would have been destroyed by proper disclosure can be logically separated from the incriminating evidence that would have remained unaffected. In fact we have said nothing like what the Court suggests. The opinion's only authority for its theory, the cited footnote from *Agurs*, was appended to the proposition that "[a *Brady*] omission must be evaluated in the context of the entire record," 427 U.S., at 112, 96 S.Ct., at 2401. In accordance with that proposition, the footnote recited a hypothetical that shows how a witness's testimony could have been destroyed by withheld evidence *that contradicts the witness.*[4] That is worlds apart from having it destroyed by the corrosive effect of withheld evidence that impeaches (or, as here, merely weakens) *some other corroborating witness.*

The physical evidence confirms the immateriality of the nondisclosures. In a garbage bag outside petitioner's home the police found Mrs. Dye's purse and other belongings. Inside his home they found, behind the kitchen stove, the .32 caliber revolver used to kill Mrs. Dye; hanging in a wardrobe, a homemade shoulder holster that was "a perfect fit" for the revolver, Tr. 74 (Dec. 6, 1984) (Detective Dillman); in a dresser drawer in the bedroom, two boxes of gun cartridges, one containing only .32 caliber rounds of the same brand found in the murder weapon, another containing .22, .32, and .38 caliber rounds; in a kitchen cabinet, eight empty Schwegmann's bags; and in a cupboard underneath that cabinet, one Schwegmann's bag containing 15 cans of pet food. Petitioner's account at trial was that Beanie planted the purse, gun and holster, that petitioner received the ammunition from Beanie as collateral for a loan, and that petitioner had bought the pet food the day of the murder. That account strains credulity to the breaking point.

The Court is correct that the *Brady* material would have supported the claim that Beanie planted Mrs. Dye's belongings in petitioner's garbage and (to a lesser degree) that Beanie planted the gun behind petitioner's stove. *Ante*, at 1572–1573. But we must see the whole story that petitioner presented to the jury. Petitioner would have it that Beanie did not plant the incriminating evidence until the day *after* he incited the police to search petitioner's home. Moreover, he succeeded in surreptitiously placing the gun behind the stove, and the matching shoulder holster in the wardrobe, while *at least 10 and as many as 19 people* were present in petitioner's small apartment.[5] Beanie, who was wearing blue jeans and either a "tank-top" shirt, Tr. 302 (Dec. 7, 1984) (Cathora Brown), or a short-sleeved shirt, *id.*, at 351 (petitioner), would have had to be concealing about his person not only the shoulder holster and the murder weapon, but also a different gun with tape wrapped around the barrel that he showed to petitioner. *Id.*, at 352. Only appellate judges could

4. " 'If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not be sure as he had only a brief glimpse, the result might well be different.' " *Agurs*, 427 U.S., at 112, n. 21, 96 S.Ct., at 2401, n. 21 (quoting Comment, *Brady v. Maryland* and The Prosecutor's Duty to Disclose, 40 U.Chi.L.Rev. 112, 125 (1972)).

5. The estimates varied. See Tr. 269 (Dec. 7, 1984) (Johnny Burns) (18 or 19 people); *id.*, at 298 (Cathora Brown) (6 adults, 4 children); *id.*, at 326 (petitioner) ("about 16 ... about 18 or 19"); *id.*, at 340 (petitioner) (13 people).

swallow such a tale. Petitioner's only supporting evidence was Johnny Burns's testimony that he saw Beanie stooping behind the stove, presumably to plant the gun. *Id.*, at 262–263. Burns's credibility on the stand can perhaps best be gauged by observing that the state judge who presided over petitioner's trial stated, in a postconviction proceeding, that "[I] ha[ve] chosen to totally disregard everything that [Burns] has said," App. 35. See also *id.*, at 165 (District Court opinion) ("Having reviewed the entire record, this court without hesitation concurs with the trial court's determination concerning the credibility of [Burns]"). Burns, by the way, who repeatedly stated at trial that Beanie was his "best friend," Tr. 279 (Dec. 7, 1984), has since been tried and convicted for killing Beanie. See *State v. Burnes*, 533 So.2d 1029 (La.App.1988).[6]

Petitioner did not claim that the ammunition had been planted. The police found a .22 caliber rifle under petitioner's mattress and two boxes of ammunition, one containing .22, .32, and .38 caliber rounds, another containing only .32 caliber rounds of the same brand as those found loaded in the murder weapon. Petitioner's story was that Beanie gave him the rifle and the .32 caliber shells as security for a loan, but that he had taken the .22 caliber shells out of the box. Tr. 353, 355 (Dec. 7, 1984). Put aside that the latter detail was contradicted by the facts; but consider the inherent implausibility of Beanie's giving petitioner collateral in the form of a box containing *only* .32 shells, if it were true that petitioner did not own a .32 caliber gun. As the Fifth Circuit wrote, "[t]he more likely inference, apparently chosen by the jury, is that [petitioner] possessed .32 caliber ammunition because he possessed a .32 caliber firearm." 5 F.3d, at 817.

We come to the evidence of the pet food, so mundane and yet so very damning. Petitioner's confused and changing explanations for the presence of 15 cans of pet food in a Schwegmann's bag under the sink must have fatally undermined his credibility before the jury. See App. 36 (trial judge finds that petitioner's "obvious lie" concerning the pet food "may have been a crucial bit of evidence in the minds of the jurors which caused them to discount the entire defense in this case"). The Court disposes of the pet food evidence as follows:

> "The fact that pet food was found in Kyles's apartment was consistent with the testimony of several defense witnesses that Kyles owned a dog and that his children fed stray cats. The brands of pet food found were only two of the brands that Dye typically bought, and these two were common, whereas the one specialty brand that was found in Dye's apartment after her murder, Tr. 180 (Dec. 7, 1984), was not found in Kyles's apartment, *id.*, at 188. Although Kyles was wrong in describing the cat food as being on sale the day he said he bought it, he was right in describing the way it was priced at Schwegmann's market, where he commonly shopped." *Ante*, at 1574–1575; see also *id.*, at 1574, n. 20.

The full story is this. Mr. and Mrs. Dye owned two cats and a dog, Tr. 178 (Dec. 7, 1984), for which she regularly bought varying brands of pet food, several different brands at a time. *Id.*, at 179, 180. Found in Mrs. Dye's home after her murder were the brands Nine Lives, Kalkan and Puss n' Boots. *Id.*, at 180. Found in petitioner's home were eight cans of Nine Lives, four cans of Kalkan, and three cans of Cozy Kitten. *Id.*, at 188. Since we know that Mrs. Dye had been shopping that day and that the murderer made off with her goods, petitioner's possession of these items was powerful evidence that he was the murderer. Assuredly the jury drew that obvious inference. Pressed to explain why he just happened to

6. The Court notes that "neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials." *Ante*, at 1573–1574, n. 19. That is obviously true. But it is just as obviously true that because we have no findings about Burns's credibility from the jury and no direct method of asking what they thought, the only way that *we* can assess the jury's appraisal of Burns's credibility is by asking (1) whether the state trial judge, who saw Burns's testimony along with the jury, thought it was credible; and (2) whether Burns was in fact credible—a question on which his later behavior towards his "best friend" is highly probative.

buy *15 cans* of pet food that very day (keep in mind that petitioner was a very poor man, see *id.*, at 329, who supported a common-law wife, a mistress, and four children), petitioner gave the reason that "it was on sale." *Id.*, at 341. The State, however, introduced testimony from the Schwegmann's advertising director that the pet food was *not* on sale that day. *Id.*, at 395. The dissenting judge below tried to rehabilitate petitioner's testimony by interpreting the "on sale" claim as meaning "for sale," a reference to the pricing of the pet food (*e.g.*, "3 for 89 cents"), which petitioner claimed to have read on a shelf sign in the store. *Id.*, at 343. But unless petitioner was parodying George Leigh Mallory, "because it was *for* sale" would have been an irrational response to the question it was given in answer to: Why did you buy *so many* cans? In any event, the Schwegmann's employee also testified that store policy was not to put signs on the shelves at all. *Id.*, at 398–399. The sum of it is that petitioner, far from explaining the presence of the pet food, doubled the force of the State's evidence by perjuring himself before the jury, as the state trial judge observed. See *supra*, at 19.[7]

I will not address the list of cars in the Schwegmann's parking lot and the receipt, found in the victim's car, that bore petitioner's fingerprints. These were collateral matters that provided little evidence of either guilt or innocence. The list of cars, which did not contain petitioner's automobile, would only have served to rebut the State's introduction of a photograph purporting to show petitioner's car in the parking lot; but petitioner does not contest that the list was not comprehensive, and that the photograph was taken about six hours before the list was compiled. See 5 F.3d, at 816. Thus its rebuttal value would have been marginal at best. The receipt—although it showed that petitioner must at some point have been both in Schwegmann's and in the murdered woman's car—was as consistent with petitioner's story as with the State's. See *ante*, at 1574.

* * *

The State presented to the jury a massive core of evidence (including four eyewitnesses) showing that petitioner was guilty of murder, and that he lied about his guilt. The effect that the *Brady* materials would have had in chipping away at the edges of the State's case can only be called immaterial. For the same reasons I reject petitioner's claim that the *Brady* materials would have created a "residual doubt" sufficient to cause the sentencing jury to withhold capital punishment.

I respectfully dissent.



Robert E. RUBIN, Secretary of the Treasury, Petitioner

v.

COORS BREWING COMPANY, Respondent.

No. 93–1631.

Argued Nov. 30, 1994.

Decided April 19, 1995.

Brewer brought action seeking declaratory judgment that Federal Alcohol Administration Act (FAAA) subsection, prohibiting

7. I have charitably assumed that petitioner had a pet or pets in the first place, although the evidence tended to show the contrary. Petitioner claimed that he owned a dog or puppy, that his son had a cat, and that there were "seven or eight more cats around there." Tr. 325 (Dec. 7, 1984). The dog, according to petitioner, had been kept "in the country" for a month and half, and was brought back just the week before petitioner was arrested. *Id.*, at 337–338. Although petitioner claimed to have kept the dog tied up in a yard behind his house before it was taken to the country, *id.*, at 336–337, two *defense* witnesses contradicted this story. Donald Powell stated that he had not seen a dog at petitioner's home since at least six months before the trial, *id.*, at 254, while Cathora Brown said that although Pinky, petitioner's wife, sometimes fed stray pets, she had no dog tied up in the back yard. *Id.*, at 304–305. The police found no evidence of any kind that any pets lived in petitioner's home at or near the time of the murder. *Id.*, at 75.

APPENDIX O

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Symposium
How the Death Penalty Works: Empirical Studies of the Modern Capital Sentencing System

*1771 POST-MCCLESKEY RACIAL DISCRIMINATION CLAIMS IN CAPITAL CASES

John H. Blume*
Theodore Eisenberg**
Sheri Lynn Johnson***

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*Visiting Professor of Law, Cornell Law School, Director, Cornell Death Penalty Project. Professor Blume served as counsel for capital defendants in some of the cases that this Article discusses. We would like to thank Professor Kevin Clermont for his comments on a draft of this Article.

**Henry Allen Mark Professor of Law, Cornell Law School. Professor Eisenberg served as an expert witness on statistical analyses of racial patterns of prosecutorial decision making in some of the cases that this Article discusses.

***Professor of Law, Cornell Law School, Co-Director, Cornell Death Penalty Project.

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Introduction

In federal habeas corpus proceedings, Earl Matthews, an African American, South Carolina death row inmate, alleged that his death sentence was the result of invidious racial discrimination that violated the Equal Protection Clause of the Fourteenth Amendment. To support his contention, Matthews presented statistical evidence showing that in Charleston County, where a jury convicted him and sentenced him to death, the prosecutor was far more likely to seek a death sentence for a Black defendant accused of killing a white person than for any other racial combination of victims and defendants, and also that such a Black defendant was more likely to receive a death sentence. The statistics proffered by Matthews did not stand alone. Testimony from former Charleston County police officers, prosecutors, defense lawyers, and community leaders bolstered these statistics and indicated that racial considerations affected the prosecution of capital cases in Charleston County. Matthews also presented, as is commonly done in other types of antidiscrimination suits, additional circumstantial evidence of racial discrimination, including information suggesting that certain hiring and firing practices and other prosecutorial actions in his case were motivated by racial animus.

One, of course, may disbelieve this evidence of racial animus. The court, however, did not assess the truthfulness of Matthews's allegations. Rather, the federal district court judge summarily dismissed Matthews's contentions on the ground that the Supreme Court's decision *1773 in McCleskey v. Kemp[1] precluded this type of challenge to a death sentence.[2] The Court of Appeals

[1]481 U.S. 279 (1987). The Court rejected McCleskey's Equal Protection Clause and Eighth Amendment challenges to his death sentence because the statewide statistical study, which Dr. David Baldus had conducted, did not provide specific evidence that any of the "decisionmakers in his case acted with discriminatory purpose." Id. at 292, 298. Part I of this Article will discuss the Court's decision in McCleskey in detail.

[2]See Matthews v. Evatt, No. C/A 3:95-132-3BC, slip op. at 13-14 (D.S.C. Mar. 25, 1996).

for the Fourth Circuit affirmed the district court's decision,[3] and the State of South Carolina executed Matthews on November 6, 1997.

Although McCleskey has been widely criticized,[4] this Article does not address its correctness. Rather, our analysis addresses flaws in the lower courts' treatment of post-McCleskey selective-prosecution claims. Any plausible reading of McCleskey suggests that Matthews's race-based claims warranted more serious treatment than the federal courts afforded them.

Our review of the published post-McCleskey decisions reveals that the abbreviated treatment of Matthews's claim is not unique. Many courts that face post-McCleskey capital-sentencing racial discrimination claims may assume that McCleskey dooms them all.[5] Although some scholars have concluded understandably that McCleskey precludes all statistically based attacks involving racial bias and the death penalty,[6] McCleskey does not hold on its face that selective-prosecution claims are not cognizable in capital cases. In any other equal protection context, the showings made in many post-McCleskey cases would have triggered, at a minimum, the opposing party's duty to rebut the prima facie case of racial discrimination. When lower courts, without examination, reject such prosecutor-specific proof of discrimination simply because a death row inmate — whose claims one might assume should receive more judicial scrutiny rather than less[7] — proffers it, they distort ***1774** McCleskey in a manner that cannot be squared with generally applicable equal protection doctrine.

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[3]See Matthews v. Evatt, 105 F.3d 907 (4th Cir. 1997).

[4]See, e.g., David C. Baldus et al., Equal Justice and the Death Penalty 370-93 (1990); Samuel R. Gross & Robert Mauro, Death and Discrimination: Racial Disparities in Capital Sentencing 159-211 (1989); Stephen B. Bright, Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty, 35 Santa Clara L. Rev. 433, 480 (1995) (referring to McCleskey as a "badge of shame upon America's system of justice"); Sheri Lynn Johnson, Unconscious Racism and the Criminal Law, 73 Cornell L. Rev. 1016, 1016 (1988); Bryan A. Stevenson & Ruth E. Friedman, Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice, 51 Wash. & Lee L. Rev. 509, 510 (1994). Even McCleskey's author, Justice Powell, came to wish that he could change his deciding vote in that case. See David Von Drehle, Retired Justice Changes Stand on Death Penalty, Wash. Post, June 10, 1994, at A1.

[5]See infra Part II.

[6]See, e.g., David C. Baldus et al., Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction, 51 Wash. & Lee L. Rev. 359, 374 (1994).

[7]The Court has noted that "[b]ecause of that qualitative difference [[of the death penalty], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Commentators have described this supposed heightened scrutiny as "super due process." See, e.g., Margaret Jane Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S. Cal. L. Rev. 1143 (1980); cf. Robert Weisberg, Deregulating Death, 1983 Sup. Ct. Rev. 305, 338-43 (outlining various procedural due process issues specific to capital cases).

Part I describes the historical background of capital-sentencing racial discrimination claims and then discusses those types of discrimination claims that McCleskey did, and did not, foreclose. Part II presents the evidence of racial discrimination in the decision to seek death in two South Carolina capital cases, including the Matthews case, and describes the perfunctory way courts treated this evidence. It then summarizes how similar attacks have fared in other jurisdictions. Part III contrasts the adjudication of these cases with the disposition of analogous issues in other types of discrimination claims. Part IV outlines an approach to capital-sentencing racial discrimination claims that both comports with well-established equal protection standards and is consistent with McCleskey.

I

Race, the Death Penalty, and Normal Equal Protection Standards

A. The Road to McCleskey

There is no question that both the historical and the current imposition of the death penalty in this country are racially discriminatory. Nearly every study, including the federal government's General Accounting Office review of twenty-eight studies, has come to this conclusion.[8] The "distorting effects of racial discrimination" in the administration of the death penalty are, in truth, as old as our Republic.[9] ***1775** This long history of the relationship between race and capital cases also has been well-documented elsewhere.[10]

By 1972, however, the Supreme Court seemed ready to face the many inequities of capital punishment. Indeed, concern that race influences who lives and who dies was perhaps the most significant factor in the Court's decision to overturn all then-existing death penalty statutes in Furman v. Georgia.[11] Justice Douglas decried the wide discretion of judges and juries in imposing the death penalty. He argued that this discretion was often responsible for "feeding prejudices

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[8]See General Accounting Office, Death Penalty Sentencing: Research Indicated Pattern of Racial Disparities 3 (1990). The GAO study refers to many of the most relevant studies. See id. at app. I. For other studies on death penalty sentencing, see Baldus et al., supra note 4; Gross & Mauro, supra note 4; Michael L. Radelet & Glenn L. Pierce, Choosing Those Who Will Die: Race and the Death Penalty in Florida, 43 U. Fla. L. Rev. 1 (1991). Significant racial disparity also has been apparent in the application of the federal death penalty. See H.R. Rep. No. 103-458, at 2-4 (1994). Stephen P. Klein and John E. Rolph, however, report no statistically significant race effect. See Stephen P. Klein & John E. Rolph, Relationship of Offender and Victim Race to Death Penalty Sentences in California, 32 Jurimetrics 33, 43 (1991). But they do find that white-victim cases are more likely to result in death sentences than nonwhite-victim cases. See id. at 37-38. This effect survives after controlling for case characteristics. See id. at 43. Klein and Rolph do not break down the nonwhite category into Black people and other nonwhites.

[9]Godfrey v. Georgia, 446 U.S. 420, 439 (1980) (Marshall, J., concurring).

[10]See, e.g., Bright, supra note 4, at 439-42.

[11]408 U.S. 238 (1972).

against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and [for] saving those who by social position may be in a more protected position."[12] Justice Marshall discussed the history of racial discrimination at length in his opinion, noting that "[n]egroes [have been] executed far more often than whites in proportion to their percentage of the population."[13] Even Justice Stewart noted that "if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race."[14]

Even when the Court upheld death penalty statutes in Gregg v. Georgia,[15] its reasoning was consistent with Furman's concerns about racial discrimination. In the plurality's view, the new statutes sufficiently channeled the sentencer's discretion to eliminate the possibility of an arbitrary or capricious imposition of the death penalty.[16] Gregg acknowledged the possibility that race may influence capital punishment, even under the new "guided discretion" statutes, but because the litigants had not presented proof that discrimination persisted, the Court upheld these statutes.[17] Moreover, one year after the decision in Gregg, the Court struck down the death penalty for rape,[18] which was notorious for the extremity of its racial imbalance.[19] Although the Court did not discuss race, observers believed that the ***1776** likelihood of racial discrimination was the key motivating factor in the Court's decision to invalidate the death penalty for rape.

Many litigators and academics therefore believed that Gregg presented them with the opportunity to demonstrate that race remained an important factor in the administration of capital punishment.[20] The next decade produced many statistical studies showing that race — both of the

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[12]Id. at 255 (Douglas, J., concurring); see also id. at 364 (Marshall, J., concurring) ("[I]t is usually the poor, the illiterate, the underprivileged, the member of the minority group — the man who, because he is without means, and is defended by a court-appointed attorney — who becomes society's sacrificial lamb . . . ." (internal quotation marks omitted)).

[13]Id. at 364 (Marshall, J., concurring).

[14]Id. at 310 (Stewart, J., concurring).

[15]428 U.S. 153 (1976).

[16]See id. at 206-07.

[17]See id. at 200.

[18]See Coker v. Georgia, 433 U.S. 584, 592 (1977).

[19]See, e.g., Furman, 408 U.S. at 364 (Marshall, J., concurring) (noting that of the 455 persons executed for rape, after the Justice Department began compiling statistics, 405 were Black).

[20]See Baldus et al., supra note 4, at 27.

defendant and the victim — had played a significant role in the administration of the death penalty.[21] These studies included that of Dr. David Baldus of the University of Iowa.

B. McCleskey v. Kemp

Baldus's study examined over 2,000 murders that occurred in Georgia during the 1970s. After considering 230 variables that could have explained the data on nonracial grounds, Baldus concluded that defendants charged with killing white victims were 4.3 times more likely to receive the death penalty than defendants charged with killing African Americans, and that Black defendants were 1.1 times more likely to receive the death penalty than other defendants.[22] Thus, a Black defendant who had killed a white victim had the greatest likelihood of receiving a death sentence.[23]

Warren McCleskey was just such a defendant; indeed, as Justice Brennan stated in dissent, Baldus's statistical analysis showed that "the jury more likely than not would have spared McCleskey's life had his victim been black."[24] McCleskey's case was a particularly appropriate vehicle for the Supreme Court to address racial disparities under post-Furman statutes, both because the case arose from Georgia (as had Furman and Gregg) and because it involved a comprehensive statistical study by a respected statistician who held no ties to the anti-death penalty community.

A bare majority of the Court, in an opinion by Justice Powell, affirmed the court of appeals's rejection of McCleskey's claim. The majority held that general statistical evidence showing that a particular state's capital punishment scheme operated in a discriminatory manner did not establish either an Eighth or a Fourteenth Amendment violation.[25] The Court found that Professor Baldus's study established "[a]t most . . . a discrepancy that appears to correlate with ***1777** race,"[26] and it then refused "to assume that what is unexplained is invidious."[27] Because the Court previously had found that statistics alone presented sufficient proof of discriminatory intent, Justice Powell had to distinguish certain prior cases. Ordinarily, he stated, statistical disparities must be "stark" to provide

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[21]See General Accounting Office, supra note 8, at app. I (listing studies).

[22]See McCleskey v. Kemp, 481 U.S. 279, 287 (1987). The raw data indicate that the death-sentencing rate for all white-victim cases was 11 times greater than the rate for Black-victim cases. See id. at 326-27 (Brennan, J., dissenting).

[23]See id. at 286-87.

[24]Id. at 325 (Brennan, J., dissenting).

[25]See id. at 291-92, 308.

[26]Id. at 312. The majority opinion states that "[e]ven a sophisticated multiple-regression analysis such as the Baldus study can only demonstrate a risk that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision." Id. at 291 n.7.

[27]Id. at 313.

sole proof of discrimination.[28] Thus, Powell apparently viewed McCleskey as presenting a less than "stark" showing. In jury selection cases, however, the Court had accepted less-extreme statistical disparities as sufficient to shift the burden of proof to the government. These cases, Powell explained, had involved less complicated decisions and fewer decision makers.[29] Powell reasoned that the larger number of actors and aspects involved in the capital-sentencing process would increase the likelihood that other factors were responsible for racial effects, and therefore render the jury selection precedents inapplicable.[30] Moreover, he noted that this complexity would have intolerably increased the rebuttal burden if the State were required to explain the statewide statistics that McCleskey had proffered.[31]

Because McCleskey's proof neither constituted a stark statistical pattern nor warranted departure from the stark-pattern standard, the Court dismissed the statewide statistics as "clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose."[32] The only other evidence of racial discrimination that McCleskey proffered was historical. Although the evidence of past race-consciousness in the Georgia criminal justice system was extensive, the Court found that because this evidence lacked recency, it had little probative value in assessing the likelihood of post-Furman discrimination.[33] Thus, McCleskey had "offer[ed] no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence."[34] He therefore failed to demonstrate a violation of either the Equal Protection Clause or the Eighth Amendment.[35]
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[28]Id. at 293.

[29]See id. at 294.

[30]See id. at 294-95.

[31]See id. at 296-97.

[32]Id. at 297.

[33]See id. at 298 n.20.

[34]Id. at 292-93.

[35]See id. at 297. The majority opinion is somewhat unclear as to whom the relevant decisionmaker is: the jury that sentences the defendant to death, the prosecutor who makes the decision to seek the death penalty, or both. However, the passage above, see supra text accompanying note 32, seems to indicate that if either the jury or the prosecutor's decision to seek or to impose the death sentence was affected by race, an equal protection violation would have occurred. As a common-sense matter, this view must be correct. Imagine, for example, a prosecutor who announces that his policy is that he only seeks the death penalty in cases involving Black defendants and white victims. Would the fact that a nonracially biased jury imposed the death sentence insulate the sentence from constitutional challenge? To ask the question is to answer it.

C. The Limits of McCleskey

McCleskey does not state precisely the limits of its holding. There are, however, compelling reasons to read it narrowly, and no legitimate reason to read it as broadly as the lower courts have done. Most probative is McCleskey's statement, in the very first paragraph of its analysis of the equal protection claim, that the flaw in McCleskey's showing turned on the absence of evidence tying alleged racial discrimination to his case: "[T]hus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in his case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence."[36] McCleskey does not support creating insurmountable evidentiary hurdles in capital cases in which race may have played a role in the decision to seek the death penalty. It also does not reject completely statistical analyses of this issue. McCleskey purports to be rooted in and consistent with standard equal protection analysis.

The Court's first paragraph analyzing McCleskey's claim contains a second reason to limit the reach of its holding. The Court obviously and properly was concerned about the implications of accepting McCleskey's proof without some evidence tying the alleged discrimination to his case:

> McCleskey argues that the Baldus study compels an inference that his sentence rests on purposeful discrimination. McCleskey's claim that these statistics are sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black.[37]

Thus, the Court feared that ruling for McCleskey on the basis of the Baldus study would threaten the validity of a large class of capital cases throughout Georgia. Because there was little reason to think that other defendants could not replicate the Baldus study in cases in other states (as likely would have been done had McCleskey prevailed), McCleskey's claim endangered at least hundreds of what might otherwise be valid capital convictions and sentences. As the Court stated in McCleskey, "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our ***1779** entire criminal justice system."[38] Once a capital defendant offers proof tying discrimination to his case, this concern dramatically decreases. At most, this proof implicates the past convictions of a single prosecutor or a single prosecutor's office.

A third reason to read McCleskey narrowly lies in what we now know about the Court's consideration — and rejection — of a broad prohibition against racial discrimination challenges to death sentences. Justice Thurgood Marshall's papers reveal a McCleskey case memorandum from

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[36]Id. at 292-93 (additional emphasis added).

[37]Id. at 293.

[38]Id. at 314-15.

Justice Scalia indicating that the latter would hold that no showing of racial discrimination in the death-sentencing process — no matter how strong or direct — would violate the Eighth or Fourteenth Amendments. Justice Scalia did not mean to say that he believed that race played no role in capital-sentencing decisions. Rather, his memorandum states that " 'it is my view . . . that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial [decisions], is real, acknowledged by the [decisions] of this court and ineradicable, I cannot honestly say that all I need is more proof.' "[39] Justice Scalia, it appears, might have been prepared to acknowledge the existence of racial discrimination but also would deem its presence to be of no legal consequence. Clearly, the majority eschewed this course. Indeed, only five members of the Court were of the view that McCleskey's evidence itself was insufficient to establish a constitutional violation, and one of them, the author of the majority opinion, has since regretted his vote.[40] Thus, because McCleskey itself is of doubtful stability, inferring support for an expansive holding surely is unwarranted.

With respect to racial discrimination claims that focus on the actions of the prosecutor, a fourth reason indicates that McCleskey erects no implicit bar. In United States v. Armstrong,[41] the Court recognized that allegations of selective prosecution based on race — clearly the genus of the challenge that Earl Matthews had presented — must be evaluated in light of "ordinary equal protection standards."[42] In short, no ***1780** reason exists to believe that prosecutorial decisions to seek the death penalty are exempt from the dictates of the Equal Protection Clause, or that proof of racial discrimination in such decisions is subject to peculiar rules.

D. Universally Applicable Equal Protection Principles

Under established equal protection principles, a death-sentenced inmate need not prove discriminatory intent by direct evidence. Rather, as the Supreme Court stated in Village of Arlington Heights v. Metropolitan Division Corporation,[43] "invidious discriminatory purpose may often be

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[39]Dennis D. Dorin, Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's McCleskey Memorandum, 45 Mercer L. Rev. 1035, 1038 (1994) (quoting Memorandum to the Conference from Justice Antonin Scalia in No. 84-6811 — McCleskey v. Kemp of Jan. 6, 1987, McCleskey v. Kemp file, in Thurgood Marshall Papers (on file with Library of Congress, Washington, D.C.). See generally Dorin, supra (discussing Scalia's memorandum and the impact on McCleskey).

[40]See Von Drehle, supra note 4, at A1.

[41]517 U.S. 456 (1996).

[42]Id. at 465 (internal quotation marks omitted); see also Hunter v. Underwood, 471 U.S. 222, 232 (1985) (discussing the standard by which to evaluate racial impact); Wayte v. United States, 470 U.S. 598, 608 (1985) ("It is appropriate to judge selective prosecution claims according to ordinary equal protection standards.").

[43]429 U.S. 252 (1977).

inferred from the totality of the relevant facts."[44] Thus, the appropriate analysis "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[45] Sensitive inquiry is necessary both because perpetrators do not often publicly announce race-based discrimination and because those responsible for key decisions may have "[m]ore subtle, less consciously held racial attitudes."[46] These attitudes become especially problematic when those responsible for the decision have broad discretion, as in the decision to seek the death penalty.[47]

The Arlington Heights Court identified several relevant factors to consider in testing for discriminatory intent: "[t]he impact of the official action," "[t]he historical background of the decision[,] . . . particularly if it reveals a series of official actions taken for invidious purposes," "[d]epartures from the normal procedural sequence," "substantive departures [[[,] . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," and "contemporary statements by members of the decisionmaking body."[48] Arlington Heights also makes clear that this list is not exhaustive.[49]

II

Post-McCleskey Cases in the Lower Courts

Far from conducting a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available,"[50] most lower courts reject post-McCleskey capital-sentencing racial discrimination claims ***1781** without any individualized analysis. Earl Matthews's and Raymond Patterson's cases present especially egregious examples. We describe these cases in some detail so that the reader may evaluate the persuasiveness of the proffered evidence that race did influence the decisions to seek death. They are, however, not isolated cases.

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[44]Id. at 266; see also Rogers v. Lodge, 458 U.S. 613, 618 (1982); Washington v. Davis, 426 U.S. 229, 242 (1976).

[45]Arlington Heights, 429 U.S. at 266.

[46]Turner v. Murray, 476 U.S. 28, 31 (1986).

[47]See id. at 35.

[48]Arlington Heights, 429 U.S. at 266-268; see also Hunter, 471 U.S. at 232 (stating that Arlington Heights supplies the "proper analysis" for selective-prosecution claims).

[49]See Arlington Heights, 429 U.S. at 268.

[50]Id. at 266.

A. Earl Matthews

With McCleskey's strictures in mind, Matthews's attorneys eschewed state wide studies of discrimination and focused on the decision maker in Matthews's case: the Charleston County, South Carolina Solicitor's Office and, in particular, Matthews's prosecutor. Matthews supplemented his statistical showings with other evidence that Arlington Heights deemed relevant: recent history of official actions taken for an invidious purpose; contemporaneous racially conscious statements by the decision-making body; examples of deviations from standard procedures; and evidence of substantive departures from ordinary criteria for death prosecutions. He also adduced proof of racially motivated personnel policies and racial bias on the part of the key decision maker in his case.

1. Evidence That Race Influenced the Decision to Seek the Death of Earl Matthews

a. "The Impact of the Official Action": Statistical Evidence of Racial Discrimination in Seeking the Death Penalty

Matthews's statistical study revealed that the prosecution had gone to trial seeking the death penalty in twenty cases in Charleston County since 1977, the year that South Carolina enacted its post-Furman death penalty statute. Thirteen of these trials involved Black or minority defendants, and all but two of the trials involved one or more white victims.[51] The study indicated that, at the time, there were five individuals on South Carolina's death row who were tried for crimes that occurred in Charleston County. Additionally, the State recently had executed another prisoner from Charleston County. Four of these persons were African American,[52] one was Native American,[53] and only one was white.[54] All of these cases involved one or more white victims. The only persons to receive death sentences in single-victim cases were Matthews, Leroy Drayton, and Anthony *1782 Green, all three of whom were African Americans convicted for murdering white victims. In contrast, Fred Kornahrens, the only white person from Charleston County who was recently on death row, was convicted of killing three people. This racial pattern seems intuitively improbable given that Charleston County is about thirty-four percent Black.[55] The pattern seems to focus disproportionately on Black-defendant cases and white-victim cases.

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[51]The two trials actually involved the same defendant, Demetrius Gathers. The state supreme court reversed Gathers's death sentence, State v. Gathers, 369 S.E.2d 140, 144 (S.C. 1988), aff'd, 490 U.S. 805 (1989) and resentenced him to life imprisonment.

[52]These four were Matthews, Leroy Drayton, Frank Middleton, and Anthony Green.

[53]The Native American was Joseph Ernest Atkins.

[54]His name was Fred Kornahrens. He recently was executed.

[55]See Bureau of the Census, U.S. Dep't of Commerce, 1 1980 Census of the Population A-42-15 (1981).

Matthews presented a statistical study that tested this impression by focusing on the effect that race had on the decision to seek the death penalty and on the disposition of homicide cases in Charleston County between January 1981 and January 1990.[56] These years cover a period roughly five years before and five years after Matthews's first trial. The same prosecutor was in office throughout this period.

Between 1981 and 1990, the prosecutor sought the death penalty in ten of twenty-five murder cases in which the defendant was Black and the victim was white, but he only sought the death penalty in two of seventy murder cases in which the defendant and victim were both Black.[57] Hence, when a Black person had killed a white person, the prosecutor sought the death penalty forty percent of the time, but when a Black person had killed another Black person, the same prosecutor only sought the death penalty 2.9% of the time.[58] Because such a statistical discrepancy would occur by chance less than one time in one thousand, Matthews's study presents prima facie evidence that the race of defendants and victims played a significant role in the prosecutor's decision to seek the death penalty.[59]

During that same period of time, the prosecutor sought the death penalty in twenty-one of sixty-five (32.3%) murder cases in which the victim was white and only in four of seventy-seven (5.2%) murder cases in which the victim was Black.[60] Again, because this statistical discrepancy only could occur by chance less than one time in one thousand, the race of the victims likely played a significant factor in the prosecutor's decision to seek the death penalty.[61]

Matthews's study also noted a strong relation between the race of a homicide victim and whether the defendant received a "reduced outcome." A reduced outcome occurs when (1) the jury convicts a defendant of a level of homicide lower than the level of the most serious ***1783** charge; (2) the jury convicts a defendant of a nonhomicide offense; (3) the jury acquits the defendant; or (4) the prosecutor drops the charges.[62] When the victim was Black, the defendant received a reduced outcome 78.2% of the time, whereas when the victim was white, the defendant only received a

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[56]See 2 Joint Appendix at 526-31, Matthews v. Evatt, 105 F.3d 907 (4th Cir. 1997) (on file with Fourth Circuit U.S. Court of Appeals) [[hereinafter Joint Appendix].

[57]See id. at 527-28.

[58]See id.

[59]See id.

[60]See id. at 528-29.

[61]See id.

[62]Id. at 530.

reduced outcome 45.6% of the time.[63] Here, too, because this statistical discrepancy only could occur by chance less than one time in one thousand, the race of the victims likely played an important role in how the solicitor resolved homicide cases.[64] The study concluded that in the absence of a persuasive explanation for the highly suspect pattern, intentional racial discrimination existed in the administration of homicide and capital cases in Charleston County.[65]

b. Contemporary Statements by Members of the Decision-Making Body

Matthews presented evidence from former employees of the Solicitor's Office, from press accounts, and from community leaders to corroborate the statistical evidence of racial bias. A former assistant prosecutor in the Charleston County Solicitor's Office at the time of Matthews's trial declared that the office had prosecuted homicide cases in a racially discriminatory manner, treating cases involving Black victims as less important than cases involving white victims.[66] She worked in the prosecutor's office for six years, all during the solicitor's tenure, and only recalled one case involving a Black defendant and a Black victim in which the solicitor sought the death penalty even though there had been many such death eligible cases.[67] In her view, when there was an aggravated murder involving a Black defendant and Black victim, "the idea of the state seeking the death penalty did not appear to enter the calculus" at the Solicitor's Office.[68] Another former prosecutor also observed a significant amount of racism ***1784** in the prosecutor's office during the time of both Matthews's trials.[69] On one occasion, she heard another prosecutor in the office say at a staff meeting that a particular case deserved less priority "because the victim was 'just a little old black man.' "[70]

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[63]See id. at 530-31.

[64]See id. at 531.

[65]See id.

[66]See id. at 561.

[67]See id.

[68]Id. In fact, in many death eligible cases in which the victim was Black, the staff attorney observed the prosecutor allowing defendants to plead guilty to substantially lesser charges even if the victims' families demanded stiffer penalties. See id. According to this former assistant prosecutor, this racially discriminatory prosecution "reflected a perception on the part of the Ninth Circuit Solicitor's Office that the victims in cases [in which the victims were black] were worth less than victims in cases of different racial makeups." Id. Another employee of the solicitor's office, who was employed from 1988 to 1994, also testified that she observed discrimination in the prosecution of cases, especially in regard to sentencing. In her opinion, white defendants received "more lenient treatment," even though the facts of their cases were often worse than cases involving Black defendants. 1 id. at 253-54.

[69]See 2 id. at 548.

[70]Id.

A twenty-five year veteran of the Charleston Police Department (1966-1991) and current United States Marshall was the lead detective in the Matthews case.[71] He also worked numerous other homicide cases and thus had constant contact with the Solicitor's Office.[72] He observed that the prosecutor's office "routinely sought tougher sentences for black defendants than it did for white defendants."[73] He maintained that the solicitor prosecuted cases more seriously and aggressively when the victim was white than when the victim was Black:[74] "when the defendant was black and/or the victim was white, [the Solicitor's Office] would charge the accused with a more serious offense and seek a greater punishment than was the case when the defendant was white and/or the victim was black."[75]

c. Departures from the Normal Procedural Sequence

Attorneys, civil rights and community leaders, and journalists provided additional corroboration of racial discrimination in the decision to seek death. Although some of this evidence tracked the statistical findings, it also added depth by providing examples of departures from the Solicitor's Office's normal procedures in seeking death. Testimony indicated that the Charleston County Solicitor's Office routinely had prosecuted cases involving white victims, especially homicide cases, more aggressively than cases involving Black victims.[76] Testimony also showed that

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[71]See 1 id. at 246.

[72]See id.

[73]Id.

[74]See id.

[75]Id.

[76]A local minister complained that "[a] black can kill a black and nothing is done, but only when a white is killed by a black is someone prosecuted." Shirley Greene & Steve Mullins, Charges of Police Brutality Spark Groundswell of Protest, News & Courier — Evening Post (Charleston, S.C.), May 15, 1983, at 1-A (internal quotation marks omitted). Nelson B. Rivers III, former president of the North Charleston NAACP branch, said in reference to a case in which a black person was accused of killing a white person that "[t]he whole situation reinforces the feeling that if you are black and accused of killing a white, you can't get a fair trial in this community." Id. at 2-A (internal quotation marks omitted). In regard to another case in which the prosecutor filed no charges against two white people who killed a Black person, Rev. Jerry Williams protested that "[i]f you turn this around" and, under the same circumstances, two Black people kill a white person, the Blacks would "quickly be locked up." David W. MacDougall, Ford, Others Want Investigation in Mungin Shooting to Continue, Post & Courier (Charleston, S.C.), May 8, 1992, at 1-B (internal quotation marks omitted). The Solicitor's Office ultimately decided not to prosecute the whites involved in killing the Black victim. See Richard Green Jr., Brothers Won't Face Charges for Shooting Suspect, Post & Courier (Charleston, S.C.), May 28, 1992, at 1-B.

On another occasion, five white Citadel students, dressed in Ku Klux Klan-styled robes, stormed into the room of a Black cadet, verbally harassed him, and left a burning cross on his floor. Solicitor Condon concluded that "his office believed the cadets, if found guilty, should be eligible for a program that will clear their records if they perform . . . community service." 5 Citadel Cadets Indicted over Racial Hazing, N.Y. Times, Oct. 8, 1987, at A20; see also Herb

the office had sought resolutions more *1785 quickly when the victim had been white.[77] Other testimony established that differences in the decision to seek death were not attributable to differences in the victims' families' preferences; in many death-eligible cases involving Black victims, the prosecutor allowed defendants to plead guilty to substantially lesser charges even though the victims' families had demanded stiffer penalties.[78] Moreover, the discriminatory treatment extended not only to bond issues and to plea bargaining decisions,[79] but also to resource allocation decisions.[80]

d. Part of the Historical Background of the Decision: Racially Discriminatory Employment Practices

Evidence of the solicitor's racially discriminatory attitude and decisions extended to the personnel policies that determined the staff who would participate in decisions about seeking death. Former employees maintained that "very few blacks [had been hired as] part of the professional staff at the Solicitor's office," but Black people "almost exclusively [had been] hired . . . as part of the support staff."[81] Testimony also suggested that Blacks had been "routinely fired . . . often for apparently no justifiable reason."[82] This routine firing, however, "was not equally practiced against whites."[83] Evidence also indicated that Black employees faced discrimination in the area of promotions.[84] One witness maintained that Black people "were almost sure not to receive any promotions."[85] Furthermore, evidence *1786 showed that Black employees were forced to perform

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Frazier, Hazing Lawsuit Is Settled Against 5 Ex-Citadel Cadets, News & Courier (Charleston, S.C.), Jan. 24, 1989, at 1-A (discussing the legal settlement that arose from the aforementioned racial incident).

[77]See 2 Joint Appendix, supra note 56, at 244.

[78]See id. at 561.

[79]See 1 id. at 245. The President of the local NAACP, as well as other NAACP members, noticed the pattern of discriminatory prosecutorial decisions, especially in homicide cases, and were prepared to discuss specific examples. They complained directly to Condon about his decisions, but he "showed little interest for their concerns." Id. at 248-49.

[80]See id. at 244-45. For example, the prosecutor's office spent more money on experts and other aspects of the investigation in homicide cases with white victims than in similar cases with Black victims. See id.

[81]2 id. at 562; see 1 id. at 254-55.

[82]2 id. at 562.

[83]Id.

[84]See 1 id. at 255-56.

[85]2 id. at 562. One former assistant prosecutor filed racial discrimination claims with the Equal Employment Opportunity Commission. See id. at 514. This former prosecutor alleged that "[b]lack employees were treated differently than white employees and racially offensive comments were made in the office." Id. This differential and

a variety of menial tasks, such as sweeping floors, even though such tasks were not in their job descriptions.[86]

e. Other Examples of the Prosecutor's Racial Bias

Other evidence demonstrated the solicitor's own racial insensitivity. For example, the solicitor blamed South Carolina's growing crime problem on moral decay and the breakdown of values in the Black community.[87] Counsel also presented evidence regarding the solicitor's uncompromising support for flying the Confederate Battle Flag on the Statehouse dome as indicative of his racism. The solicitor resisted efforts to reach a compromise about the divisive issue and declared that "[t]o even think about taking this flag down because it offends certain people I think

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unfair treatment that African Americans received in the Solicitor's Office prompted her to make verbal protests. The office, however, did not appreciate her complaints, and she "was expected to remain quiet and docile." Id. The office then asked her to resign. See id. Another Black attorney in the office filed a racial discrimination claim against the Solicitor's Office with the South Carolina Human Affairs Commission in 1991. See id. at 515. She maintained that the office commonly treated African Americans differently than whites, and it often made them feel unwanted. See id. She also noticed that "[w]hites employed in the solicitor's office would commonly receive promotions easier and more frequently than equally qualified blacks." Id. She recalled how she received a suspension without pay and earned probation for her involvement in a verbal conflict with a white employee, see id., while the white employee received no disciplinary sanction. See id. This differential treatment was especially appalling because the white employee's racism provoked this conflict. See id. While on probation, the Solicitor's Office continued its disrespectful practices by requiring her to participate in offensive and degrading "counseling." Id. After she filed the complaint, the office terminated her employment. See id. The Solicitor's Office later admitted that she consistently had received excellent comments regarding her work. See id.

[86]See 1 id. at 256. One cannot dismiss these declarations as the views of several disgruntled former Black employees. A former white assistant solicitor noted the same unequal treatment and testified:

> While working in the solicitor's office, I noticed that, on some occasions, black employees were treated differently than whites. I also recall that when the white attorneys in the office organized social events, blacks were sometimes excluded. I clearly remember several occasions where I was invited to office social functions while a particular fellow Assistant Solicitor was not. Since my relationship to the organizers of these social events was similar to that of this particular Assistant Solicitor's, I believed that the reason for the different treatment was because I am white and she is black. Because of this concern, I usually chose not to participate in these office social functions.

2 id. at 549.

[87]See Schuyler Kropf, Condon Urges Blacks to Action, Post & Courier (Charleston, S.C.), Nov. 16, 1993, at 3-B.

is contrary to pluralism in American *1787 society."[88] The solicitor urged opponents of the Confederate Flag to deal with other issues and "leave this flag where it belongs."[89]

f. A Substantive Departure: The Anomaly of Seeking Death for Earl Matthews

Although Matthews was death eligible, many of the facts and circumstances surrounding his case could have led an unbiased decision maker to decide that the death penalty was not an appropriate punishment. First, Matthews was only nineteen at the time of the offense and had a minimal prior record. In fact, one of his arresting officers even stated that he was not a "hard-nosed" criminal. Second, the only aggravator in this case — that the death occurred during an armed robbery — hardly distinguished the case from other, similar homicides that had occurred in the area and had not resulted in capital prosecutions. Finally, the killing resulted from a "botched" robbery that Matthews committed while under the influence of drugs and alcohol. The surviving victim remembered that Matthews became increasingly nervous as the robbery progressed, did not speak clearly, seemed uneducated, and acted like this was his first robbery.

2. The Cursory Judicial Review of Matthews's Claim

Given the statistical evidence of discrimination, the lengthy history of the prosecutor's antipathy toward African Americans, and the lack of any compelling reason to select this case for death penalty prosecution, one could easily have drawn the inference that racial bias influenced the decision maker in Matthews's case. Nevertheless, a federal district court rebuffed Matthews's claim. The judge did not discuss any of the evidence that Matthews had presented, instead he simply stated:

*1788 The crux of the petitioner's claim is that the death penalty was applied in a discriminatory fashion against him in violation of the due process and equal

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[88]Sid Gaulden, Condon Supports Battle Flag, Post & Courier (Charleston, S.C.), Oct. 20, 1993, at 1-B. During his campaign for Attorney General, Matthews's prosecutor promised "to fight to keep the standard flying above the Statehouse." Id.

[89]Id. Soon after becoming Attorney General, Matthews's prosecutor filed a memorandum in the South Carolina Supreme Court stating that the Confederate Flag had legal authority to fly on the Statehouse dome. See Memorandum in Support of the State of South Carolina and the Attorney General's Petition To Withdraw Its Brief at 2, Coble v. South Carolina (S.C. 1995), reprinted in 2 Joint Appendix, supra note 56, at 546. The memorandum reversed the prior policy of the Attorney General's office. See id. Thus, rather than simply adopting the State's existing position, or even supporting a compromise position as the state legislature was contemplating, Matthews's prosecutor urged uncompromising support for the Confederate Flag.

The South Carolina Advisory Committee to the United States Commission on Civil Rights issued a report condemning the flying of the Confederate Flag at state facilities in South Carolina. According to the report, "[t]he singular issue that has recently highlighted the severity of increased racial tensions is the flying of the Confederate Flag at State facilities." South Carolina Advisory Comm. to the U.S. Comm'n on Civil Rights, Perceptions of Racial Tensions in South Carolina 21 (1995).

> protection clauses. Pursuant to [McCleskey], a defendant cannot question a prosecutor's discretionary decision to pursue the death penalty in his case unless he can present a prima facie case that discrimination has occurred. Relying on statistics will not work because the petitioner must show that the decision in his case was made for discriminatory reasons. "Thus, to prevail under the Equal Protection Clause, [the petitioner] must prove that the decisionmakers in his case acted with discriminatory purpose."
>
> In this case, the petitioner has pointed to no evidence or facts that the solicitor sought the death penalty in his case for a discriminatory purpose. In addition, the [McCleskey] Court indicated a reluctance to question the discretionary decisions of prosecutors and stated that a legitimate explanation exists for seeking the death penalty, that is, that the petitioner committed a crime for which the laws permit the imposition of the death penalty. Such is the case here as pursuant to the South Carolina death penalty statute, S.C. Code § 16-3-20, et seq. (1976), a person convicted of murder shall be punished by death or imprisonment for life. Thus, in recognition of the solicitor's discretion, the violation of the statute, and the failure of the petitioner to show a prima facie case that discrimination was the reason for the death penalty, his claim is rejected on the merits and summary judgment should be entered for the respondents.[90]

Rather than discuss the evidence of discrimination that Matthews had offered, the judge denied its existence.[91] However, the statement that Matthews "pointed to no evidence or facts that the solicitor sought the death penalty in his case for a discriminatory purpose"[92] cannot be squared with reality. Furthermore, the judge also denied Matthews's motion for discovery that would have allowed a definitive exploration of the troublesome pattern of race-linked behavior by Matthews's prosecutor.[93]
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[90]Matthews v. Evatt, No. C/A 3:95-132-3BC, slip op. at 13-14 (D.S.C. Mar. 25, 1996) (second alteration in original) (citations omitted) (quoting McCleskey v. Kemp, 481 U.S. 279, 292 (1987)), aff'd, 105 F.3d 907 (4th Cir.), cert. denied, 118 S. Ct. 102 (1997).

[91]The circuit court deemed Matthews's racial discrimination claim to be procedurally barred and declined to address the merits. Matthews v. Evatt, 105 F. 3d 907, 910 (4th Cir.), cert. denied, 118 S. Ct. 102 (1997).

[92]Matthews, No. C/A 3:95-132-3BC, slip op. at 13.

[93]See id. at 28.

B. Raymond Patterson

1. Evidence That Race Influenced the Decision to Seek the Death of Raymond Patterson

Raymond Patterson, an African American, received the death penalty in a Lexington County, South Carolina trial for the armed robbery and murder of Matthew Brooks, a white man from West Virginia. Evidence at trial showed that Patterson had attempted to mug Brooks and his wife, Ruth Brooks. Mr. Brooks fought to stop the robbery. In the ensuing scuffle, Patterson's gun discharged, killing Mr. Brooks.

Prior to the trial, Patterson's counsel moved to prohibit the State from seeking the death penalty because race had played a role in the State's decision to seek death in the past.[94] The court summarily denied the motion. After the jury sentenced Patterson to death, counsel renewed the motion because, while the jury had been deciding Patterson's fate, the trial court had accepted a guilty plea to murder from a white defendant in a more heinous case.[95] The court again denied his motion.[96] On appeal, the South Carolina Supreme Court perfunctorily rejected his claim.[97] Once one understands the statistical and anecdotal evidence presented by the defense counsel, however, the state Supreme Court's treatment of the claim seems especially unsatisfactory.

a. Disparate Impact: The Statistical Evidence

Counsel noted that, in the past, the prosecution had sought the death penalty in relatively unaggravated cases involving a Black defendant and white victim.[98] By contrast, counsel pointed out that cases with white defendants are often more aggravated in that they involve torture or

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[94]See State v. Patterson, 482 S.E.2d 760, 767 (S.C.), cert. denied, 118 S. Ct. 146 (1997).

[95]See Transcript of Record at 2353-55, Patterson (No. 24549). The defendant, Leroy Bolin, Jr., and an accomplice broke into a home and tied the inhabitants with duct tape. When one of the burglary victims tried to escape, the defendant shot him with a shotgun. Even though that white defendant was eligible for the death penalty or could have received a life sentence without parole, the State agreed that he would be eligible for parole after serving only 20 years.

[96]See id. at 2355.

[97]See Patterson, 482 S.E.2d at 767.

[98]For example, counsel indicated that the State had sought the death penalty against J.D. Gleaton and Larry Gilbert, Black men who like Mr. Patterson received convictions for killing a white man in the course of a robbery. See Motion to Prohibit Solicitor from Exercising Peremptory Strikes Against African-Americans at 6, State v. Patterson, No. 93-GS-32-2519 (S.C. Ct. Gen. Sess. 1993).

multiple murder victims.[99] In addition to this anecdotal ***1790** evidence, defense counsel offered a statistical study that reinforced their conclusions.[100] While there had been 174 homicide victims in Lexington County since 1977, the State never had sought the death penalty in a case involving a Black victim.[101] By contrast, the prosecution had issued a notice of intent to seek the death penalty in thirteen of 128 cases (10.2%) in which the homicide victim had been white.[102] This pattern existed despite the fact that Blacks had comprised a disproportionately higher percentage of homicide victims in Lexington County. Although African Americans had constituted only eleven percent of Lexington County's population, twenty-six percent (forty-four of 172) of the homicide cases had involved Black victims.[103] Thus, the statistical evidence established that "[b]lacks are almost three times as likely as whites to be the victims of homicide but prosecutors are more aggressive in seeking punishment to protect white victims"[104] and that "[t]he most victimized group seems to be receiving the least protection, as measured by rates at which death was sought."[105]

In addition to the anecdotal and statistical data about the relation between race and the solicitor's death-seeking decisions, Patterson presented other case-specific evidence of racially discriminatory behavior. The evidence included racist innuendo from the solicitor prior to trial, the racist attitudes of the victim, and the solicitor's disparate treatment of Black and white jurors.

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[99]For example, Tony Cooper and Robert Southerland received death sentences for the kidnaping, torture, rape, and mutilation of a white woman. See State v. Southerland, 447 S.E.2d 862, 865 (S.C. 1994); State v. Cooper, 439 S.E.2d 276, 276 (S.C. 1994). Michael Torrence killed three people. See State v. Torrence, 406 S.E.2d 315, 317-18 (S.C. 1991). James Michael Charping brutally beat, raped, and tortured his victim. See State v. Charping, 437 S.E.2d 88, 89 (S.C. 1993). Ronald Smart stabbed two people to death. See State v. Smart, 299 S.E.2d 686, 687 (S.C. 1982); State v. Smart, 262 S.E.2d 911 (S.C. 1980). Robert South shot a police officer in the performance of his duties. See State v. South, 331 S.E.2d 775, 777 (S.C. 1985). Michael Sloan raped his victim, beat her head with an iron, and stabbed her. See State v. Sloan, 298 S.E.2d 92, 93 (S.C. 1982).

[100]See Defendant's Memorandum in Support of Motion to Change Venue at exhibit A, Patterson (No. 85-GS-32-526).

[101]See id. at 2.

[102]For some defendants, there was more than one trial. Professor Eisenberg, Patterson's statistical expert, however, counted multiple cases involving the same defendant as a single case.

[103]See Defendant's Memorandum in Support of Motion to Change Venue at 2, Patterson (No. 85-GS-32-526).

[104]Id.

[105]Id.

b. Contemporary Statements by the Decision Makers

The defense noted that prior to trial the solicitor had informed the press that the victim's family was afraid to speak openly because Patterson's family also lived in the area.[106] There was apparently no basis to believe that the victim's family had to fear, in any way, Patterson's ***1791** family, especially since the case already had gone to trial twice without incident. The defense contended that the State obviously was playing to the possible racist attitudes of potential jurors.[107]

Defense counsel presented evidence that the racism of the victim's widow had influenced the decision to seek the death penalty. In a deposition in connection with her civil suit against the motel in which she and Mr. Brooks had stayed, Mrs. Brooks revealed a deep-seated antipathy toward Blacks:

> Q: What did [the police] ask you about?
>
> A: They asked me if it was a man, and I told them yes, it was a man, and it was a black man. And they asked me the color, you know, whether he was black, and I said yes, he was black. That's what made me so afraid.
>
> Q: Why would that make you afraid?
>
> A: I am just totally afraid of them. I mean as long as they keep a distance from me, I'm all right, but I don't want their hands on me; I don't want anything, you know.
>
> Q: This is black people generally, you mean?
>
> A: Yes.[108]

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[106]See Lisa Greene, Man Goes on Trial for His Life for Third Time Since '84 Slaying, The State (Columbia, S.C.), Feb. 6, 1995, at A1.

[107]See Motion to Impose Sanctions for Outrageous State Conduct at 1, Patterson (No. 93-GS-32-2519).

[108]Deposition of Ruth Pruett Brooks at 29-30, Brooks v. Mid-Carolina Motor Inn, No. 3:85-2720-0 (S.C. Ct. App. 1995). Ms. Brooks later testified in the civil suit that when she was in the hospital, she made it clear that she only wanted white people to come into her room. Her wishes extended to doctors and nurses:

> A: [I] made sure there wasn't anybody come in the room, only somebody that was white.
> Q: And that was the doctor and the nurse?
> A: Yes.

Id. at 31. Later, Ms. Brooks testified about two men she saw just after her husband was shot. When asked if the men were white or Black, she answered, "White. I would have run if they had been black." Id. at 72.

c. Departures from Usual Procedures

Patterson's lawyers also presented evidence regarding the prosecution's use of peremptory strikes. For example, during Patterson's first trial, the state used its peremptory strikes to obtain an all-white jury.[109] Counsel also noted that there had been previous findings of discriminatory intent in the use of peremptory challenges in capital cases involving a Black defendant and white victim. Larry Gilbert and J.D. Gleaton were tried twice before all-white juries after the State had excluded all potential African American jurors.[110] In the sentencing report filed with the South Carolina Supreme Court, the trial judge ***1792** noted that the solicitor systematically had excluded Blacks from the jury.[111]

Patterson's counsel also presented evidence from other attorneys practicing in Lexington County. This evidence included their observations of the State's use of peremptory strikes to exclude Blacks from juries in criminal trials.[112] Again, in addition to the anecdotal data, Patterson's

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[109]See State v. Patterson, 414 S.E.2d 155, 156 (S.C. 1992).

[110]One commentator has noted that "[o]ften the only member of a racial minority who participates in the process is the accused." Bright, supra note 4, at 443. There are few Black prosecutors, especially at the highest levels. Jeffrey Pokorak has stated that there are only 22 elected African American district attorneys in the country. See Jeffrey J. Pokorak, Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors, 83 Cornell L. Rev. 1811, 1816 (1998).

[111]See Motion to Prohibit Solicitor from Exercising Peremptory Strikes Against African Americans, exhibit A at 10, Patterson (No. 93-GS-32-2519). Striking African American jurors in capital cases is widespread. For example, in the Chatahooche Judicial Circuit in Georgia — which has sent more people to death row than any other circuit in Georgia — prosecutors have used 83% of their challenges against African American jurors. See Bright, supra note 4, at 455-56.

[112]For example, Richard Briebart testified as follows:

> Q: Have you noticed what could be described as a usual practice on the part of the Solicitor to strike blacks?
> A: Where there is a black defendant, yes, sir.

Motion to Prohibit Solicitor from Exercising Peremptory Strikes Against African-Americans, exhibit C at 131, Patterson (No. 93-GS-32-2519). Attorney Daniel A. Beck, another experienced Lexington County attorney, offered similar testimony as to the practice of the solicitor's office to strike blacks from juries:

> Q: There were preemptory challenges systematically used by the Solicitor's office to exclude all black jurors in those cases?
> A: Yes, sir. I believe very strongly that there were.

Id. exhibit D at 166.

H. Patterson McWhirter, the former Public Defender for Lexington County, testified:

> A: No, I never had [in the fourteen years I was the public defender] a black on a jury. I mean I'm

counsel offered statistical evidence supporting its assertions regarding the State's use of its peremptory challenges. A statistical study by Professor William G. Jacoby of the Department of Government and International Studies at the University of South Carolina, an expert in the field of quantitative methodology, examined the solicitor's pattern of exercising peremptory strikes in Lexington County capital trials and calculated that the probability that these strikes occurred by chance was 1.93×10^{-17}.[113] That number is a decimal point followed by sixteen zeroes and then a two (with rounding). To put this in perspective, if the probability was one in a billion, that number would be a decimal point followed by eight zeroes and then a one.[114]

*1793 **d. Substantive Departures**

The State accused Patterson of committing a relatively unaggravated offense. The crime did not involve torture, multiple murder victims, or even cold-blooded, calculated murder. Instead, this case involved an immature nineteen-year-old delinquent who inadvertently shot someone in the course of a mugging gone awry.

2. Dismissive Judicial Treatment of Patterson's Claim

Patterson's claim received no better treatment than that of Matthews. Again, the court did not discuss the substantial evidence before it. The Supreme Court of South Carolina simply stated:

> Appellant contends the trial judge erred in denying his motion to bar the solicitor from seeking the death penalty on the ground of prosecutorial discrimination. Appellant contends the solicitor violated his rights under the 6th, 8th, 13th, and 14th amendments of the U.S. Constitution and article I, §§ 3, 14, and 15 of the State constitution. Appellant cited statistics on the solicitor's decision to seek the death penalty in murder cases. He argues the solicitor has sought the death penalty against white defendants only when the circumstances are highly aggravated and never when the victim was Black.
>
> In McCleskey v. Kemp, the United States Supreme Court held a full evidentiary hearing should be held if a capital defendant can establish a prima facie

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not talkin' about a death penalty trial, but I'm talkin' about [any] trial. I never had a black placed on the jury when I had a black defendant.
Q: And that was the result of the solicitor's exercising peremptory challenges.
A: Right.

Id. exhibit E at 5-6.

[113]See id. exhibit F at 2.

[114]Counsel also presented evidence that the prosecutor's reasons for challenging Black jurors in other cases were demonstrably false and thus clearly pretextual. See id. exhibit G.

> case that prosecutorial discretion in capital cases has been tainted with discrimination. This claim is essentially an equal protection claim. Appellant must provide "exceptionally clear evidence" that the decision to prosecute was for an improper reason. In McCleskey, the Court held similar statistics did not establish discrimination. Further, as we noted above, these statistics do not take the defendant's race or the aggravating or mitigating circumstances into consideration. Appellant has not proven discriminatory purpose by exceptionally clear evidence. Therefore, we hold the trial judge did not err in denying appellant's motion.[115]

In neither case did the courts acknowledge that there was a difference between the statistical evidence presented in these cases and that presented in McCleskey. Nor did the courts discuss the substantial circumstantial evidence of discriminatory intent in the prosecutors' offices. Rather, both cases all but held that without direct evidence of intent — without an admission that the prosecutor had sought the death penalty because the defendant was Black and the victim was white — a defendant could not bring a capital-sentencing racial discrimination claim.

***1794**

C. Other Post-McCleskey Cases

Post-McCleskey capital cases in other states, as well as other cases in South Carolina counties,[116] all have given little credence to claims of county-level prosecutorial discrimination. This skepticism is appropriate when the evidence supporting claims of prosecutorial discrimination is nonexistent or weak.[117] Unfortunately, the brevity of the lower courts' treatment of the issue often makes it difficult to discern what evidence was before the court. In early post-McCleskey cases, it seems fair to infer that the proof took the form of a statistical showing similar to that made in McCleskey.[118] With respect to the more recent cases, the uninformed reader might wonder: Why

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[115]State v. Patterson, 482 S.E.2d 760, 767 (S.C. 1997) (citations omitted) (quoting McCleskey v. Kemp, 481 U.S. 279 (1987)).

[116]Studies reveal statistically significant racial effects in Anderson, Greenwood, and Spartanburg counties, as well as in the Sixth Judicial Circuit, which consists of three counties. See Affidavit of Theodore Eisenberg, Bell v. Evatt, C/A No. 92-CP-04-722 (S.C. Ct. App. 1992); Testimony of Theodore Eisenberg, Truesdale v. State, No. 91-CP-29-318 (S.C. Ct. App. 1991); Testimony of Theodore Eisenberg, Elmore v. Evatt, No. 90-CP-24-1004 (S.C. Ct. App. 1990).

[117]See, e.g., Lee v. State, 942 S.W.2d 231, 237 (Ark. 1997); Underwood v. State, 708 So.2d 18, 37-38 (Miss. 1998); State v. Loza, 1997 WL 634348, at *5 (Ohio Ct. App. Oct. 13, 1997); State v. Keene, 1996 WL 531606, at *4 (Ohio Ct. App. Sept. 20, 1996); People v. Hale, 661 N.Y.S.2d 457, 467 (N.Y. Sup. Ct. 1997); Cantu v. State, 939 S.W.2d 627, 649 (Tex. Crim. App.) (en banc), cert. denied, 118 S. Ct. 557 (1997); Bell v. State, 938 S.W.2d 35, 51 (Tex. Crim. App. 1996) (en banc), cert. denied, 118 S. Ct. 90 (1997).

[118]For a substantial collection of early post-McCleskey cases, see Baldus et al., supra note 6, at 375 nn.67, 69.

do these litigants persist in making the same old, tired claim?[119] Familiarity with the facts behind some of these cases, however, raises quite different questions. Certainly the opinions in Matthews and Patterson give the reader no hint of the substantial evidence of discriminatory intent that the defendants had proffered.

The cases that do discuss the evidence of intent proffered by the defendant uniformly dismiss that evidence as insufficient. The courts treat these efforts to comply with McCleskey with varying levels of disdain. Courts' reactions include seemingly misapprehending the nature of the claim, dismissing discrimination allegations by relying on general language in McCleskey about the need to respect prosecutorial discretion, and claiming that county-level statistical data really do not show what they purport to show — county-level discrimination. The distinction between systemic statistical showings and statistical showings focused on a single decision maker largely has been ignored, despite its central role in McCleskey's rationale.[120] Furthermore, even those ***1795** cases that have taken most seriously claims based on county-wide statistical data dismissed these claims on the ground that the statistical analysis did not account for enough factors about the cases to assure positively that racial effects were at work.

Perhaps prompted by a dissent, the Florida Supreme Court conducted the most thorough analysis of any post-McCleskey racial discrimination claim to date. In Foster v. State,[121] a defendant presented statistical evidence of local prosecutorial discrimination by the Bay County, Florida prosecutor's office:

> In support of his claim, Foster proffered a study conducted by his counsel of some of the murder/homicide cases prosecuted by the Bay County State Attorney's Office from 1975 to 1987. Analyzing the raw numbers collected, Foster concluded that defendants whose victims were white were 4 times more likely to be charged with first-degree murder than defendants whose victims were black.[122]

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[119]See, e.g., Carriger v. Lewis, 971 F.2d 329, 334 (9th Cir. 1992); Meeks v. Singletary, 963 F.2d 316, 318 (11th Cir. 1992); Williams v. Cain, 942 F. Supp. 1088, 1099 (W.D. La. 1996), rev'd in part, aff'd in part, 125 F.3d 269 (5th Cir. 1997), cert. denied, No. 97-9567, 1998 WL 682167 (U.S. Oct. 5, 1998); Stewart v. Peters, 878 F. Supp. 1139, 1148-49 (N.D. Ill. 1995); Rogers v. Director, 864 F. Supp. 584, 598 (E.D. Tex. 1994).

[120]See, e.g., Watkins v. Angelone, 1998 WL 2861, at *4 (4th Cir. Jan. 7, 1998); United States v. Davis, 904 F. Supp. 554, 559-60 (E.D. La. 1995); see also State v. Taylor, 669 So.2d 364, unpublished app. at *29 (La. 1996) (dimissing [*sic*], with extreme brevity, defendant's statistical data as contrary to McCleskey, despite the fact that the statistics focused specifically on the East Baton Rouge Parish).

[121]614 So. 2d 455 (Fla. 1992).

[122]Id. at 463. The defendant's evidence also show that, of those defendants facing first-degree murder charges, white-victim defendants were six times more likely to go to trial, and that, of those defendants who went to trial, white-victim defendants were 26 times more likely to be convicted of first-degree murder. See id. The court stated that such statistical evidence did not implicate the prosecutor's decisionmaking: "The figures . . . cannot be attributed to a decision by the Bay County State Attorney's Office and thus are not relevant here." Id. at 464 n.9.

The Florida Supreme Court combined three approaches to the data to reject the claim. The court initially and incorrectly equated Foster's showing of statistical evidence that focused on one prosecutorial office's decision making with McCleskey's statewide showing: "Foster's claim suffers from the same defect [as McCleskey's]. He has offered nothing to suggest that the state attorney's office acted with purposeful discrimination in seeking the death penalty in his case."[123] Perhaps recognizing that this explanation was not reconcilable with Foster's offer of proof, the court acknowledged Foster's effort to distinguish McCleskey: "Foster argues that McCleskey does not foreclose his challenge because his evidence focuses solely on the practices of one prosecutor's office, whereas the Baldus study consisted of generalized statistics covering every aspect of Georgia's death penalty scheme."[124] The court responded to Foster's argument by invoking McCleskey's reference to wide prosecutorial discretion and the need for " 'exceptionally clear proof' " before inferring an abuse of discretion.[125] ***1796** The court then rejected Foster's proof because his statistical showing did not account for any of the nonracial variables that could have explained the disparity.[126] As the court reasoned, the disparity was not "a significantly greater disparity than figures proffered by the Baldus study which had taken into account numerous nonracial variables."[127]

In State v. Taylor,[128] the Missouri Supreme Court indicated that county-level statistical data did not bear on the prosecutor's motive in the defendant's case.[129] It treated nonstatistical evidence of other acts of discrimination by the prosecutor's office as irrelevant.[130] The defendant relied in part on statistical evidence concerning first-degree murder cases in the relevant county during the three years preceding the imposition of his death sentence.[131] He also relied on allegations of bias by an assistant prosecutor involved in his original plea, allegations of discrimination by the county prosecutors in jury selection, allegations of racial slurs and employment discrimination by the prosecutor's office, the State's unusual refusal to offer life without parole in exchange for a guilty plea, and a study of racial disparity in Missouri capital punishment cases covering 1977 to 1991.[132]

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[123]Id. at 463.

[124]Id. at 464.

[125]Id. (quoting McCleskey v. Kemp, 481 U.S. 279, 297 (1987)).

[126]See id.

[127]Id.

[128]929 S.W.2d 209 (Mo. 1996) (en banc).

[129]See id. at 221.

[130]See id.

[131]See id.

[132]See id.

The court imposed extremely narrow strictures on the kind of allegations that could contribute to a claim of prosecutorial discrimination, stating that the county-level study did "not show purposeful discrimination or any effect on his case, specifically."[133] It added that "[t]he other allegations of discrimination within the prosecutor's office were irrelevant because they did not involve decision makers, were remote in time, and did not show discriminatory purpose in his case."[134]

In Lane v. State,[135] the defendant presented the Nevada Supreme Court with a county-level study that allegedly established that the county intentionally had sought the death penalty in a racially discriminatory manner.[136] The court rejected the showing on the ground that the study did not control for enough factors about the cases:

> The survey's fatal flaw is that it fails to demonstrate that black and white persons who are similarly situated are treated differently.
>
> *1797 First, Lane's statistics do not sufficiently narrow the factors which weigh into the prosecutor's decision to seek the death penalty. While the survey does tend to show that the death penalty has been sought more often for black non-felons than for white felons, the survey fails to take into consideration the relative strengths and weaknesses of those eighty-six cases, the individual characteristics of the offenses, whether aggravating or mitigating circumstances were present or absent, the nature of the aggravating and mitigating circumstances, whether plea bargains were offered and accepted, and the individual characteristics and attitudes of each capital defendant.
>
> Without such vital information, we cannot determine whether or to what extent race may have been implicated in the capital cases involved in the survey. We therefore have no basis for holding that there was a racially discriminatory purpose behind the Washoe County District Attorney's decision to seek the death penalty in this case.[137]

Thus, although the court expressed a willingness at least to consider a county-level statistical showing, it dismissed the showing as insufficiently complete.

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[133]Id.

[134]Id.

[135]881 P.2d 1358 (Nev. 1994), vacated on other grounds, 956 P.2d 88 (1998).

[136]See id. at 1362.

[137]Id. at 1362-63.

The Supreme Court of California, in People v. McPeters,[138] expressed a similar willingness to consider countywide data on race-of-victim effects, but it seemed similarly critical of the particular study proffered. McPeters, however, differs from most post-McCleskey cases in that it involved a pre-trial motion for discovery. The Fresno Public Defender Office had accumulated data and had correlated the race of the victim to death sentences. These data seemed compelling on their face: Although only one-third of all willful homicide victims were white, "all death or life-without-parole sentences were meted out in cases involving White victims."[139] These data coupled with the modest nature of the relief requested seemingly would have made the court more inclined to accept the defendant's statistical data. The California Supreme Court, however, denied the defendant's pretrial motion for discovery of the prosecution's records relating to capital-charging policies and criticized the study for not describing or analyzing the facts or circumstances of the cases beyond race.[140]

Although we have focused most of our attention on single decision maker statistical showings, courts have also dismissed another subset of post-McCleskey racial discrimination claims with individualized proof. Some litigants have used statewide data, combined with undisputed evidence that other decisions in the defendant's case have ***1798** rested on racial criteria. In Davis v. Greer,[141] the Seventh Circuit reviewed a statistical study showing that: (1) a capital defendant in Illinois was six times more likely to receive the death penalty if his victim was white; and (2) a black defendant convicted of killing a white victim was 3.75 times as likely to receive the death penalty as a white defendant convicted of killing a white victim.[142] The court held that this study was insufficient to support an inference of discrimination even when the prosecutor had decided to remove all African Americans from the jury venire.[143] The court failed to explain why the racial cleansing was not probative of racial bias in the decision to seek death. In an even stronger case, involving statewide data, countywide data, and admitted race discrimination in jury selection, the Northern District of Illinois was less cryptic, but equally unimpressed:

> [The defendant] asks this Court to make a leap of logic that cannot be made under the McCleskey standard: that there is a direct correlation between how the state uses its peremptories and the questions whether the state seeks the death penalty in a racially discriminatory manner or whether the jurors that ultimately serve use racial bias. Admittedly, the unconstitutionality of discrimination in the use of peremptories

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[138] 9 Cal. Rptr. 2d 834 (Cal. 1992).

[139] Id. at 843 (emphasis added).

[140] See id. at 843-44.

[141] 13 F.3d 1134 (7th Cir. 1994).

[142] See id. at 1143.

[143] See id. at 1143-44.

hinges in part on an assumption that jurors might use the race of the defendant or the victim in its decision. However, we cannot leap from that proposition to the conclusion that the prosecution decided to seek or the jury imposed the death penalty on racial grounds.[144]

III

Critique of Post-McCleskey Cases: Have Courts Accurately Applied Equal Protection Principles?

This sampling of cases addressing post-McCleskey county-level claims shows a range of judicial responses. The responses can be evaluated at two levels. First, at the doctrinal level, the cases raise the question whether the courts are reasonably applying McCleskey to county-level, prosecutor-specific discrimination claims, given the background of general equal protection doctrine. Here the answer seems clear: the courts are less hospitable to such claims than they should be. A second level of analysis, which is explored in the next section of this Article, separates the question of ultimate proof of county-level prosecutorial discrimination from the logically prior question concerning the allocation of burdens of proof and persuasion. All other ***1799** areas of discrimination treat these questions separately. Separating these questions in the county-level selective-prosecution area would allow a capital defendant who makes a reasonable showing of racial effects to shift the burden of production to prosecutors, who have unique knowledge of why they chose to seek death in some cases but not others.

The cases recounted above show crucial misunderstandings of what McCleskey does and does not hold. The most fundamental error arises when courts infer that the failure of the statistically based attack on racial effects in McCleskey dooms all subsequent equal protection challenges to prosecutorial capital case decision making that rely on evidence of racial patterns.[145] As discussed in Part I, this reading of McCleskey is neither accurate nor consistent with broader equal protection doctrine.[146]

One must also question courts that refuse to draw inferences of prosecutorial-level discrimination in one case from prosecutorial behavior in other local cases. Cases such as Taylor hold that county-level statistical data regarding prior cases do not bear on the prosecutor's motive

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[144]Williams v. Chrans, 742 F. Supp. 472, 495 (N.D. Ill. 1990).

[145]See, e.g., United States v. Olvis, 97 F.3d 739, 746 (4th Cir. 1996) (citing McCleskey as embodying a "general rule that in cases involving discretionary judgments 'essential to the criminal justice process,' statistical evidence of racial disparity is insufficient to infer that prosecutors in a particular case acted with a discriminatory purpose"); Baldus et al., supra note 6, at 374 (stating that McCleskey effectively terminated statistically based claims of racial discrimination in capital sentencing).

[146]See supra Part I.C.

in a subsequent defendant's case.[147] McCleskey by no means mandates this approach to statistical evidence. It merely holds that statewide data, standing alone, are insufficiently connected to an individual defendant's case to create an inference of racial discrimination.[148]

Beyond McCleskey, this ban on countywide data is inconsistent with the treatment of similar evidence in other contexts. Consider, for example, a government personnel officer who has refused to hire every Black applicant over a period of years. A current Black job applicant who offered such evidence likely would not be told that the apparent prior pattern of race-based decision making was unrelated to proving intentional discrimination in her case. The prior pattern would be probative evidence. To treat it otherwise would be inconsistent with Arlington Heights's instruction to conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[149] The circumstantial nature of statistical patterns of prior behavior does not disqualify them from supporting a finding of intentional discrimination. In some contexts, such as discrimination ***1800** in jury panels, courts only require statistical evidence from other cases.[150] When statistical evidence — even statewide statistical evidence, but certainly countywide evidence — is combined with direct evidence of other discriminatory acts by prosecutors and their offices, it is difficult to see why additional kinds of evidence would be necessary.

Courts that recognize the relevance and probity of county-level evidence rely on yet another misapprehension to reject capital defendants' claims of prosecutorial discrimination. For example, while the state supreme courts in Foster and Lane expressed willingness to consider statistical evidence of county-level discrimination, they both found the statistical showings to be inadequate because the showings did not control for enough factors about the cases.[151] Stark racial effects, even though statistically improbable, would not suffice.

Under this view, defendants may need to analyze each homicide case in the relevant county for the presence of racial factors, for the presence of statutory aggravating and mitigating factors, and for the presence of other factors that legitimately might influence prosecutorial decision making. But such an analysis would be impossible. Because a capital defendant enjoys a constitutional right to proffer in mitigation "any aspect of [his] character or record and any of the circumstances of the offense,"[152] defendants would have to hypothesize, in each case, about all of the features that the

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[147]See supra text accompanying notes 122-28.

[148]See supra Part I.B-C.

[149]Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (emphasis added).

[150]See Castaneda v. Partida, 430 U.S. 482, 500-01 (1977).

[151]See supra text accompanying notes 120-21, 131.

[152]Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); accord McKoy v. North Carolina, 494 U.S. 433, 441 (1990); Mills v. Maryland, 486 U.S. 367, 374-75 (1988); Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987).

prosecutor might have found to be mitigating. Moreover, they would have to do so with the minimal amount of information about cases that exists in sources reasonably available to them.

As a preliminary matter, the post-McCleskey courts' insistence on more detailed statistical showings may stem in part from the proof in McCleskey. The comprehensive, sophisticated showing that McCleskey rejected may have raised unrealistic expectations about the depth of statistical evidence that one should expect in the mass of capital cases.[153] Some courts have commented that the county-level showings in their cases controlled for fewer factors than the statewide showing in McCleskey.[154] However, it is not feasible to expect a typical, individual defendant to control for hundreds of factors about a case — McCleskey was an exceptional defendant in this regard. In addition, one ***1801** reasonably cannot expect county-level attacks, particularly outside populous urban areas, to include hundreds of variables in the analysis. To include hundreds of variables in a multiple-regression analysis similar to that in McCleskey requires thousands of cases.[155] The Baldus study in McCleskey included over 2,000 cases,[156] but could do so only because it was a statewide study in a state with many capital cases. To insist that prosecutorial discrimination studies control for many factors about a case, while requiring that they be conducted at the county level and yield statistically significant results, asks the impossible of most defendants, and of all defendants outside large urban areas. Moreover, in urban areas where the numbers might be large enough for such controls, more than one decision maker would be the norm; so in another sense, these studies would be less probative of the likelihood that racial motivation affected the decision to seek the death penalty for an individual defendant.

Insistence on massive controls of factors about cases is not the norm in other discrimination areas. In McCleskey itself, the Court cited with approval Bazemore v. Friday[157] for the proposition that the Court "has accepted statistics in the form of multiple-regression analysis to prove statutory violations under Title VII of the Civil Rights Act of 1964."[158] Bazemore took a reasonable attitude towards the comprehensiveness of statistical analysis required to establish discrimination. Indeed, it expressly eschewed requiring a plaintiff to include all relevant variables in a statistical model and stated:

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[153]As Justice Brennan noted in McCleskey: "McCleskey presents evidence that is far and away the most refined data ever assembled on any system of punishment, data not readily replicated through casual effort." McCleskey v. Kemp, 481 U.S. 279, 341 (1987) (Brennan, J., dissenting).

[154]See, e.g., Foster v. State, 614 So. 2d 455, 464 (Fla. 1992).

[155]Helena Chmura Kraemer & Sue Thiemann, How Many Subjects? Statistical Power Analysis in Research 65 (1987).

[156]See McCleskey, 481 U.S. at 286.

[157]478 U.S. 385 (1986).

[158]McCleskey, 481 U.S. at 294 (citing 478 U.S. 385, 400-401 (1986) (Brennan, J., concurring in part)).

> The Court of Appeals erred in stating that petitioners' regression analyses were "unacceptable as evidence of discrimination," because they did not include "all measurable variables thought to have an effect on salary level." The court's view of the evidentiary value of the regression analyses was plainly incorrect. While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors "must be considered unacceptable as evidence of discrimination." Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.
>
> Importantly, it is clear that a regression analysis that includes less than "all measurable variables" may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination ***1802** by a preponderance of the evidence. Whether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant. However, as long as the court may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail.[159]

One court has extended Bazemore's willingness to consider statistical analyses that do not account for all relevant variables to statistical showings other than regression analysis.[160]

Perhaps most importantly, those studies that have been able to control for many factors in capital cases suggest that even when all feasible factors are controlled, the racial effects usually do not disappear. The Baldus study in McCleskey, the detailed study of Philadelphia cases in this Symposium,[161] state-sponsored studies in New Jersey,[162] and studies by Samuel Gross and Robert Mauro[163] all controlled for factors that are beyond the ability of capital defendants faced with analyzing only dozens or hundreds of homicide cases. Yet racial effects do not disappear in these

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[159]Bazemore, 478 U.S. at 400-01 (footnote and citations omitted).

[160]See Salazar v. District of Columbia, 954 F. Supp. 278, 288 n.24 (D.D.C. 1996) ("While the regression analyses considered in Bazemore do differ from Plaintiffs' statistical sample study in this case, the Supreme Court's discussion is still helpful, because it directly addresses the validity of an expert statistical analysis that fails to incorporate all relevant information.").

[161]See Baldus et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 Cornell L. Rev. 1638 (1998).

[162]See State v. Marshall, 613 A.2d 1059, 1063-65 (N.J. 1992); Baldus et al., supra note 6, at 405-13.

[163]See Gross & Mauro, supra note 4, at 43-92. This study also contains a useful discussion of the likely effect of omitted variables. See id. at 97.

most comprehensive studies. Instead, these effects may even increase in strength.[164] Thus, it is reasonable to treat statistically significant showings of racial effects seriously even when these effects have not controlled for all potentially relevant factors about capital cases. Of course, that does not mean that in any individual case, there will never be factors that have caused spurious racial effects. The question is only whether to presume that greater controls would eliminate racial effects, and to that query, the older, more comprehensive studies offer a clear answer: No.

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IV

Properly Allocating the Burden of Production: Statistical and Other County-Level Evidence as Establishing a Prima Facie Case

One oversight that exacerbates problems with existing judicial analyses of county-level discrimination claims is the failure to separate the burden of production from the ultimate burden of persuasion. Courts tend to act as if the capital defendant alleging discrimination must establish the existence of discrimination. They rarely discuss the concept of a prima facie case that shifts the burden of production to the alleged wrongdoer. Regardless of the strength of his initial showing, courts are making the capital defendant bear the full burden of producing evidence, as well as the burden of persuasion traditionally allocated to a civil movant. In Matthews, Patterson, and McPeters, the courts deemed the defendants' strong statistical and other showings insufficient — even to warrant discovery that would have provided useful, and perhaps definitive, information about prosecutorial decision making. This one-sided approach to the capital defendant's burdens is inconsistent both with the theory of how burdens of production normally are allocated and with how the Supreme Court has allocated these burdens in other areas of discrimination.

A. The Theory of Burdens of Production

Edmund Morgan's classic discussion of presumptions notes that some presumptions "have their origin in considerations of the comparative convenience with which the parties can produce evidence of the fact in issue."[165] This approach to presumptions squares both with common sense and with more modern notions of efficiency. The litigant with easier access to information ought in general to be responsible for producing that information. The capital defendant who makes a prima facie case of discrimination should be entitled to a favorable presumption until the prosecutor offers evidence to rebut the prima facie case.

In county-level discrimination cases, the prosecutor's office clearly enjoys easier access to the most accurate information available. To make a colorable showing of prosecutorial discrimination a capital defendant must search public records and construct a list of homicide cases that might have been death eligible. After constructing the list, the defendant must ascertain, as best

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[164] See Baldus et al., supra note 161, at 1675.

[165] Edmund M. Morgan, Some Observations Concerning Presumptions, 44 Harv. L. Rev. 906, 926 (1931).

he can, information about each case. Such information, although fundamental to the defendant's claim, is not always readily available from the public record. Sometimes *1804 counsel must gather even the most basic facts, such as the race of the defendant or victim, from other sources. Thus, even to make a simple statistical statement, such as "the prosecutor's office never has sought the death penalty in this county in a Black-victim case," can involve enormous amounts of intensive archival work. Systematically extracting other pertinent information — the presence of aggravating and mitigating circumstances, the relation between the defendant and the victim, the defendant's prior criminal record, and the details of the crime — can be extremely difficult. Furthermore, because defendants may offer, and prosecutors may consider, nonstatutory mitigating factors, one reasonably cannot expect the capital defendant to know precisely what moved a prosecutor in other homicide cases to seek or not to seek death.

In contrast to the sometimes insurmountable burdens that capital defendants face in constructing colorable claims of discrimination, county-level prosecutors that face discrimination charges have personal knowledge of all relevant factors influencing the decision whether to seek death. Capital defendants who make showings as strong as those made in Patterson, Matthews, and other cases should benefit from a production-shifting presumption that requires the prosecutor to come forward with evidence about the factors influencing his decision making.

B. Allocation of Burdens of Production in Other Discrimination Cases

A reasonable prima facie standard for county-level prosecutorial discrimination claims would be a standard consistent with other discrimination jurisprudence. In both constitutional and statutory cases, the Supreme Court allows reasonable initial showings of racial effects to shift the burden of production to the alleged discriminator. This burden shifting is found in the constitutional areas of jury selection[166] and peremptory challenges,[167] as well as in the statutory Title VII context.[168]

McCleskey did distinguish the nature of the capital-sentencing decision from prior holdings that accepted statistical proof in jury selection and Title VII cases.

> *1805 [T]he capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII cases. Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire.

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[166]See Castaneda v. Partida, 430 U.S. 482, 497-98 (1977).

[167]See Batson v. Kentucky, 476 U.S. 79, 94 (1986).

[168]See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509-10 (1993); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714-15 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576-77 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973); see generally Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 Geo. L.J. 279, 324-34 (1997) (discussing burdens of proof in employment discrimination).

> Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. Thus, the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case. In those cases, the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions.[169]

The basis upon which McCleskey distinguished these other areas from capital sentencing, however, is inapplicable to county-level attacks on prosecutorial discrimination. In county-level discrimination claims, the Court's concerns about attacks on decentralized decision making are irrelevant. An inference from statistics about the prior behavior of the same prosecutor or prosecutor's office is not the same as the inference needed in McCleskey, which was from statewide general statistics to a local decision not necessarily related to those statistics. As in the jury venire selection and Title VII cases, county-level statistics relate to fewer entities. In fact, they relate to only one person or entity.

The smaller number of decision makers creates two crucial differences. First, the inference that the defendant himself experienced racial discrimination becomes stronger if we know that his prosecutor, at least some of the time, engaged in racial discrimination. Second, when the challenged decision focuses on one person or entity, that person or entity may rebut incorrect inferences about the decision. This type of rebuttal is not possible with statewide data because no one person or entity is privy to the information that could rebut the inference.

Thus, the concern about death-seeking decision making involving more variables is all that remains of McCleskey's uniqueness. If one assumes that the decision to seek death involves more factors than the decision employed in Title VII cases, then this concern remains at least partially intact. But the studies discussed above,[170] which do contain many variables, suggest that controlling for multiple variables does not eliminate racial effects. So it is unlikely that racial effects in ***1806** simpler studies are merely artifacts of failing to control for more variables. Further, there is no support for a contrary presumption. Given the available data, courts should not shield discrimination from effective review simply because it occurs in a more complex setting than heretofore encountered.

C. A Modest Proposal

Decades of Supreme Court jurisprudence in virtually all other areas of discrimination, as well as intimations in county-level selective-prosecution cases, support ruling that a reasonable prima

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[169]McCleskey v. Kemp, 481 U.S. 279, 294-95 (1987) (citation and footnote omitted).

[170]See supra notes 161-63 and accompanying text.

facie case of discrimination shifts the burden of production to the alleged discriminator. In Washington v. Johnson,[171] the Fifth Circuit describes a process in which the prosecutor was forthcoming with evidence about the bases for his decision to seek death in the defendant's case:

> In his state petition for habeas relief, Petitioner raised the claim of purposeful racial discrimination. The State responded with an affidavit of Bill Turner, the Brazos County district attorney, who made the decision to charge Washington with capital murder. Turner affirmed that race does not play a role in charging decisions, and that in Washington's case, capital murder and the death penalty were sought because of the nature of the murder, committed in the course of a robbery, and because of Washington's past violence and statements warning of possible future violence. Additionally, the affidavit set forth the capital murder cases in which Turner had been involved and the sentences imposed. Washington, though afforded the opportunity to cross examine Turner at the state habeas hearing on the contents of the affidavit, declined to question him.[172]

After a prima facie case is established, the prosecutor could furnish similar evidence about relevant homicide cases in which death had and had not been sought. In Foster v. State,[173] Chief Justice Barkett, in a concurrence and dissent, suggested the following standard[174] for capital cases:

> A party asserting racial discrimination in the State's decision to seek the death penalty should make a timely objection and demonstrate on the record that the discrimination exists and that there is a strong likelihood it has influenced the State to seek the death penalty. Such discrimination conceivably could be based on the race of the victim or on the race of the defendant. Once the trial court ***1807** determines that the initial burden has been met by the defendant, the burden then shifts to the State to show that the practices in question are not racially motivated. If the trial court determines that the State does not meet that burden, the State then is prohibited from seeking the death penalty in that case.[175]

A burden-shifting rule is not inconsistent with the Supreme Court's ruling against McCleskey. In a statewide challenge, as in McCleskey, one cannot expect meaningful rebuttal evidence because the challenged decision makers are so diffuse. At the county level, however, there

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[171]90 F.3d 945 (5th Cir. 1996), cert. denied, 117 S. Ct. 1259 (1997).

[172]Id. at 954.

[173]614 So.2d 455 (Fla. 1992).

[174]Chief Justice Barkett proposed this standard for determining violations of the Florida State Constitution, but we think it aptly describes the standard that federal equal protection law as a whole mandates.

[175]Foster, 614 So. 2d at 468 (Barkett, C.J., concurring in part and dissenting in part).

is little reason not to require rebuttal evidence. Moreover, if a prosecutor failed to rebut a defendant's showing, that would not jeopardize the death penalty in masses of cases, but only would require the reversal of the death sentences that he had sought.

Interestingly enough, even though Foster had not proffered county-level evidence, Chief Justice Barkett explained the kind of evidence that a prima facie case would include: statistical evidence in a particular jurisdiction and "other information that could suggest discrimination, such as the resources devoted to the prosecution of cases involving white victims . . . , and the general conduct of a state attorney's office, including hiring practices and the use of racial epithets and jokes."[176] This type of evidence, of course, is exactly the kind of information proffered in the cases discussed in this Article and uniformly dismissed by lower courts as insufficient. It is also the kind of evidence routinely accepted in other kinds of equal protection cases.

To be specific, we propose that if the defendant establishes a prima facie case of discrimination, by which we mean a showing by statistical or other evidence that discrimination is more likely than not to have occurred, then the burden of production shifts to the prosecutor, who must then articulate some legitimate, nondiscriminatory reason for seeking death. If the prosecutor fails to assert such a reason, the defendant prevails. If the prosecutor produces evidence creating a genuine issue of fact, then the defendant, retaking the burden of persuasion, must establish discrimination by a preponderance of the evidence.

Conclusion

It is remarkable that in ten years of post-McCleskey litigation, not a single claimant has prevailed. In any discrimination case, judges are reluctant to find intentional discrimination by state officials.[177] Nevertheless, in other classes of race cases, courts do find intentional discrimination ***1808** with less evidence than has been accumulated in some of these cases. Why are courts so hostile to post-McCleskey county-level claims?

One might wonder if reluctance to find intentional discrimination is especially strong in the case of prosecutors, whose race-neutral exercise of discretion should be a lynchpin of our criminal justice system. While this reluctance may explain the post-McCleskey cases in part, courts have not exhibited nearly the same reluctance to find prosecutors guilty of Batson violations. In other contexts as well, courts have not treated prosecutors as if they were above the law.[178]

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[176]Id. at 467.

[177]See Theodore Eisenberg & Sheri Lynn Johnson, The Effects of Intent: Do We Know How Legal Standards Work?, 76 Cornell L. Rev. 1151, 1181 (1991).

[178]See Kalina v. Fletcher, 118 S. Ct. 502 (1997); Buckley v. Fitzsimmons, 509 U.S. 259, 272-76 (1993); Burns v. Reed, 500 U.S. 478, 492-96 (1991).

Nor is the suggestion that there have been no post-McCleskey winners because there has been no racial discrimination in the decisions to seek the death penalty a plausible hypothesis. Many studies show capital case racial effects. Moreover, if prosecutors commonly use race to select juries, why would we expect that they are somehow more colorblind in their decisions to seek the death penalty?

Whatever the source of the lower courts' reluctance, one manifestation of this reluctance is their focus on statements in McCleskey about high evidentiary standards for race-based claims in capital cases, and their corresponding inattention to the context of these statements. After holding that McCleskey had presented no evidence of discrimination in his case, the Court in McCleskey emphasized the broad discretion of prosecutors and the need for solid proof.[179] Although courts rely on this emphasis to reject post-McCleskey claims,[180] the Supreme Court's expressed concern does not preclude race-based attacks on prosecutorial decision making.

Thus, the question in Matthews, Patterson, and cases from other states is not whether McCleskey precludes their form of the race-based challenge, but rather what level of proof should trigger the imposition of a burden on county-level decision makers.

***1809** A final reason for hostility to post-McCleskey claims, in both South Carolina and elsewhere,[181] is that courts often are reluctant to discuss or even describe evidence of racial bias in criminal cases. For example, the South Carolina Supreme Court recently reversed the conviction and death sentence in State v. Manning.[182] Manning is African American, and the victim, a state-

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[179]The Court in McCleskey states:

> [T]he policy considerations behind a prosecutor's traditionally "wide discretion" suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties "often years after they were made." Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.

McCleskey v. Kemp, 481 U.S. 279, 296-97 (1987) (citations omitted).

[180]See, e.g., Foster, 614 So. 2d at 464.

[181]Other state courts have shown a similar reluctance to address similar issues. See Bright, supra note 4, at 471. For example, in Isaacs v. State, 355 S.E.2d 644 (Ga. 1987), the court held that the trial judge should have recused himself because of his involvement in a motion to disqualify. See id. at 646. The court, however, failed to mention that the motion was motivated by the judge's record of racial discrimination. See Bright, supra note 4, at 471. As another example, the Missouri Supreme Court reversed two capital cases without mentioning that the prosecutors had used racial slurs to refer to Black citizens, systematically excluded Blacks from juries, and refused to plea bargain in Black-defendant/white-victim cases. See id.

[182]495 S.E.2d 191 (S.C. 1997).

trooper, was white.[183] After a mistrial (at which the jury hung 10-2 for acquittal), the prosecution requested and obtained a change of venue, arguing in effect that there were too many potential Black jurors in Dillon County for the State to obtain a fair trial.[184] The trial judge, a former police officer, granted the motion and transferred the case to a county with a significantly smaller Black population than Dillon County.[185] The state court reversed, finding the trial judge's decision to grant the change of venue an abuse of discretion.[186] However, the court never mentioned the racial basis of the State's request. The South Carolina Supreme Court has avoided other thorny racial issues in capital cases,[187] and as Coker v. Georgia[188] suggests, the Supreme Court sometimes may do the same.[189]

Fear of labeling state officials racist, the need for prosecutorial discretion, and general reluctance to address racial claims all may fuel the doctrinal missteps in post-McCleskey county-level cases. An understanding of courts' reluctance is not, however, a reason to condone such action. Judges, especially federal judges, enjoy constitutionally protected independence precisely because they must make unpopular and difficult decisions. In the proud modern history of the judiciary, judges' finest hours have come by challenging discrimination rather ***1810** than sheltering it.[190] It would be ironic if they now were to afford racial discrimination its greatest shelter, through heightened burdens of proof, in cases involving life and death.

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[183]See Final Brief of Appellant at 3, Manning (No. 95-CP-0629).

[184]See id.

[185]See id.

[186]See Manning, 495 S.E.2d at 195-96.

[187]See State v. Arthur, 374 S.E.2d 291 (S.C. 1988). The trial judge made the comment that the mentally retarded defendant, who was African American, would have been "better off under slavery, because at least then he would have had somebody to take care of him." Brief of Appellant, Arthur (No. 22924).

[188]433 U.S. 584 (1977).

[189]Cf. Dobbs v. Kemp, 790 F.2d 1499 (11th Cir. 1986), modified and reh'g denied, 809 F.2d 750, cert. denied, 481 U.S. 1059 (1987).

[190]See, e.g., Brown v. Board of Education, 347 U.S. 483, 495 (1954); Jack Bass, Unlikely Heroes (1981).

APPENDIX P

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(Cite as: 233 F.3d 1322)

United States Court of Appeals,
Eleventh Circuit.

Kris Edward HELTON, Plaintiff-Appellee,
v.
SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, Defendant-Appellant.

No. 00-10097.

Nov. 21, 2000.

After his second-degree murder conviction was affirmed, 641 So.2d 146, petitioner filed federal habeas petition. The United States District Court for the Southern District of Florida, No. 98-10110-CV-NCR, Norman C. Roettger, Jr., J., 85 F. Supp.2d 1323, granted writ of habeas corpus, and state's Department of Corrections appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) extraordinary circumstances warranted equitable tolling of habeas statute's limitations period, and (2) trial counsel's failure to investigate or present gastric evidence regarding victim was ineffective assistance of counsel.

Affirmed.

West Headnotes

[1] Habeas Corpus k603
197k603
The period of limitations under the federal habeas corpus statute may be equitably tolled when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence. 28 U.S.C.A. § 2254.

[2] Habeas Corpus k843
197k843
[2] Habeas Corpus k846
197k846
Whether the district court properly applied the standard for equitable tolling under the federal habeas corpus statute is a question of fact which is reviewed for abuse of discretion, and Court of Appeals defers to the district court's findings of fact unless clearly erroneous. 28 U.S.C.A. § 2254.

[3] Habeas Corpus k842
197k842
Whether a criminal defendant has received effective assistance of counsel is a mixed question of fact and law which Court of Appeals reviews de novo on federal habeas review, although Court reviews for clear error the state trial court's findings of the historical facts underlying the claim. U.S.C.A. Const.Amend. 6.

[4] Limitation of Actions k104.5
241k104.5
Equitable tolling of a statute of limitations is an extraordinary remedy which is generally applied sparingly.

[5] Habeas Corpus k603
197k603
Extraordinary circumstances warranted equitable tolling of statute of limitations for state prisoner's filing of federal habeas petition, in view of prisoner's receipt of incorrect information as to relevant limitations period, his inability to discover appropriate calculation due to deficiencies in prison library system, his diligent pursuit of his legal remedies without delay, and unusual history of the case. 28 U.S.C.A. § 2254.

[6] Criminal Law k641.13(6)
110k641.13(6)
Defense counsel's failure to investigate or present gastric evidence, namely, evidence of murder victim's stomach contents, to establish victim's time of death was ineffective assistance of counsel, as evidence was potentially exculpatory, and defendant was prejudiced because evidence could have created reasonable doubt in case that was based purely on circumstantial evidence. U.S.C.A. Const.Amend. 6.

***1323** Michael J. Neimand, Florida Atty. General's Office, Dept. of Legal Affairs, Miami, FL, for Defendant-Appellant.

Melvin S. Black, Miami, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, HILL and POLITZ **[FN*]**, Circuit Judges.

FN* Honorable Henry A. Politz, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

POLITZ, Circuit Judge:

The Florida Department of Corrections appeals the district court's grant of a writ of habeas corpus to Kris Edward Helton. For the reasons assigned, we affirm.

BACKGROUND

In 1991, Helton was living with his fiancée, Marcella Gunderson, and her three children, Matthew, Michael, and Marshall. On July 31, 1991, at around 6:30 P.M., Gunderson fed twenty-two month old Marshall a small amount of dinner, consisting of chicken, rice, and strawberry yogurt. She then put Marshall to bed at approximately 8:30 P.M. Helton arrived home at 9:30 P.M. and around 11 P.M. they retired to bed. Around 1:30 A.M. Gunderson ***1324** awoke and found Helton sitting up in bed, smoking a cigarette, with what she described as a "worried look on his face." Helton told her that her movements had awakened him. Gunderson got up to check on the children. Upon entering Marshall's room, she discovered he was not in his crib. Alarmed, she called Helton and they found Marshall's body outside at the bottom of the front steps, lying face down. The child was taken to a local hospital in an ambulance and pronounced dead upon arrival.

An autopsy determined that the cause of death was a severe trauma to the head. The medical examiner found pink particulate in the boy's stomach, along with fibrous white matter described as rice. A specific time of death assessment was not made at that time.

Helton was convicted by a jury of second-degree murder of the child and was sentenced to life imprisonment. On direct appeal, the Florida Court of Appeal unanimously reversed, finding that the evidence was insufficient to support a circumstantial evidence conviction. That court granted a rehearing, withdrew its reversal, and examined the case under a restated standard for circumstantial convictions, specifically: a conviction can stand only if the evidence is inconsistent with any reasonable hypotheses of innocence. Applying this standard, the appellate court determined that there was evidentiary contradiction to all logical hypotheses of Helton's innocence. They then affirmed the conviction. **[FN1]** In a dissenting opinion, one jurist stated that he would reverse the conviction and award a new trial, based largely on the gastric evidence. That jurist concluded, "There can be no doubt that this evidence might have affected the verdict rendered." **[FN2]** The Florida Supreme Court denied review of Helton's petition. The United States Supreme Court also denied his petition for review. Helton then pursued collateral relief in state court; however, this also was denied, as was his pro se petition for habeas corpus.

FN1. Helton v. State of Florida, 641 So.2d 146 (Fla.Dist.Ct.App.3d Cir.1994).

FN2. Id. at 156. The majority opinion did not discuss the gastric evidence. Instead, they noted in a footnote that any claim Helton may have for ineffective assistance of counsel must be brought by motion for post-conviction relief. They also noted that the record in the case at that time was "wholly inadequate" in regards to the benefits of the stomach contents evidence. Id. at 154 n. 11.

Helton then filed the instant petition, invoking 28 U.S.C. § 2254, alleging ineffective assistance of counsel. Helton's challenge focuses on the trial attorney's failure to investigate and employ a time of death argument based on the gastric evidence. The state's reply to the habeas application centered mainly on its claim that the petition was untimely.

Following an evidentiary hearing on the gastric evidence/time of death claims, the court a quo granted the writ, finding that trial counsel was ineffective for failing to challenge the time of death and present the gastric evidence. As to the issue of timeliness, the district court found that equitable tolling was warranted in this case based on: 1) the petitioner's diligent pursuit of his legal rights on appeal; 2) the misinformation by Helton's counsel as to the expiration of the statute of limitations; 3) the inadequacy of the prison library; and 4) the "strange history of this case." **[FN3]**

FN3. Helton v. Singletary, 85 F. Supp.2d 1323, 1328 (S.D.Fla.2000).

ANALYSIS

[1][2][3] In Sandvik v. United States, **[FN4]** we held that § 2254 was intended to be an ordinary statute of limitations and not a jurisdictional bar. The period of limitations, therefore, may be equitably tolled "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even ***1325** with diligence." **[FN5]** We also stated that we reviewed the district court's dismissal of the motion de novo because this was solely an issue of law. **[FN6]** In Sandvik, we were faced with determining, in the first instance, whether equitable tolling should be allowed under § 2254. We here review whether the district court properly applied the standard for equitable tolling. This is a question of fact which is reviewed for abuse of discretion. **[FN7]** We defer to the district court's findings of fact unless clearly erroneous. **[FN8]** Whether a criminal defendant has received effective assistance of counsel is a mixed question of fact and law which we review de novo. We review for clear error, however, the trial court's findings of the historical facts underlying the claim. **[FN9]**

FN4. 177 F.3d 1269 (11th Cir.1999).

FN5. Steed v. Head, 219 F.3d 1298, 1300 (11th Cir.2000) (citing Sandvik, 177 F.3d at 1271).

FN6. Id.

FN7. See United States v. Patterson, 211 F.3d 927 (5th Cir.2000); Graham-Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552 (6th Cir.2000); Santa Maria v. Pacific Bell, 202 F.3d 1170, 1175 (9th Cir.2000) ("[A] district court's decision whether a statute of limitations has been equitably tolled is generally reviewed for an abuse of discretion, unless the facts are undisputed, in which event the legal question is reviewed de novo."); Clark v. Runyon, 116 F.3d 275 (7th Cir.1997).

FN8. Justice v. United States, 6 F.3d 1474 (11th Cir.1993).

FN9. Mincey v. Head, 206 F.3d 1106 (11th Cir.2000).

[4][5] Equitable tolling is an extraordinary remedy which is generally applied sparingly. **[FN10]** It is undisputed that the petitioner missed the one year deadline under the AEDPA. The district court opined that it was "not disposed to apply mechanically the limitations period when review is so glaringly warranted. Such result would belie the meaning of 'equitable tolling'." **[FN11]** We agree. Although this court has recently held that attorney "miscalculation of the limitations period or mistake is not a basis for equitable tolling," we previously have not been faced with a situation, such as is here presented, where a combination of several factors results in such extraordinary circumstances. **[FN12]** The facts present in this case go beyond mere attorney miscalculation. Not only did Helton receive incorrect information as to the relevant statute of limitations, but he was further prevented from discovering the appropriate calculation due to the found deficiencies in the prison library system.

FN10. Steed, 219 F.3d at 1300.

FN11. Helton, 85 F. Supp.2d at 1328.

FN12. Steed, 219 F.3d at 1300.

As the trial judge noted, the Supreme Court has declared that equitable tolling may be allowed in situations where the claimant has actively pursued his legal remedies. **[FN13]** The district court specifically found that this case involved a petitioner who has diligently pursued his legal remedies without delay. This is not the case of a prisoner waiting several years to bring his petition for habeas corpus. Viewed in its totality, we cannot say that this finding is clearly erroneous.

FN13. See Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed.2d 435 (1990).

Finally, we agree with the district court that the history of this case contributes to the determination of extraordinary circumstances. This was a circumstantial evidence conviction which originally was overturned by the Florida appellate court for insufficient evidence. On rehearing, that court chose to withdraw its reversal and affirm the conviction, rearticulating the standard of review for circumstantial evidence convictions. As noted above, the gastric evidence question presented to the Florida appellate court led at least one judge to believe that the verdict may have been different had the evidence been presented to the jury.

We find no abuse of discretion in the district court's determination that the statute of limitations should be equitably tolled ***1326** herein. We next consider Helton's claim of ineffective assistance of counsel. In Strickland v. Washington, **[FN14]** the Supreme Court established a two-prong analysis for an ineffective assistance of counsel claim. The petitioner must first demonstrate that counsel's performance was deficient, falling below a constitutional minimum standard. Then, there must be a reasonable probability that, but for counsel's errors, the result of the trial would have been different.

FN14. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984).

Florida maintains that the district court did not give appropriate due deference to the state court decision. This contention is based on our observations in Neelley v. Nagle **[FN15]** about § 2254(d)(1) which provides:

> 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 ... 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. **[FN16]**

FN15. 138 F.3d 917 (11th Cir.1998).

FN16. 28 U.S.C. § 2254(d)(1).

In Neelley, this court held that the proper methodology for applying § 2254(d)(1) involved a three-part inquiry. The court first must determine whether the federal law applicable to the petitioner's claim has been clearly established. Then, the court must determine whether the state court's adjudication of the claim was contrary to the established federal law. Finally, if the decision is not contrary to federal law, "[t]he state court decision must stand unless it is not debatable among reasonable jurists that the result of which the petitioner complains is incorrect." **[FN17]** We recently recognized that the "viability of [the third] aspect of Neelley is questionable" because of the Supreme Court's subsequent holding in Williams v. Taylor. **[FN18]** In Williams, the high court rejected the Fourth Circuit's interpretation of § 2254(d)(1), which also looked to a "reasonable jurist" standard, and found that such standards would improperly cause a federal court to use a subjective inquiry, rather than an objective one. In light of this holding, we look only to whether the district court made the proper objective inquiry into the reasonableness of the state court's decision.

FN17. Neelley, 138 F.3d at 924-25.

FN18. McIntyre v. Williams, 216 F.3d 1254, 1257 (11th Cir.2000) (discussing Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed.2d 389 (2000)). The Court in Williams found:

> 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 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.

Williams, 120 S. Ct. at 1521-22.

[6] The first prong of the Neelley analysis is readily satisfied. The Supreme Court clearly established the law applicable to ineffective assistance of counsel claims in Strickland v. Washington. Application of the second prong presents a more difficult question. The state court decisions on Helton's habeas corpus petitions were summary denials, assigning no reasons. As the district court noted, we are favored with no reasoning, analysis, findings of fact, or legal basis for the denials of Helton's claims. We have, therefore, no basis for determining whether the ***1327** state court properly applied the Strickland analysis in denying the habeas claim. Accordingly, we find no error in our trial court's determination that it was justified in finding and concluding that federal law was ignored in the state level review.

Even in the absence of that finding, if the court went on to consider this case under the final prong of the Neelley analysis, we would examine only the objective reasonableness of the state court's decision. Again, in light of the exhaustive review by the district court, we cannot say that it erred in concluding that the decision by the state court was unreasonable.

Finally, Florida asserts that the district court erred in its determination that Helton's trial counsel was ineffective. A review of the record developed at the evidentiary hearing demonstrates that the district court did not err in holding that trial counsel's failure to investigate and present the stomach contents evidence at trial rose to the level of ineffective assistance of counsel.

Helton's counsel was not an experienced defense attorney. **[FN19]** The defense provided by the gastric evidence had the potential of being persuasive proof of Helton's innocence. Counsel incorrectly believed that advancing this theory would derogate from the other theories he was offering. At bar was a purely circumstantial evidence conviction. The prosecution had no inculpatory physical evidence against Helton. The gastric evidence defense could have provided Helton with exculpatory physical evidence. Defense counsel's uninformed decision to ignore this issue at trial manifestly falls below any objective standard of reasonableness. There was a failure herein to meet the sixth amendment minimal standard for the performance of defense counsel. We agree with the district court that Helton has met the first prong of the Strickland analysis.

FN19. Helton, 85 F. Supp.2d at 1331.

Helton likewise easily satisfies the second prong of this analysis. At trial, a criminal defendant need only submit evidence sufficient to create a reasonable doubt. As the district court noted, the gastric evidence could have provided that doubt. Counsel's failure, therefore, to even investigate, much less present the gastric evidence, obviously prejudiced Helton's trial. Accordingly, the district court did not err in holding that Helton received ineffective assistance of counsel at the trial stage, and it properly granted Helton's petition for a writ of habeas corpus.

The judgment appealed is AFFIRMED.

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APPENDIX Q

Michael JACKSON, Petitioner–Appellant,

v.

Arthur CALDERON, Warden, Respondent–Appellee.

No. 97–99032.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 10, 1998

Filed May 8, 2000

Following affirmance of murder conviction and death sentence, 49 Cal.3d 1170, 264 Cal.Rptr. 852, 783 P.2d 211, state prisoner petitioned for habeas corpus. The United States District Court for the Central District of California denied petition, but granted certificate of probable cause, and petitioner appealed. The Court of Appeals, Canby, Circuit Judge, held that: (1) claims of ineffective assistance of counsel were not procedurally defaulted; (2) petitioner was not denied effective assistance by trial counsel's failure to move to suppress certain statements; (3) assuming that trial counsel was deficient in failing to interview certain witnesses, petitioner did not demonstrate prejudice; (4) counsel's decision not to use reports of psychiatrists retained to interview petitioner appeared to be a judgment call within *Strickland*'s standard of competent counsel; (5) petitioner showed no prejudice form failure to interview certain defense witnesses before trial; (6) even when they were cumulated, any failures of trial counsel at guilt phase did not constitute ineffective assistance; (7) petitioner failed to establish his freestanding claim of actual innocence; but (8) petitioner was denied effective assistance at penalty phase.

Affirmed in part, reversed in part, and remanded with instructions.

O'Scannlain, Circuit Judge, filed an opinion concurring in part and dissenting in part.

1. Habeas Corpus ⇐403, 422

For the procedural default rule to apply to bar a habeas petitioner's claim, a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default.

2. Habeas Corpus ⇐422

Federal habeas claims of ineffective assistance of counsel were not procedurally defaulted, though California Supreme Court denied those collateral claims "both on the merits and as untimely," where California Supreme Court's ruling in *In re Clark*, arguably clarifying California's timeliness requirement sufficiently to raise a bar to federal review, became final only two days before petitioner's state habeas petition was filed in the California Supreme Court, so that any undue delay on the part of petitioner necessarily occurred before *Clark*.

3. Habeas Corpus ⇐422

Where California Supreme Court had not made it clear that its denials for untimeliness of collateral claims of ineffective assistance of counsel involved no decision of federal constitutional law, untimeliness ruling against petitioner would not constitute an independent state ground that would procedurally default his federal habeas claims.

4. Habeas Corpus ⇐842

Court of Appeals reviews de novo the district court's determination that habeas petitioner has failed to meet the *Strickland* requirements for showing ineffective assistance of counsel. U.S.C.A. Const. Amend. 6.

5. Criminal Law ⇐1166.10(1)

The *Strickland* prejudice analysis is complete in itself, and there is no place for a harmless-error review in addition to the *Strickland* requirement of prejudice, in determining whether defendant has been denied effective assistance of counsel. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐641.13(6)

Trial counsel's failure to investigate the circumstances of defendant's damaging hospital statements, indicating recollection of events inconsistent with defendant's claim of inability to remember shooting due to phencyclidine (PCP) intoxication, did not result in ineffective assistance, even assuming that counsel's failure fell below the *Strickland* standard of competence, as defendant failed to show that a proper investigation would have revealed any third party sources for defendant's information. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐641.13(6)

Volunteered statement, not in response to any question or assertion, would not have been excludable under *Miranda*, and thus counsel's failure to move to suppress it was not ineffective assistance. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐641.13(6)

There were no grounds for suppression of defendant's statement, made the day after his arrest and after he had been informed of his *Miranda* rights, in which he recognized his interrogators as "the cops who say I killed that officer with a shotgun," when the officers had previously said nothing about a shotgun, and thus trial counsel's decision not to move to suppress did not constitute deficient performance, where there was no evidence that defendant was impaired at the time, there was evidence that he was not impaired, and there was no evidence of coercion or other improper tactics by the police. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐641.13(6)

Though trial counsel might have had grounds under *Miranda* to challenge second of defendant's three statements made in hospital after shooting with which he was charged, and assuming that failure to move to suppress this statement fell below the *Strickland* standard of competent performance, failure did not result in ineffective assistance since, in light of the admissibility of defendant's first and third hospital statements, there was no reasonable probability that exclusion of the second statement would have changed the result of the trial. U.S.C.A. Const. Amend. 6.

10. Criminal Law ⇐641.13(6)

If counsel's choice not to move to suppress statements was a reasonable tactical one, his performance was not deficient. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐641.13(6)

Assuming that trial counsel was deficient in failing to interview civilian witnesses regarding damaging statement allegedly made by defendant to back-up police officers after shooting of another officer, defendant did not demonstrate prejudice as required to show denial of effective assistance, where testimony of officer that defendant made the statement was not shaken, and he was directly facing defendant at the time of the statement, the other officer nearest to defendant at the time testified on cross-examination that he had not heard the damaging reference, and defendant did not show that any of the civilian witnesses were in a position to hear what he said. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⇐641.13(6)

Trial counsel's decision not to use reports of psychiatrists retained to interview murder defendant appeared to be a judgment call within the range of decisions falling within *Strickland*'s standard of competent counsel, where adverse portions of the reports could reasonably be seen as damaging to defendant. U.S.C.A. Const. Amend. 6.

13. Criminal Law ⇐641.13(6)

Trial counsel's not having psychiatrist limit his report to exclude background information, and his decision not to call psychiatrist when report included damaging background information, was within permissible realm of professional judgment, as it was not clear that psychiatrist, by

excluding information from report, would escape having to respond concerning all of the information that he had used to form his expert opinions, under California law, nor was it clear that psychiatrist's favorable testimony would have created a reasonable probability of a different result, particularly in light of California statute precluding direct testimony on premeditation, and given that counsel obtained nonexamining expert's answer a hypothetical to effect that ability of person under influence of phencyclidine (PCP) to deliberate would be impaired. U.S.C.A. Const. Amend. 6; West's Ann.Cal.Evid.Code §§ 801–804; West's Ann.Cal.Penal Code § 29.

14. Criminal Law ⇐641.13(6)

Counsel is not required to dictate what his experts in their professional judgment need to do to render proper professional services.

15. Criminal Law ⇐641.13(6)

Even assuming that counsel was ineffective in not having psychiatric expert examine murder defendant, there was not a reasonable probability that the result would have been different, and thus defendant was not denied effective assistance, in light of fact that expert did extensively examine defendant before the habeas evidentiary hearing, and conceded on cross-examination that various actions of defendant at time of shooting could show deliberation and premeditation, despite phencyclidine (PCP) intoxication. U.S.C.A. Const.Amend. 6.

16. Criminal Law ⇐641.13(6)

Assuming that it ordinarily falls below the *Strickland* level of required competence to put a witness on the stand without interviewing the witness, defendant showed no prejudice, as there was no reasonable probability that the jury relied on aberrant, more damaging, testimony of first defense witness, much less relied on it to convict when they would not otherwise have done so, where other witnesses testified to a different version of circumstances preceding murder, and prosecutor argued that version in final argument, and comments of two other defense witnesses as to defendant's irrational behavior would not have loomed large given other evidence of defendant's irrational behavior. U.S.C.A. Const.Amend. 6.

17. Criminal Law ⇐641.13(2.1)

Even when they were cumulated, any failures of trial counsel at guilt phase of murder trial did not create a reasonable probability that, but for the cumulative effect of the errors, the result would have been different, as required to establish ineffective assistance under *Strickland*, given persuasive case of deliberation and premeditation despite phencyclidine (PCP) intoxication. U.S.C.A. Const.Amend. 6.

18. Criminal Law ⇐641.13(7)

In failing to prepare and investigate for a penalty defense in first-degree murder trial, beyond interview by counsel's investigator with defendant's mother and his estranged wife some weeks before trial, speaking briefly to those witnesses on day of trial, and reviewing defendant's juvenile and military records, counsel fell below the requisite standard of competence. U.S.C.A. Const.Amend. 6.

19. Criminal Law ⇐641.13(7)

Counsel's deficiencies at the penalty phase of murder trial were prejudicial, denying defendant effective assistance, where no attempt was made to compile a social history of defendant, which would have developed mitigating matter, the defense presented no medical testimony during the penalty phase though one expert was prepared to testify that defendant could remember little of the incident due to intoxication from phencyclidine (PCP) and another was of the view that it could have been established to a 90% medical certainty that defendant was unable to think consciously at the time of the crime, statute precluding such testimony at guilt phase did not apply to penalty phase, counsel did not conduct any investigation into

an act of aggravation, and case involved as unplanned encounter between a grossly intoxicated, originally unarmed defendant and a victim suddenly ending in death. U.S.C.A. Const.Amend. 6; West's Ann.Cal.Penal Code §§ 29, 190.3(k).

20. Homicide ⇐358(1)

Evidence of mental problems may be offered to show mitigating factors in the penalty phase of murder trial, even though it is insufficient to establish a legal defense to conviction in the guilt phase. West's Ann.Cal.Penal Code § 190.3(k).

21. Habeas Corpus ⇐462

A habeas petitioner asserting a freestanding claim of actual innocence must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent.

22. Habeas Corpus ⇐462

Assuming that a freestanding claim of innocence could be maintained by habeas petitioner who did not claim that he committed no crime but only that he could not have premeditated or specifically intended to kill victim because of phencyclidine (PCP) intoxication, petitioner failed to make the necessary showing that he could not have premeditated or specifically intended to kill, though expert testified that, to a 95% medical certainty, petitioner could not done so, where other testimony of same expert showed that the effects of PCP on any particular user are unpredictable, and another expert testified that a person with petitioner's level of PCP in his blood would not necessarily be unable to process thought, premeditate, deliberate and intend to kill.

23. Habeas Corpus ⇐883.1

Where there was no showing that a court-appointed neurologist would be able to eliminate the effect of expert testimony at habeas evidentiary hearing that a person with petitioner's level of phencyclidine in his blood would not necessarily be unable to premeditate, the district court did not abuse its discretion in failing to appoint such a neurologist.

24. Habeas Corpus ⇐715.1

The district court was entitled to disregard the evidence at habeas evidentiary hearing concerning positron emission tomography (PET) scan of petitioner who had been under the influence of phencyclidine (PCP) at time of murder, where the state's expert testified at the hearing that the use of PET scans to diagnose chronic PCP abuse is not generally accepted by the scientific community, and this testimony was not refuted, and no evidence was introduced that the PET scan proved that petitioner was unable to premeditate or form a specific intent at the time of the shooting.

Allyn O. Kreps, Troy & Gould; Robert S. Draper, O'Melveny & Myers, Los Angeles, California, for the petitioner-appellant.

Donald de Nicola, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

Appeal from the United States District Court for the Central District of California; Manuel L. Real, District Judge, Presiding. D.C. No. CV-91-04249-R.

Before: CANBY, O'SCANNLAIN and THOMAS, Circuit Judges.

Opinion by Judge CANBY; Partial Concurrence and Partial Dissent by Judge O'SCANNLAIN.

CANBY, Circuit Judge:

In 1983, Michael Jackson, while grossly intoxicated with phencyclidine (PCP), shot and killed West Covina Police Officer Kenneth Wrede. Several witnesses testified to Jackson's bizarre behavior before the event, and to the brief encounter that ended in the shooting. Jackson concedes that he shot Officer Wrede, but he has always maintained that he has no recollection of the encounter whatsoever. The question before us is whether Jackson was provided

with effective assistance of counsel in presenting his defense to the capital charge that resulted.

Jackson was convicted of first-degree murder and sentenced to death. The California Supreme Court affirmed the conviction and sentence. *See People v. Jackson*, 49 Cal.3d 1170, 264 Cal.Rptr. 852, 783 P.2d 211 (1989) (in bank), *cert. denied*, 498 U.S. 881, 111 S.Ct. 226, 112 L.Ed.2d 181 (1990). Jackson subsequently exhausted his state collateral remedies and then filed a petition for habeas corpus in the district court. *See* 28 U.S.C. § 2254. The district court, after holding an evidentiary hearing on some of the claims, denied the petition. The district court then granted a certificate of probable cause and stayed Jackson's execution pending this appeal. We now affirm the judgment of the district court insofar as it upholds Jackson's conviction for first degree murder, but we reverse that part of the judgment that upholds the sentence of death. We conclude that Jackson received ineffective assistance of counsel, to his prejudice, at the penalty phase of his trial.

FACTUAL BACKGROUND

On the morning of August 31, 1983, Jackson was with friends smoking PCP-laced cigarettes in a garage in West Covina, California. He was a regular PCP user, and on this occasion he had smoked more than one laced cigarette. Suddenly, he jumped up, kicked off his shoes, and ran outside into the street. There several people observed him jumping around, falling down, and diving head first onto the pavement. One witness saw Jackson start to cross the street several times, only to change his mind each time seemingly without cause. The same witness said Jackson was pulling and slapping at his hair.

A few blocks away, a motorist who had seen Jackson stopped to report Jackson's unusual behavior to Officer Wrede. Wrede radioed from his patrol car that he was going to investigate a "possibly dusted" suspect, and requested additional officers. Wrede then drove to Jackson's location and confronted Jackson. He asked Jackson to sit down on the curb, but Jackson did not comply and began to walk away. Wrede then struck Jackson in the back of the legs with his baton. Jackson and Wrede then wrestled each other to the ground. As they got back up, Wrede repeatedly sprayed Jackson in the face with mace, to no apparent effect. Jackson went to an adjacent yard and attempted unsuccessfully to pull up a tree. He removed two long support stakes and threw them at Wrede.

Wrede ran to his patrol car and opened the driver's door, possibly to radio again for back-up. Jackson went to the front passenger-side door, opened it, and reached for a shotgun that was in a rack inside of the car. Jackson and Wrede wrestled for control of the shotgun and Jackson prevailed, ripping the gun and its rack from the mounting and out of the car. Wrede drew his gun and moved to the left rear of the car, while Jackson remained on the passenger side and pointed the shotgun across the top of the car toward the light bar and Wrede. After some difficulty because the rack was still fastened to the shotgun, Jackson managed to pump a shell into the chamber. There was some conflict in the evidence over what happened next, but at some point Jackson lowered his gun onto the roof and Wrede lowered his gun. Jackson then picked the shotgun back up and fired, hitting the light bar and Wrede. One pellet hit Wrede in the eye, killing him. The entire encounter between Jackson and Wrede had lasted less than four minutes.

Jackson then stumbled away from the patrol car, still carrying the shotgun and rack. Police back-up units arrived less than a minute after the shooting. Jackson walked toward one officer, who testified that Jackson said, "Now I'm gonna kill all the fucking pigs." No other witness testified to hearing that statement. One officer yelled for others to shoot; Jackson replied, "I'm gonna shoot you." Another officer released a police dog, which at-

tacked Jackson. Jackson stunned the dog by hitting him with the shotgun, and said, "I'm going to kill you, too, dog." The dog recovered and bit Jackson, causing him to drop the shotgun. Three officers then tackled Jackson, who resisted and reached unsuccessfully for the gun worn by one of them. The officers succeeded in subduing and handcuffing Jackson.

Jackson was taken to a police station, but his blood pressure fell to 90/40 and he was removed to Queen of the Valley Hospital by 1:30 p.m. At the hospital, Jackson was unable to respond to verbal commands. Medical records describe him as incoherent, in shock, and semi-conscious. A blood sample was taken and was later found to contain PCP in the amount of 176 nanograms per milliliter. At 3:00 p.m., an officer conducted a booking interview. Some time later, according to a nurse's testimony, Jackson without any questioning or prompting asked, "Why am I under arrest? Are you charging me with killing a cop?"

Shortly after 4:00 p.m., Jackson was transferred to the jail ward of the Los Angeles County Medical Center, where two officers read him his *Miranda* rights. One of the officers then interrogated Jackson, and testified that Jackson asked what he was arrested for. When told "murder," Jackson responded in a questioning tone of voice, "I killed a policeman?" At the end of the interrogation, as the officer was leaving, Jackson said, "I didn't kill that policeman."

The next day, the same officer and his partner returned to interrogate Jackson further. The officer testified that Jackson waived his *Miranda* rights, and that Jackson remembered the officers from the previous day, stating that they were "the cops who say I killed that officer with a shotgun." The officer testified that neither he nor his partner had told Jackson that a shotgun had been used.

Jackson remained in the jail ward of the Medical Center for some three weeks. His trial began some six months after the incident.

THRESHOLD PROCEDURAL ISSUES

The State raises two procedural points that we address before considering the claims of ineffective assistance of counsel. First, the State contends that it is entitled to the expedited procedures and greater deference to state court rulings provided by Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104–132, § 107, 110 Stat. 1214, 1221–26 (Apr. 24, 1996) (codified at 28 U.S.C. §§ 2261–2266). As the State recognizes, most of the provisions of the Act do not apply to this case because Jackson's petition was filed in district court prior to the Act's effective date. *See Lindh v. Murphy*, 521 U.S. 320, 326–27, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Congress provided, however, that Chapter 154 was to apply to all cases "pending on or after the date of enactment" of the Act. Pub.L. No. 104–32, § 107(c), 110 Stat. 1226. The State contends that it meets the various criteria that Chapter 154 establishes as conditions of its applicability to a "unitary review" state. *See* 28 U.S.C. § 2265. We need not examine this claim further, because we recently rejected an identical argument by the State in *Ashmus v. Woodford*, 202 F.3d 1160 (2000) (amended opinion). *Ashmus* controls here.

[1–3] The State next contends that Jackson's ineffective-assistance claims are all procedurally defaulted because the California Supreme Court denied those collateral claims "both on the merits and as untimely." The untimeliness ruling, argues the State, is an independent state procedural ground that precludes federal habeas corpus relief. *See Coleman v. Thompson*, 501 U.S. 722, 729–30, 734–35, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). For the procedural default rule to apply, however, "a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported de-

fault." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir.1994) (citing *Ford v. Georgia*, 498 U.S. 411, 424–25, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991)). Prior to the California Supreme Court ruling in *In re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509, 855 P.2d 729 (1993), California's untimeliness rule did not meet that standard, and consequently did not bar federal habeas review. *See Morales v. Calderon*, 85 F.3d 1387, 1388, 1393 (9th Cir.1996). In *Morales*, we found no need to determine whether *Clark* clarified California's timeliness requirement sufficiently to raise a bar to federal review, because *Clark* was decided after the California Supreme Court denied Clark's petition. *Id.* Here, we reach the same conclusion, because *Clark* was decided only thirty-two days, and became final only two days, before Jackson's state habeas petition was filed in the California Supreme Court. Any undue delay on the part of Jackson necessarily occurred before *Clark*. *See Calderon v. United States Dist. Ct. (Bean)*, 96 F.3d 1126, 1128, 1129–31 (1996) (applying *Morales* to find no procedural default when state habeas petition was filed nine months after *Clark* became final).[1] Jackson's federal habeas claims of ineffective assistance of counsel therefore are not procedurally defaulted. We address them now.

INEFFECTIVE ASSISTANCE: GUILT PHASE

Jackson raises many claims of ineffective assistance during the guilt phase, but the primary contentions may be grouped into five general categories: (1) failure to investigate the circumstances of Jackson's statements at the hospitals; (2) failure to move to suppress those statements; (3) failure to investigate and controvert at trial the statements made by petitioner after the back-up police arrived on the scene; (4) failure to prepare and utilize medical evidence regarding Jackson's lack of premeditation due to his intoxication; and (5) failure to interview and prepare defense witnesses prior to putting them on the stand.

[4, 5] Our standard for reviewing these claims is *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* requires Jackson to show that his attorney's performance was unreasonable in light of prevailing professional norms, *see id.* at 687–88, 104 S.Ct. 2052, *and* 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."[2] *Id.* at 694, 104 S.Ct. 2052. We review de novo the district court's determination that Jackson has failed to meet the *Strickland* requirements. *See Johnson v. Baldwin*, 114 F.3d 835, 838 (9th Cir.1997).

1. *Investigation of Hospital Statements.*

[6] Jackson asserts that his counsel utterly failed to investigate the circumstances of his damaging hospital statements, which collectively indicated that Jackson recollected killing a policeman with a shotgun. Counsel never had his investigator look into those circumstances,

1. In any event, our court has very recently held that, as of April 1996, the California Supreme Court had not made it clear that its denials for untimeliness involved no decision of federal constitutional law. *See La Crosse v. Kernan*, No. 97–55085, 2000 WL 432414, at * 4, 211 F.3d 468, —— (9th Cir. Apr. 24, 2000). Accordingly, the 1993 untimeliness ruling against Jackson would not constitute an independent state ground that would procedurally default his claims. *See id.*

2. We reject the State's contention that, in addition to the *Strickland* requirement of prejudice, we also must conduct a standard harmless-error review of any *Strickland* violations. *See Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *Lockhart v. Fretwell*, 506 U.S. 364, 369 n. 2, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The *Strickland* prejudice analysis is complete in itself; there is no place for an additional harmless-error review. *See Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir.1996).

because the investigator was never told the statements had been made. Jackson contends that a proper investigation might have revealed that police or hospital personnel had revealed to Jackson that he had been arrested for shooting a policeman with a shotgun.

We assume for purposes of decision that counsel's failure fell below the *Strickland* standard of competence.[3] Jackson, however, has wholly failed to show that a proper investigation would have revealed any such sources for Jackson's information. No evidence was offered in district court that anyone among the police or hospital staffs referred to the nature of the incident within Jackson's hearing. Jackson therefore fails to meet the prejudice requirement of *Strickland*.

Jackson invokes *Evans v. Lewis*, 855 F.2d 631 (9th Cir.1988), in which this court held that a defense counsel's failure to secure a timely mental examination of the defendant was prejudicial because it prevented a physician at a later resentencing from testifying with reasonable medical certainty to the defendant's mental illness at the time of the crime. *See id.* at 638–39. In *Evans*, however, we relied upon substantial evidence to show that the defendant *had* in fact been mentally diseased at the time of the crime. *See id.* Here, we have only speculation concerning the possibility that someone informed Jackson, after the event but prior to his statements, that he had been arrested for shooting a policeman with a shotgun. To find prejudice on this record would be to presume prejudice solely from counsel's deficient performance, which *Strickland* says we may not do. *See Strickland*, 466 U.S. at 693, 104 S.Ct. 2052.

2. *Failure to Move to Suppress Hospital Statements.*

[7] The district court held, and we agree, that counsel's failure to challenge Jackson's first and third statements on *Miranda* grounds did not constitute deficient performance. It is true that Jackson was not long out of his comatose condition when he made the first statement: "Why am I under arrest? Are you charging me with killing a cop?" All of the evidence regarding that statement, however, indicated that it was volunteered and was not a response to any question or assertion. As a spontaneous statement, it would not have been excludable under *Miranda*. *See Oregon v. Elstad*, 470 U.S. 298, 312–14, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

[8] Jackson's third hospital statement was made the day after his arrest, after he had been informed of his *Miranda* rights. Jackson recognized his interrogators as "the cops who say I killed that officer with a shotgun," when the officers had previously said nothing about a shotgun. There is no evidence that Jackson was impaired at the time, and there is evidence that he was not. There is no evidence of coercion or other improper tactics by the police. Jackson's counsel accordingly had no grounds for moving to suppress the statement, and his decision not to make such a motion does not constitute deficient performance.

[9, 10] Counsel might have had grounds under *Miranda*, however, to challenge Jackson's second hospital statements, made after he had been advised of his rights and told that he had been arrested for murder: "I killed a policeman?" and "I didn't kill that policeman." We assume, therefore, for purposes of decision that the failure to suppress these statements fell below the *Strickland* standard of competent performance. In light of the admissibility of Jackson's first and third hospital statements, however, there is no reasonable probability that exclusion of the sec-

3. We need not decide whether counsel's performance was deficient when the claim of ineffectiveness may be rejected for lack of prejudice. *See Strickland*, 466 U.S. at 697, 104 S.Ct. 2052.

erate or premeditate, or to harbor malice. Counsel did not ask the psychiatrists to investigate Jackson's background, but both did.

The first psychiatrist, Dr. Skrdla, furnished an opinion nine days after his appointment. Apparently to counsel's surprise, Dr. Skrdla did discuss Jackson's background, including his dishonorable discharge from the army, four armed robberies committed when he was 15 or 16 years of age, and various other matters. Dr. Skrdla opined that Jackson showed no evidence of organic brain disease or functional psychosis, and that he was competent to stand trial. Dr. Skrdla further opined that Jackson was intoxicated but legally sane at the time of the offense. He stated that Jackson was "believed to have possessed the mental capacity to form the specific intent to kill, and actually formed such intent." Dr. Skrdla further stated, however, that "[b]ecause of his drug induced state of intoxication, he is not believed to have actually deliberated, premeditated, nor meaningfully and maturely reflected upon the gravity of his contemplated acts. However, he is believed to have been capable of harboring malice aforethought."

[12] This opinion was clearly a mixed bag, and Jackson's counsel testified in district court that he did not want to put Dr. Skrdla on the stand because he was not willing to concede that Jackson was capable of forming, and did form, the specific intent to kill. He also did not want to risk opening the door to the background information. This decision is clearly a judgment call within the range of competent counsel. Indeed, the district court ruled that Jackson had not raised the issue of his counsel's failure to utilize Dr. Skrdla at the trial. As Jackson now argues the matter, the importance of Dr. Skrdla's report is that it was delivered to counsel four months before Dr. Mead's report, which also went into Jackson's background. If counsel wanted to avoid inclusion of background material, according to Jackson, counsel should have warned Dr. Mead not to include any.

Counsel did not so advise Dr. Mead, however, and his report did include background information. Dr. Mead listed four brief opinions:

1) At the time of the commission of the alleged offense, Mr. Jackson was sane.

2) Mr. Jackson is able to understand the nature and purpose of the proceedings against him.

3) He is able to cooperate in a rational manner with counsel in presenting a defense.

4) At the time of the commission of the alleged offense, Mr. Jackson was grossly intoxicated with PCP. He has little recollection of the day's proceedings.

In the remainder of his report, Dr. Mead discussed Jackson's background, including his mother's statement that Jackson began sniffing glue at age 14 and thereafter "became his own worst enemy." He also reported that Jackson "states that he had never shot a shot gun and could not imagine his ever doing so," and that Jackson "wished he could have a Sodium Amytal interview because he held on to the idea that he would not have ever killed anyone." Jackson had had "several 'bad trips' on PCP and remembers at one time feeling that the house was charged with electricity." Jackson was in a fight in the military that resulted in his losing consciousness; he could not remember ever losing consciousness again until the time of the offense. He showed no signs of major mental illness; "[a]ny psychiatric diagnosis would be within the realm of character pathology."

Jackson's counsel decided that several items in the background material would be prejudicial if Dr. Mead testified and the report had to be handed over to the prosecution. Included were the facts that: Jackson had been using PCP regularly, and had had "bad trips," but had not lost consciousness; he had "remembered" a bad trip when he thought the house was

charged with electricity; and that he had come to believe that the police were picking on him. Counsel also feared that the reference to "character pathology" would open the door to other adverse information. Counsel therefore made a motion in limine, asking the trial court to exclude all background matters in the report from being delivered to the prosecution and from being the subject of cross-examination of Dr. Mead. The court denied the motion (at least partly because counsel would not show the report to the prosecution at the time of the motion), and as a consequence counsel elected not to call Dr. Mead.

[13] Again, counsel's decision would appear to be a judgment call within the range of decisions falling within *Strickland*'s standard of competent counsel. The adverse portions of the report can reasonably be seen as damaging to Jackson. Jackson insists, however, that the ineffectiveness of counsel consists in his not having Dr. Mead limit his report. It is not at all clear, however, that Dr. Mead would thus escape having to respond concerning all of the information that he had used to form his expert opinions. *See* Cal. Evid.Code §§ 801–804.

Nor is it clear that Dr. Mead's favorable testimony would have created a reasonable probability of a different result. On voir dire for the motion in limine, Dr. Mead, after stating that Jackson was "under the influence of PCP at the time he was arrested," responded as follows to Jackson's counsel:

> Q: ... Did you also, after taking into consideration your interviews with Mr. Jackson, and the arrest reports, have an opinion as to whether Mr. Jackson, on August 31, 1983, was conscious or basically knew what was going on?
>
> Did he remember the events of August 31, 1983?
>
> A: In my opinion he did not have a full memory of what occurred that day.

Although this testimony would have helped Jackson, it is limited in scope and probable effect. There is no basis for concluding that Dr. Mead would have been more helpful, because he was not a witness in the evidentiary hearing in district court.

The decision not to call Dr. Mead to testify left Jackson without the testimony of any psychiatrist who had examined him—far from a desirable situation when the sole defense concerns Jackson's state of mind. There is an evidentiary problem, however, that overhangs all of counsel's decisions concerning expert testimony. California Penal Code § 29 provides:[5]

> In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.

Jackson's counsel believed that section 29 applied to impairment by voluntary intoxication, and would prevent him from eliciting Dr. Mead's (or any other medical expert's) opinion that Jackson in fact had not premeditated. Counsel was not wrong in so concluding. Although the California Supreme Court avoided ruling on the point in *People v. Breaux*, 1 Cal.4th 281, 303, 3 Cal.Rptr.2d 81, 821 P.2d 585, 596 (1991), section 29 since has been interpreted to preclude expert testimony that a defendant in fact did not premeditate. *See People v. Rangel*, 11 Cal.App.4th 291, 302–03, 14 Cal.Rptr.2d 529, 536 (1992). The inability of Dr. Mead to testify directly on premeditation decreased the value of his possible contribution, although he would not

5. Section 29 was originally enacted in 1981 and has undergone minor amendments that do not affect our analysis. *See People v. Saille*, 54 Cal.3d 1103, 1111 n. 5, 2 Cal. Rptr.2d 364, 820 P.2d 588, 593 n. 5 (1991).

have been precluded from testifying regarding Jackson's condition at the time of the offense. In all, counsel's decision not to call Dr. Mead was within his permissible realm of professional judgment.

Counsel's means of avoiding the problem posed by Cal.Penal Code § 29 was to rely on hypothetical questions posed to Dr. Aniline, the one medical expert who did testify. Dr. Aniline had not examined Jackson, but was a highly qualified expert on the effects of PCP. He was Ward Chief in Psychiatry at Los Angeles County Medical Center. He had been furnished with the "murder book," toxicological reports, and with daily transcripts of the trial testimony.

Dr. Aniline explained that PCP had once been used as an anesthetic, and that a first-time user with Jackson's blood level of PCP would be unconscious. A chronic user could tolerate much higher levels, but because PCP is stored in the body, a small amount could "set off" a chronic user. Dr. Aniline stressed the unpredictability of the effects of PCP, and testified that PCP intoxication is unique in that it "is very often associated with partial memory states, meaning, that some things are remembered and other things are not, even though an individual may be behaving, let's say in somewhat normal patterns, they can eat, sleep, deal with things socially or go through many known behaviors." Dr. Aniline stated that PCP users may seem to be alert and aware, but "they may not be responding or processing information around them ... the way they would normally.... They are not asleep or comatose. But they are not entirely aware of what is going on around them."

Jackson's counsel asked Dr. Aniline a hypothetical that included virtually all of the evidence of Jackson's actions leading up to and including the shooting and arrest, and Dr. Aniline opined that the person so acting and acted upon was intoxicated by PCP. Then, assuming the same facts, counsel asked Dr. Aniline whether the person involved could deliberate before shooting. Dr. Aniline answered: "I don't know if he deliberated before or not. I think from the information that I have been presented, I would say that some of his ability to think is going to be impaired. And deliberation is part of that.... I think from my point of view in my opinion, there would be impairment of the ability to do that. Whether he did that or not, per se, I can't say."

Dr. Aniline was cross-examined on the fact that he had not interviewed or examined Jackson. Jackson argues here that the failure to arrange such an interview or examination is a failure of effectiveness on the part of his trial counsel.[6] Counsel's original letter to Dr. Aniline, however, told Dr. Aniline that he was not sure whether it would be advantageous to interview Jackson because he does not remember the incident, and that he would appreciate Dr. Aniline's view on the matter.[7] Dr. Aniline did not ask to interview Jackson, perhaps because he assumed that there would be other, examining psychiatrists testifying.

[14, 15] Counsel is not required to dictate what his experts in their professional judgment need to do to render proper professional services. *See Hendricks v. Calderon*, 70 F.3d 1032, 1038–39 (9th Cir. 1995). Moreover, because experts may not testify directly that a defendant did not premeditate, it was a reasonable professional judgment to choose instead to emphasize the effects of PCP generally on the mental processes. Even if we assume, however, that counsel was ineffective in not having Dr. Aniline examine Jackson, there is not a reasonable probability that

6. The State argues that Jackson neither properly exhausted this issue nor raised it in his federal habeas petition. Our disposition of the issue makes it unnecessary for us to address that point.

7. Jackson contends that his counsel instructed Dr. Aniline not to interview Jackson. The district court found to the contrary, however, and that finding is not clearly erroneous.

the result would have been different if the examination had occurred. Dr. Aniline extensively examined Jackson before the evidentiary hearing in district court, and testified to a 95% certainty that he lacked the capacity to deliberate. He also testified that the lack of capacity could have been determined to a 90% degree of certainty at the time of Jackson's trial.[8] But on cross-examination, Dr. Aniline conceded that if Jackson went to the car to get the shotgun, that could be an example of premeditation, and it would be rational to infer so. Similarly with regard to Jackson's putting his head down on the roof of the car and then waiting to shoot until Wrede had relaxed his guard: Dr. Aniline agreed that "[i]f he put his hand [sic] down and therefore maybe even elicited unguarded response and then afterwards, after eliciting the unguarded response, fired, that would show considerable thought." When asked if such behavior would show deliberation, Dr. Aniline answered, "The way we just framed the last sentence, it would." Similarly, he stated that announcing an intention to use a gun showed premeditation. In the light of these and several similar answers, there is no reasonable probability that an examination of Jackson by Dr. Aniline would have changed the outcome of the trial.

We conclude, therefore, that Jackson has failed to show deficient performance and resulting prejudice, within the meaning of *Strickland*, in counsel's preparation and presentation of expert medical testimony in the guilt phase of Jackson's trial.

5. *Failure to Interview Witnesses.*

[16] Jackson's counsel asked his investigator to interview all of the witnesses who were listed in the murder book. As we have said already, the investigator did not succeed in interviewing many of those witnesses. Jackson complains that it was ineffective assistance for his counsel to call as defense witnesses persons that he had not interviewed. We assume that it ordinarily falls below the *Strickland* level of required competence to put a witness on the stand without interviewing him. We look then to the question of prejudice.

The instance that Jackson presents as most damaging was his counsel's calling of Adrian Mitchell as the first defense witness. Adrian was 12 years old and his mother had said that he was too upset by the incident for her to allow him to be interviewed. His statement was in the murder book. Counsel on direct examination elicited from Mitchell that Jackson had been acting irrationally just before the encounter with Officer Wrede-that he had been walking erratically, jumping, and diving onto the ground.

On cross-examination and after some disjointed testimony, Mitchell said that he had seen the shooting. Jackson's counsel objected on the ground that the cross-examination was going beyond the scope of the direct examination, but the objection was overruled. Mitchell then testified that, after Jackson got the shotgun, Officer Wrede asked him to put the gun down and Jackson had put it down on the roof. Then Officer Wrede walked around the back of the car, put his gun down on the trunk of the car, and then put his hand up. Jackson then shot the officer. No other witness had testified that Officer Wrede had put his gun down before being shot.

On re-direct examination, Jackson's counsel elicited that Mitchell had not actually heard Officer Wrede ask Jackson to put his gun down; he had merely assumed it. Mitchell also responded that he had told the interviewing officer (who was in the courtroom) what he had just described. Mitchell's statement in the murder book, however, simply stated that Mitchell had shot the officer. Jackson's counsel made

8. This evidence of Dr. Aniline was introduced in district court in support of Jackson's free-standing claim of actual innocence, which we discuss later in the opinion. The evidence does suggest, however, the most that could have been gained from an interview with Jackson by Dr. Aniline.

no attempt to impeach Mitchell with the statement.

If Mitchell's account had been the only one in evidence, prejudice might have been established. There were several accounts of the shooting, however. By far the most detailed was that of Rob Dunham, who was stopped in his car 45 feet from the police car at the time of the shooting, with nothing obstructing his view. He testified that, after the officer said something that Dunham could not hear, Jackson put his gun down on the top of the car, but kept his hand on it. He also put his head down, although not down flat on the roof. Officer Wrede then took a step to go around the car, turning his gun away from Jackson. Jackson then picked up the shotgun and shot the officer.

Other witnesses described the shooting in much briefer fashion, but none of them stated that the officer laid his gun down and put up his empty hand. In final argument, the prosecutor mentioned Adrian Mitchell, but argued the facts as presented by Rob Dunham. The prosecutor contended that Jackson chose the moment to shoot the officer because the officer has "got the gun pointed at a different direction than at my head." There is no reasonable probability that the jury relied on Adrian Mitchell's aberrant testimony at all, much less having relied on it to convict when they would not otherwise have done so.

We similarly find no *Strickland* prejudice from testimony of defense witnesses Downs and Shelton, both of whom testified to irrational behavior by Jackson. Downs stated that, when Officer Wrede asked Jackson his name, Jackson answered that it was "none of his fucking business." Shelton testified that Jackson had responded angrily, assuming a karate stance when asked for identification. Neither comment looms large in the trial in light of all of the other evidence of Jackson's irrational behavior and his free use of coarse language. We conclude that there has been no *Strickland* prejudice.

6. *Cumulative Ineffectiveness and Prejudice.*

[17] Finally, we reject Jackson's contention that the cumulative effect of his counsel's errors deprived him of effective assistance. In so holding, we consider all of the errors of counsel urged by Jackson, whether we have discussed them or not. Even when they are cumulated, any failures of counsel do not create a reasonable probability that, but for the cumulative effect of the errors, the result would have been different. It is true that counsel's defense in the guilt phase was not highly spirited and focused, but for the most part it did not fall "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. With regard to those actions that we assume were outside the permissible range, there was no showing of prejudice within the *Strickland* standard.

We recognize that premeditation is always arguable when a homicide results from an unplanned encounter involving an accused who was grossly intoxicated. The prosecution, however, presented a persuasive case that Jackson had to reason deliberately in: choosing his first weapon, tree stakes; then pursuing Officer Wrede to his car to select a more destructive weapon; releasing the shotgun's slide action, cocking the weapon and firing it when Officer Wrede had turned aside; threatening other officers with the weapon; and in reaching for another officer's weapon during the arrest struggle. There is not a reasonable probability that, but for counsel's deficiencies, the jury would not have convicted of first-degree murder. We therefore affirm the ruling of the district court upholding Jackson's conviction.

INEFFECTIVE ASSISTANCE: PENALTY PHASE

[18] Counsel testified in district court that he never expected Jackson's trial to reach the penalty phase, and his preparation reflected that view. The total investi-

gation for purposes of the penalty phase took less than two hours some weeks before the trial began. It consisted of an interview by counsel's investigator with Jackson's mother and his estranged wife. Counsel also spoke briefly to those two witnesses on the day that they testified in the penalty phase. He also reviewed Jackson's juvenile and military records. With that minimal preparation, Jackson's counsel began the first and only penalty phase he had ever tried, only four days after the verdict had been rendered. Counsel testified in district court that he did not ask for a continuance because he had no further investigation to do. In so failing to prepare and investigate for a penalty defense, counsel clearly fell below the requisite standard of competence. *See Williams v. Taylor*, — U.S. ——, ——, 120 S.Ct. 1495, 1513–1514, — L.Ed.2d —— (2000).

[19] The defense case in mitigation consisted of the testimony of Jackson's wife and his mother. His wife testified that she had left Jackson because he was using drugs and couldn't handle it. She stated that Jackson had arranged to take their children to the park later in the day of the shooting. She said that Jackson was a good provider when he was working, and a good husband except for the drug use. He loved and got along well with the children. She related the incident when he believed that the house was charged with electricity. She felt that the verdict was unfair in light of Jackson's intoxication. On cross-examination, she said that she was aware of his dishonorable discharge from the army and his prison term for burglary. On redirect examination, counsel asked if Jackson was a private person. She answered "yes," and added: "he didn't care about other people's problems. He wasn't interested. He wasn't the type of person that would want to know what was going on in somebody else's life. If it didn't have nothing to do with him, then he wasn't concerned about it."

Jackson's mother testified that Jackson's father was a hustler who was not around and did not care about Jackson. Jackson started sniffing glue at age 14, and that is when his problems started. Jackson's mother never had trouble with Jackson in school. He won trophies in sports. She felt that Jackson was sick and she suggested help, but he said nothing was wrong with him. She was shocked at the verdict because the act seemed so clearly drug-related. On cross-examination, Jackson's mother admitted that Jackson had spent his tenth grade in custody because of a robbery. She was also aware of a later burglary where a person with him had a gun.

The testimony of the two defense witnesses covered less than 30 pages of trial transcript. No attempt was made to compile a social history of Jackson, to indicate the conditions in which he had been brought up and lived. There was expert testimony at the evidentiary hearing in district court that a major part of competent counsel's duty at the penalty phase is to prepare and present such a history. Jackson's counsel did not investigate or prepare evidence regarding Jackson's addiction to PCP and the meaning and consequences of such addiction.

[20] The defense presented no medical testimony during the penalty phase. Counsel testified in district court that it would not have helped to have Dr. Mead testify that Jackson was grossly intoxicated and had little recollection because "the guilt phase is over." This explanation is wholly insufficient. "Evidence of mental problems may be offered to show mitigating factors in the penalty phase, even though it is insufficient to establish a legal defense to conviction in the guilt phase." *Hendricks*, 70 F.3d at 1043; *see* Cal.Penal Code § 190.3(k) (trier of fact at penalty phase shall take account of "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime").

Certainly one of the primary factors to be considered in mitigation was the clouded mental condition of Jackson caused by drug intoxication. Yet, because of the difficulties Jackson's counsel had with his medical expert testimony in the guilt phase, the jury had never heard from any medical expert who had examined Jackson or who could testify concerning Jackson's actual condition at the time of the crime. One of the constraints operating on counsel in the guilt phase had been Cal.Penal Code § 29, which prevented expert testimony concerning "whether the defendant had or did not have the required mental state[ ] ... for the crimes charged." But section 29 by its own terms is limited to "the guilt phase of a criminal action." *Id.* It did not constrain such testimony at the penalty phase. In district court counsel stated that at the penalty phase he still found harmful material in Dr. Mead's report, but he could not identify harmful material that was not already available to the prosecution. When he made a motion in limine concerning Dr. Mead's report during the guilt phase, counsel had told the court that Dr. Mead's report contained background information "which basically is going to be used in case we get in a penalty phase" but which is inappropriate for the guilt phase. Then, when counsel got to the penalty phase, he declined to have Dr. Mead testify because of the very material that counsel had earlier said he would introduce at the penalty phase!

Counsel did not compensate for his failure to employ Dr. Mead at the penalty phase by having Dr. Aniline examine Jackson so that he could testify in mitigation. Instead, nothing was done and the penalty phase was left without any expert evidence at all concerning one of the most important factors in mitigation—Jackson's clearly impaired mental condition at the time of the crime.

Counsel did not conduct any investigation at all into an act of aggravation of which he had notice—an alleged sodomy committed by Jackson when he was in the army. Although Jackson told his counsel that the incident had not occurred as reported, counsel did not investigate or interview the victim prior to the victim's testimony in the penalty phase. The testimony left room for argument that the sodomy committed by Jackson had not been committed by force or threat of force, which was a requisite for admissibility. *See* Cal.Penal Code § 190.3. Yet Jackson's counsel made no motion in limine, and no objection to the testimony.

We have no doubt that counsel's deficiencies at the penalty phase were prejudicial. The declaration of Dr. Jackman in the district court indicates some of the mitigating matter that could and should have been presented as a part of Jackson's social history. It recites that Jackson suffered repeated beatings in childhood, and that his mother choked him when angry with him. Jackson's childhood and adolescence were characterized by neglect and instability. It notes that Jackson exhibited signs of mental illness in childhood and was diagnosed at one time as schizophrenic. In all, Dr. Jackman's report presents a very different picture of Jackson than any the jury was allowed to consider.

We conclude that the utter failure to present medical evidence was prejudicial as well. *See Bean v. Calderon*, 163 F.3d 1073, 1080–81 (9th Cir.1998) (presentation of medical experts without preparation and foundation prejudicial at penalty phase), *cert. denied*, —— U.S. ——, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999). Dr. Mead's report indicates that he was prepared to testify that Jackson could remember little of the incident. Dr. Aniline, whose testimony in the district court was introduced as part of the "actual innocence" claim that we discuss below, testified that it could have been established to a 90% medical certainty in 1983 that Jackson was unable to think consciously at the time of the crime. Certainly medical testimony would have been available that Jackson's ability to think was grossly impaired.

The State argues that some of the evidence now relied on by Jackson cannot be accepted at face value, that declarations of family members controvert some of the family history that Jackson contends should have been presented. The State is correct that, because Dr. Jackman did not testify, the State has not had a chance to test his statement by cross-examination. *See Wallace v. Stewart*, 184 F.3d 1112, 1118 (9th Cir.1999), *cert. denied*, — U.S. —, 120 S.Ct. 844, 145 L.Ed.2d 713 (2000). But Jackson's mother in her deposition admitted hitting Jackson with "whatever I had in my hand," and that she choked him more than five but less than ten times. She said she did not choke him into unconsciousness, but that "His head is bobbing. I thought a couple of times maybe his tongue was out, and that is when I would have stopped." This evidence, alone, presents a very different picture from her testimony at the penalty phase. And with medical evidence, the jury would have been presented with a different medical picture of Jackson's state of consciousness than the one they received, which was no picture at all. Dr. Aniline presented evidence in district court indicating the kind of testimony available, and the State had the opportunity to cross-examine him. In sum, the evidence produced at the evidentiary hearing convinces us that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the [penalty] proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. In other words, the probability of a different result is "sufficient to undermine confidence in the outcome." *Id.* That probability of a different result establishes Jackson's right to relief. *See Williams v. Taylor*, — U.S. —, ———, 120 S.Ct. 1495, 1512–13, — L.Ed.2d —.

It is true that there was evidence of premeditation, in the guilt phase, that the jury could consider in the penalty phase. But the evidence was far from overwhelming; this is one highly unusual murder in the first degree, with an unplanned encounter between a grossly intoxicated, originally unarmed defendant and a victim suddenly ending in death. In determining the degree to which the lack of medical evidence of Jackson's actual impairment and the lack of a social history prejudiced Jackson, we keep in mind the admonition of *Hendricks:*

> The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors, in effect, to weigh the worth of one's life against his culpability. Presumably the imposition of a death sentence is entrusted to a jury because it is a uniquely moral decision in which bright line rules have a limited place. In light of the whole record, and despite the substantial evidence of aggravation, we conclude that the failure of [counsel] to present mitigating evidence rendered the sentencing hearing neither fair nor reliable.

Hendricks, 70 F.3d at 1044; *see also Williams v. Taylor*, — U.S. at —, 120 S.Ct. at 1513–14 (evidence of lack of premeditation may affect jury's selection of penalty even if it does not undermine death-eligibility). As in *Hendricks*, we conclude that counsel's failure rendered the verdict of death unreliable, and that the writ must issue invalidating that sentence.

FREE–STANDING CLAIM OF FACTUAL INNOCENCE

[21] Much of the testimony and argument in the district court was directed toward establishing a "free-standing" claim of "actual innocence" for Jackson. The State contends that actual innocence is not a permissible ground for issuing a writ of habeas corpus, citing the discussion in *Herrera v. Collins*, 506 U.S. 390, 398–408, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). The majority opinion in *Herrera*, however, assumed for purposes of decision that "a

truly persuasive" demonstration of actual innocence would render the execution of a defendant unconstitutional, but that "the threshold showing for such an assumed right would necessarily be extraordinarily high." *Id.* at 417, 113 S.Ct. 853. As we have noted, however, a majority of the Justices in *Herrera* would have supported a claim of free-standing actual innocence. *See Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir.1997), *cert. denied*, 523 U.S. 1133, 118 S.Ct. 1827, 140 L.Ed.2d 963 (1998). We also held that "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Id.*

[22, 23] The petitioner in *Carriger* contended, however, that he had not committed any crime against the victim; Jackson contends only that he could not have premeditated or specifically intended to kill Officer Wrede. Even if we assume, without deciding, that a free-standing claim of innocence may be maintained in such circumstances, we conclude that Jackson has not made the necessary showing. Jackson has certainly cast doubt on his conviction by Dr. Aniline's testimony that, to a 95% medical certainty, Jackson could not have premeditated or specifically intended to kill. But other testimony of Dr. Aniline, both at trial and in the evidentiary hearing, shows that the effects of PCP on any particular user are unpredictable, that the effects wax and wane during intoxication, and that rational persons could interpret some of Jackson's actions (described above in our discussion of the guilt phase) as showing premeditation. Dr. Baselt testified at the evidentiary hearing that a person with a level of 176 nanograms per milliliter of blood would not necessarily be unable to process thought, premeditate, deliberate and intend to kill. Dr. Aniline's testimony, considered in full, does not directly counter or qualify this conclusion. There is no showing that a court-appointed neurologist would be able to eliminate the effect of Dr. Baselt's testimony, and the district court consequently did not abuse its discretion in failing to appoint such a neurologist. *See United States v. Nelson*, 137 F.3d 1094, 1101 n. 2 (9th Cir.) (denial of appointment of expert reviewed for abuse of discretion), *cert. denied*, 525 U.S. 901, 119 S.Ct. 232, 142 L.Ed.2d 190 (1998).

[24] The positron emission tomography (PET scan) evidence also provides little support for Jackson's claim. The State's expert testified at the hearing that the use of PET scans to diagnose chronic PCP abuse is not generally accepted by the scientific community, and this testimony was not refuted. The district court was accordingly entitled to disregard the evidence.[9] *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593–94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). In addition, Jackson's PET scan is susceptible to conflicting interpretations, and its importance is unclear. No evidence was introduced that the PET scan proves that Jackson was unable to premeditate or form a specific intent at the time of the shooting. The PET scan evidence could, at best, only establish that Jackson suffered some PCP-induced brain abnormality, the effect of which on Jackson's capacity for higher thought is not demonstrated. The PET scan, by itself or in combination with the other evidence offered by Jackson, fails to make the required showing of probable innocence, which "contemplates a stronger showing than insufficiency of the evidence to convict." *Carriger*, 132 F.3d at 476. Jackson's free-standing claim of actual innocence consequently fails.

CONCLUSION

Jackson has failed to demonstrate that he was prejudiced by ineffective assistance of counsel at the guilt phase of his trial. We therefore affirm the district court's denial of a writ of habeas corpus to over-

9. We find no abuse of discretion by the district court in refusing to allow Dr. Buchsbaum to testify in rebuttal on the PET scan issue.

turn his conviction. We also affirm the district court's rejection of Jackson's free-standing claim of actual innocence.

We conclude, however, that Jackson has demonstrated ineffective assistance of counsel at the penalty phase of his trial, and has shown that counsel's ineffectiveness created a reasonable probability that, but for counsel's errors, the death penalty would not have been imposed. We accordingly reverse the district court's denial of a writ of habeas corpus with regard to the penalty, and we remand this matter to the district court with instructions to issue a writ invalidating Jackson's death penalty as now imposed.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED with instructions.

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

I concur in the court's affirmance of Jackson's conviction for first degree murder. I also concur in the court's denial of Jackson's actual innocence claim. The court's reliance on speculation regarding the effect of additional evidence to overturn Jackson's sentence, however, forces me to dissent from that portion of its opinion.

I

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court instructed us on how to evaluate claims of ineffective assistance of counsel. Although the majority follows *Strickland*'s analytical framework, it fails to apply its command that "every effort be made to eliminate the distorting effects of hindsight" and that our review of the decisions of trial counsel be "highly deferential." *Id.* at 689, 104 S.Ct. 2052. Only by doing so can we remain true to the Court's teaching that in order to set aside his sentence Jackson must show that his trial "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [him] by the Sixth Amendment." *Id.* at 687, 104 S.Ct. 2052.

The majority takes Jackson's trial counsel to task for the following sins of omission. First, the majority chides counsel for not introducing evidence regarding Jackson's childhood experience of beatings, neglect and possible mental illness. Second, the majority asserts that at the penalty stage, trial counsel's failure to introduce evidence regarding the effects of phencyclidine (PCP) on Jackson's ability to reason and premeditate prejudiced Jackson. We may not overturn his sentence, however, unless his counsel's representation fell outside of "the wide range of reasonable conduct" and unless any errors created the "reasonable probability of a different result." *Id.* at 694, 104 S.Ct. 2052. At best, Jackson's arguments convince me only that the additional evidence might have had "some conceivable effect of the outcome of the proceeding," a standard which the Court expressly held, "is not enough." *Id.* at 693, 104 S.Ct. 2052.[1]

II

The majority contends first that trial counsel did not present adequate evidence of Jackson's social history. Specifically, the majority points to evidence that Jackson suffered repeated beatings as a child, that his mother choked him several times, that his childhood was characterized by neglect and instability, and that Jackson exhibited signs of mental illness in childhood and was diagnosed at one time as schizophrenic.

The majority relies on representations in the declarations of various family mem-

1. The majority also alleges other errors by trial counsel-the length of the investigation and failure to investigate the circumstances surrounding the sodomy Jackson committed while in the military. The majority's failure to explain how these actions prejudiced Jackson renders these arguments little more than makeweight. If Jackson cannot show prejudice, he has not established a violation of his right to counsel.

youth, trial counsel had Jackson evaluated by two doctors who stated that he did not show any signs of mental illness at the time of trial. The two electroencephalograms showed no abnormalities. An attorney may reasonably rely on the reports of expert witnesses whom he hires to advise him. *See Morgan v. Bunnell*, 24 F.3d 49, 52 (9th Cir.1994). In determining whether Jackson's counsel acted within the wide range of professional judgment, we must focus on the reasonableness of the attorney's actions in light of what he was told by the experts. An attorney who hires two expert psychologists who in turn inform him that his client suffers from no mental illness acts reasonably when he does not pursue evidence that his client may have exhibited signs of mental illness as a child, particularly when the only indication of this was a juvenile record from thirteen years earlier.

Jackson has also failed to show prejudice. Considering the two expert conclusions of no mental illness, a report from when Jackson was sixteen revealing that he had been expected to develop stronger schizophrenic tendencies had no "reasonable probability" of changing the outcome of the sentencing proceeding.

III

The next category of evidence the majority faults trial counsel for not introducing is that dealing with the effects of PCP on Jackson's ability to premeditate. The majority concludes that trial counsel should have had Dr. Mead or another expert testify that Jackson was grossly intoxicated at the time of the murder and had little recollection of the events. The trial record demonstrates, however, that such additional testimony as the majority demands had little chance of affecting the decision of the jury, which already had before it evidence both of Jackson's PCP intoxication and of the effects of PCP.

Medical evidence during the guilt phase of the trial established the high level of PCP in Jackson's blood, as well as the presence of amphetamines and cocaine in his urine. The level of PCP was so high that according to defense expert, Dr. Aniline, it would render a first-time user unconscious. Jackson admitted he was a chronic user of PCP and had used PCP the day of the murder. Dr. Aniline testified further that Jackson's behavior at the time of the crime corresponded with PCP intoxication. Thus the jury knew that Jackson was high on PCP when he murdered the police officer.

The jury also heard at the guilt phase from Dr. Aniline that the effects of PCP are unpredictable, that individuals intoxicated with PCP remember only some things that happen during their high, and that even though they appear alert, they are not in fact entirely aware of what is happening and may not be processing information the way they normally would be. Finally and importantly, Dr. Aniline told the jury that a PCP user in Jackson's state of intoxication would have an impaired ability to think and deliberate, though he could not conclude for certain whether or not Jackson had deliberated. As the district court found, all of this evidence was consistent with trial counsel's strategy to explain how Jackson could have taken the actions he did and still be so intoxicated that his ability to think was impaired. Thus the jury had before it substantial evidence of the effects of PCP on a user's ability to think.

Even if trial counsel were unconstitutionally ineffective for not using an expert witness who had examined Jackson at the penalty stage to testify to Jackson's impaired ability to think, this would not have had a "reasonable probability" of producing a different sentencing outcome. At the penalty phase, the jury may consider all evidence presented at the guilt phase. *See People v. Cummings*, 4 Cal.4th 1233, 1330, 18 Cal.Rptr.2d 796, 850 P.2d 1 (1993) (In Bank). The jury that sentenced Jackson knew that PCP greatly impairs a user's mental condition and knew that Jackson was high on PCP at the time of

the crime. Yet, it sentenced him to death. I simply cannot say that there is a reasonable probability that a jury knowing those facts would have come out differently if only an expert had put two and two together. The jurors were quite capable of doing this themselves. Moreover, whatever additional evidence of PCP's effect on the ability to deliberate Jackson's counsel introduced, the jury had before it other evidence of premeditation. Jackson went to the police car, opened the door, grabbed the shotgun, and cocked the gun. There was also evidence that Jackson intentionally caused the officer to drop his guard before shooting him to death.[2] Because of this evidence of premeditation and because the jury effectively had before it the evidence the majority wishes trial counsel had introduced, I cannot conclude that but for counsel's decisions not to introduce the evidence there is a "reasonable probability" that the jury would have given a different sentence.

The evidence demonstrates that the jury was well aware that Jackson's ability to think clearly may well have been impaired when he shot the police officer, but still imposed the death sentence. The majority speculates when it concludes that if an expert who examined Jackson weeks after the murder had told the jurors that Jackson's ability to think at the time of the crime was impaired, there is a reasonable probability that they would not have imposed the death sentence. Perhaps the majority is inclined to the view that Jackson should not have received the death penalty: "[T]he evidence [of premeditation] was far from overwhelming; this is one highly unusual murder in the first degree, with an unplanned encounter between a grossly intoxicated, originally unarmed defendant suddenly ending in death." Supra at ——. For me, the point is that the jury knew all of that and still sentenced Jackson to death. I cannot usurp the role of the jury in determining the appropriate punishment by supplanting its judgment with my own.

IV

A sentence of death should not be imposed lightly nor without due consideration of all relevant factors. Nor should a federal court of appeals lightly overturn the sentence given by the jury, as well as the reasoned determinations of two state courts and a federal district judge, all of whom affirmed the sentence. Trial counsel's decisions fell well within the wide range of professional conduct and there is no "reasonable probability" that any errors he may have made affected the outcome of the proceeding. Thus, I must dissent from that portion of the opinion vacating Jackson's capital sentence.



UNITED STATES of America, Plaintiff–Appellee,

v.

JUVENILE MALE, Defendant–Appellant.

No. 99–30269.

United States Court of Appeals, Ninth Circuit.

Submitted May 4, 2000*

Filed May 11, 2000

Defendant was convicted in the United States District Court for the District of Montana, Donald W. Molloy, J., of aggra-

2. At the evidentiary hearing before the district court, Dr. Aniline himself testified that these and other actions by Jackson show deliberation and premeditation.

* The panel unanimously finds this case suitable for decision without oral argument. Fed. R.App. P. 34(a)(2).

APPENDIX R

tent that it apply disability standards consistent with those of private industry. The Board's current regulations appear to tolerate a discrepancy between Board and industry determinations of disability in an employee's regular occupation. *See* 20 C.F.R. § 208.11(a).

[2] Davis has presented sufficient evidence to infer that the Board applies different disability standards than the industry. He has presented evidence that one railroad refused to hire him for his regular occupation because of his hearing disability. Additionally, Dr. Peacher's statement that Davis "may" not have passed his yearly physical had his employer remained solvent, although equivocal, suggests that the Rock Island Railroad applied less stringent hearing disability requirements than the Board's requirements of complete deafness in one ear with substantial impairment in the other.

The appeals referee's decision did not consider the apparent discrepancy between the Board's standards and the statute. Indeed, the referee may not consider such a legal question, but must apply the regulation. *See School Board v. Department of Health, Education & Welfare*, 525 F.2d 900, 908 (5th Cir.1976). The Board's opinion also did not treat the point, but merely adopted the referee's decision as its own. The only possibly relevant comment in the opinions is the referee's statement that "pre-employment hiring practices are frequently much more rigid and exacting than practices or standards allowing a 20 year employee to stay on a job." R. I, 11. That is not a justification, but only an observation. We believe the Board is obligated to explain why its standards are more stringent than those applied by the railroad industry in hiring or retaining employees with over twenty years of experience. We reverse the Board's determination denying Davis disability benefits and remand to the Board for further proceedings. On remand we expect the Board (1) to demonstrate that it is applying the railroad industry's prevailing standards to disability determinations in this case, or (2) to show that Davis' impairment is not disabling under railroad industry standards, or (3) to grant Davis a disability annuity because of his hearing impairment.

REVERSED AND REMANDED.



Shirley TYLER, Petitioner-Appellee, Cross-Appellant,

v.

Ralph KEMP, Warden, Respondent-Appellant, Cross-Appellee.

No. 84-8213.

United States Court of Appeals, Eleventh Circuit.

Feb. 22, 1985.

Petitioner sought habeas corpus relief from conviction and sentence for murder of her husband as affirmed, 247 Ga. 119, 274 S.E.2d 549. The United States District Court for the Northern District of Georgia, Horace T. Ward, J., granted the writ as it pertained to the death sentence, and the state appealed. The Court of Appeals held that: (1) petitioner was denied effective assistance of counsel during sentencing phase in that defense counsel presented no evidence of mitigating circumstances; (2) jury charge on mitigating evidence did not affect outcome of trial, and thus was not reversible error; and (3) denial of psychiatric examination to develop mitigating evidence regarding petitioner's mental state was not error.

Affirmed.

1. Criminal Law ⇐641.13(1)

Someone challenging assistance of counsel must show that particular acts of counsel were outside wide range of compe-

tent assistance, and that those acts were actually prejudicial.

2. Criminal Law ⇐641.13(7)

In prosecution for murder in which defendant alleged that she poisoned her husband because she was afraid he would hurt her son, defense counsel was ineffective in failing to present, at sentencing phase, mitigating evidence, both from within defendant's family and without, which was available but not utilized.

3. Criminal Law ⇐822(1)

In reviewing adequacy of jury charge Court of Appeals looks to charge in its entirety.

4. Criminal Law ⇐822(1)

An appellate court must decide whether charge given, viewed in context of entire instruction, failed to adequately guide jury with respect to nature and function of mitigating circumstances.

5. Criminal Law ⇐796

An instruction regarding mitigating circumstances must normally explain both what a mitigating circumstance is as well as its function in a capital sentencing determination; although instruction does not specifically have to use the word "mitigating," it must communicate that the law considers circumstances which reduce punishment and degree of moral culpability.

6. Criminal Law ⇐1172.9

Instruction, though failing to communicate clearly weight and consideration jury should give to mitigating evidence, did not affect outcome of trial, and therefore was not reversible error.

7. Criminal Law ⇐1213.8(8)

Imposition of death penalty in domestic homicide case is not per se cruel and unusual punishment. U.S.C.A. Const. Amend. 8.

8. Mental Health ⇐434

Under Georgia law, without a special plea of insanity, it is within trial court's discretion to grant or deny motion for psychiatric examination.

9. Mental Health ⇐434

Denial of defendant's petition for a psychiatric examination to develop mitigating evidence regarding her mental state, which would have been especially useful in penalty phase of trial, was not error where there was no special plea of insanity, and similar evidence could have been presented in defendant's case, although trial counsel did not attempt to do so.

William B. Hill, Jr., Asst. Atty. Gen., Atlanta, Ga., for respondent-appellant, cross-appellee.

Glenn Zell, Atlanta, Ga., for petitioner-appellee, cross-appellant.

Appeals from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, CLARK, Circuit Judge, and THOMAS *, District Judge.

PER CURIAM:

Petitioner, Shirley Tyler, a state prisoner currently incarcerated at the Middle Georgia Correctional Institute in Hardwick, Georgia, was convicted and sentenced to death for the murder of her husband, James Tyler. After exhausting her state remedies she filed a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 raising ten grounds for relief. The matter was initially referred by the district court to a magistrate. The magistrate recommended that the writ be denied. The district court, however, found that the petitioner had been denied effective assistance of counsel during the penalty phase of the trial. Additionally, the district court found that an instruction given by the state trial court was defective in its explanation of mitigating circumstances. Therefore, the district court granted the

* Honorable Daniel H. Thomas, U.S. District Judge for the Southern District of Alabama, sitting by designation.

writ of habeas corpus as it pertained to the death sentence and the state brings this appeal. We affirm.

The Death of James Tyler and Petitioner's State Trial

James Tyler died on October 22, 1979 en route to the hospital. The doctor was unable to ascertain the cause of death and an autopsy was conducted. The pathologist concluded that Mr. Tyler died as a result of poisoning, after finding a lethal amount of parathion in his body. A subsequent investigation revealed a poison called phoskil (containing parathion) had been spread around the Tyler home to kill roaches. After discussions with Ms. Tyler, investigators began to suspect that she had poisoned her husband. She subsequently gave a statement in which she admitted that on the night of his death she had scraped some of the powder from a drawer and put it in her husband's chili because she was afraid he would hurt her son.[1] She was subsequently indicted for murder. At trial, Ms. Tyler was represented primarily by appointed counsel, Richard A. Bishoff.[2] Mr. Bishoff had only been admitted to the bar several months before his appointment as petitioner's counsel in November of 1979.[3] He had never participated in a murder case and his sole criminal experience consisted of trying a robbery case and an aggravated assault case, each of which took less than half a day. Mr. Bishoff filed several pretrial motions including a motion to suppress Ms. Tyler's statement, a motion for a change of venue due to pretrial publicity, and a motion for a psychiatric examination. All of these were denied by the trial judge. At trial, Bishoff presented two witnesses for the defense: Shirley Tyler and her oldest son Tony, who was then thirteen. Ms. Tyler testified at trial that her husband had been depressed and that he committed suicide after she had refused to give him poison. The state offered two explanations of Ms. Tyler's motive for killing her husband. One theory was that she killed him in order to receive life insurance benefits. The second theory was that she was having an extramarital affair.[4] The jury convicted Ms. Tyler of first-degree murder. No evidence was introduced by either party at the sentencing phase of the trial. The jury imposed the death penalty and more specifically found the presence of the aggravating circumstance that Mr. Tyler's death was "inhuman in that it involved torture." O.C.G.A. § 17–10–30(7).

On direct appeal to the Georgia Supreme Court, petitioner's conviction and sentence were affirmed. *Tyler v. State*, 247 Ga. 119, 274 S.E.2d 549 (1981). The Supreme Court denied Ms. Tyler's petition for a writ of certiorari. *Tyler v. Georgia*, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981). Petitioner exhausted the state collateral remedies and filed the instant petition in January of 1982. Two evidentiary hearings were held, one in September of 1982 and the second hearing in November of 1982. The magistrate issued his report and

1. Mr. Tyler had been hospitalized on two previous occasions for severe abdominal pain, nausea, uncontrolled bowels, and extreme thirst. Because the cause of these previous illnesses was never determined by a physician, the state's theory at trial was that the two previous illnesses were induced by Mrs. Tyler's poisoning of her husband as well.

2. Ms. Tyler was actually represented by two court appointed attorneys, Bishoff and Eric D. Hearn, Mr. Bishoff's law partner. Mr. Hearn assisted in trial preparation, Mr. Bishoff actually tried the case.

3. Mr. Bishoff had graduated from the University of Georgia Law School in March of 1979, taken the bar in February of 1979 and been admitted to the bar in June of 1979.

4. The district court found that there was little substantial evidence to support either of these theories. As to the insurance benefits claim, there was some evidence she inquired as to Mr. Tyler's insurance *after* his death. The jury, however, did not find that Ms. Tyler killed James Tyler for pecuniary gain even though the state urged them to do so at the penalty phase. *See* O.C.G.A. § 17–10–30(4) (aggravating circumstance; murder for the purpose of receiving money). The evidence regarding the extramarital affair centered upon a certain man Ms. Tyler had seen during a period of separation from her husband and who she was seen with after her husband's funeral.

recommendation finding no merit in any of petitioner's claims. Petitioner objected to the report and the district court subsequently granted habeas corpus relief as to the sentence of death.

There are five issues on appeal in this case; three of which are appealed by the state and two of which are raised on cross-appeal by Ms. Tyler. The state raises the following issues: (1) whether the district court erred in finding that Ms. Tyler was denied effective assistance of counsel in the sentencing phase of the trial because counsel presented no evidence in mitigation; (2) whether the trial court's charge on mitigating circumstances was constitutionally defective; and (3) whether certain comments made by the district attorney during closing argument were so prejudicial as to render the trial fundamentally unfair. The issues on cross-appeal are: (1) whether the death sentence is cruel and unusual punishment for a case involving a domestic homicide; and (2) whether Ms. Tyler was denied due process and equal protection of the law when the court denied her motion for a psychiatric examination both prior to trial and prior to the sentencing hearing. We approach these issues in turn.

Ineffective Assistance of Counsel

The district court found that Bishoff rendered ineffective assistance of counsel at the sentencing phase, principally because he presented no evidence of mitigating circumstances. Resolution of this issue requires application of the facts to the legal principles enunciated by the Supreme Court in the recent decision of *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Strickland*, the Court held that ineffective assistance of counsel would be measured by the test of whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied upon as having produced a just result. 104 S.Ct. at 2064. In order to make this determination, the Court delineated a two-part inquiry. First, did counsel in fact render a deficient performance? And second, if counsel's performance was deficient, was this prejudicial to the defense in any particular way?

[1] In order to make the first determination, the Court said that the test must be whether counsel's conduct fell below an objective standard of reasonableness. 104 S.Ct. at 2065. In other words, someone challenging the assistance of counsel must show that the particular acts of counsel were outside the "wide range of competent assistance." The Court also expressed a presumption in favor of competence that one challenging the effectiveness of counsel must overcome. 104 S.Ct. at 2066.

In order to make the second determination, it must be shown that the acts of counsel that were outside the range of competence were actually prejudicial, *i.e.*, that they had an adverse effect. 104 S.Ct. at 2067. In order to show actual prejudice, it must be shown that there was a "reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different." 104 S.Ct. at 2068.

[2] Applying these principles, we conclude that the district court did not err in holding that Bishoff was ineffective for failure to present mitigating evidence at the sentencing phase, and we conclude also that the omission was actually prejudicial.

During his investigation Bishoff (possibly accompanied by Hearn) met with members of Ms. Tyler's family at the jail for a couple of hours and discussed the case and defendant's background. Before trial Bishoff talked by phone with Shirley Tyler's grandmother and asked for the names of people who could testify. Immediately before trial, at the courthouse, Bishoff talked with the grandmother, aunt and brother. All stated, either at the jail or at the courthouse, or on both occasions, that they would not testify, or that they did not want to be involved. Their explanation, given at that time or at the habeas hearing, or both, was that they knew nothing of the murder and had nothing to tell.

The aunt and the grandmother testified that Bishoff did not tell them that their

testimony was needed on any subject other than guilt or innocence and did not explain the sentencing phase of the trial or that evidence of a mitigating nature was needed. They testified that they would have been willing to appear as mitigating evidence witnesses had they understood that such testimony was useful and needed, and they described various mitigating facts they could have covered in testimony. Bishoff's own testimony reveals that at no time did he discuss with the family members the need for their testimony in mitigation. Rather, so far as the family members knew from him, once they declined to testify because they knew nothing about the killing, the matter of their testifying ended. There was mitigating evidence that could have been submitted: that Shirley Tyler had no prior criminal record, not even an arrest; that she had a good work record and used her earnings to help care for her family; that her husband was drunk and abusive at times and had knocked out some of her teeth when drunk; that she and her children moved away at one time because he drank and beat her; that on one occasion he put her out of the house in her night clothes; that she was a good mother, "crazy about her children," and kept them clean and cared for; that her character and reputation as wife and mother were good.

Mitigating evidence from outside the family was possibly available. Despite testimony that Ms. Tyler had a good work record, no effort was made to bring forward testimony from her last employer. The absence of a prior criminal record was not adduced by evidence or stipulation.

Mitigating evidence was especially important because of the attitude in the small rural county where the murder occurred. Ms. Tyler's family lived outside the county. She had married and moved there. Her husband's family lived in the county. Both families were blacks, and the black community was outraged over the killing. Bishoff sought testimony from persons within the county but had difficulty finding anyone who would even talk to him about the case. He sought the testimony of a black minister, whose testimony he thought would be more helpful than that of anyone else, but to no avail. In these circumstances the testimony of family members, of defendant's former employer, and of her lack of a criminal record was especially important. These appeared to be the sole available sources for mitigating evidence, and they were not utilized.

As the Supreme Court has noted in its capital decisions, one of the key aspects of the penalty trial is that the sentence be individualized, i.e., the jury's discretion should be focused on the particularized nature of the crime and the characteristics of the individual defendant. *Gregg v. Georgia*, 428 U.S. 153, 206, 96 S.Ct. 2909, 2940, 49 L.Ed.2d 859 (1976). In *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) the court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving adequate and accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted in this case was thus robbed of the reliability essential to assure confidence in that decision.

In a recent decision, *King v. Strickland*, 748 F.2d 1462 (11th Cir.1984), a panel of our circuit reached the same conclusion as we do on similar facts. In *King*, counsel, who had never tried a capital case, failed to present available character testimony in mitigation at the penalty phase. The panel concluded that this, in conjunction with his weak closing argument at the penalty phase, denied the petitioner effective assistance of counsel. As the court in *King* stated, "[t]here is a sufficient probability that effective counsel could have convinced a sentencer that the death sentence should not be given to undermine confidence in the outcome." at 1465.

We conclude that if evidence such as we have described had been offered at the penalty phase, there is a reasonable probability that the result of the proceeding would have been different, i.e., that a sentence of life as opposed to death would have been rendered by the jury. Therefore, we affirm the district court on the issue of ineffective counsel at sentencing.

In affirming we cannot agree with several other findings entered by the district court. The court found that Bishoff never attempted to contact family members except for defendant's brother and that in fact he never did contact family members. As appears from evidence set out above, these findings are plainly erroneous. The court found that Bishoff was "patently unreasonable in not presenting mitigating evidence because of his presumption that a jury with Christian women on it would not vote for the death penalty." Bishoff's statement was: "I knew a majority of those women and children, families, and most of them were of the Christian faith. I did not see how they would bring back a death penalty." This single remark by Bishoff is extracted from a considerable discussion by him of the efforts that he and Hearn had made to know about the jury and of his views concerning the jury. He explained that he knew most of the jurors in the small county. He testified that he and Hearn investigated potential jurors and had another lawyer go over the jury list as well. Clearly Bishoff relied on much more than a theory, that the district court viewed as implausible, that a jury with Christian women would not return the death penalty. The implication, or finding, that he rested on this alone is not supported by the record.

The district court was highly critical of Bishoff's brief closing argument. Except for the absence of mitigating evidence to comment upon, we find it hard to fault him for either brevity or content of the argument. His brief plea for mercy, plus an argument that Ms. Tyler had learned of her husband's insurance policy only after his death, was not wide of the mark.

The court found that Bishoff was confused about the distinction between the guilt and sentencing phases of the proceedings. We can find no evidence to support this conclusion.

Bishoff had been admitted to the practice of law for about six months and possessed limited trial experience. Based on these two facts alone, the court expressed "serious doubt" that Bishoff was in a position to make a sound judgment call about presentation of mitigating evidence. No court should appoint an inexperienced lawyer to represent the defendant in a death penalty case. The risks to defendant, counsel, the judicial system and the community at large are too great. But the test is performance, not time at the bar.[5]

The Jury Charge Regarding Mitigating Circumstances

The district court found that the charge given to the jury on mitigating circumstances was constitutionally inadequate concluding that it failed to define mitigating circumstances or to describe their nature and function as required by this circuit's holding in *Spivey v. Zant*, 661 F.2d 464 (5th Cir. Unit B 1981). The particular instruction given to the jury in this case reads as follows:

> The law provides that the jury shall, before determining the punishment to be imposed, consider evidence in extenua-

5. Both appointed lawyers in this case worked on investigation. They talked with each other about what they achieved. Bishoff was lead counsel at trial and conducted most of the trial on behalf of defendant. We need not decide the extent to which in these circumstances trial counsel may be held ineffective if there are failures in seeking out evidence, for it is clear in this case that Bishoff talked to family members about their testifying and did not seek mitigating testimony from them, and that he knew that Ms. Tyler had a good work record and had been in no criminal difficulty. We do not imply that co-counsel Hearn failed in any respect. We merely note that the district court appeared to proceed on an unspoken premise that if there were shortcomings in investigation, preparation, or trial, all were chargeable to Bishoff. This is an issue for another day.

tion, mitigation, and aggravation of punishment, all authorized by the law, and in addition it shall consider any statutory aggravating circumstances which may be supported by the evidence. And the only issue at this time is the determination of the punishment to be imposed. Now in addition to the aggravating circumstances presented by the state, I specifically charge you that the law provides that you are to consider mitigating circumstances where there are mitigating circumstances, authorized by the law and warranted by the evidence in arriving at your decision on the appropriate penalty to be imposed. You may consider any matter in this case contended for by the defendant as a mitigating circumstance even though the defendant does not specifically enumerate any particular matter as a mitigating circumstance. Anything about the case that you consider might go in mitigation, you should consider it, and I specifically direct you to do so.

[3–5] In reviewing the adequacy of a jury charge we look to the charge in its entirety. *Cupp v. Naughten*, 414 U.S. 141, 146–47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). This standard applies to the sentencing as well as the guilt innocence phase of a trial. *Westbrook v. Zant*, 704 F.2d 1487, 1501 (11th Cir.1983). Therefore, an appellate court must decide whether the charge given, viewed in the context of the entire instruction, failed to adequately guide the jury with respect to the nature and function of mitigating circumstances. *Morgan v. Zant*, 743 F.2d 775 (11th Cir. 1984). In *Spivey, supra*, the court said that there must be a clear instruction on mitigation that guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense. 661 F.2d at 471. An instruction regarding mitigating circumstances must normally explain both what a mitigating circumstance is as well as its function in a capital sentencing determination. *Id.* Although the instruction does not specifically have to mention the word "mitigating," it must communicate that the law considers circumstances which reduce punishment and the degree of moral culpability. As this circuit has repeatedly stated:

> An authorization to consider mitigating circumstances is a hollow instruction when unaccompanied by an explanation informing the jury why the law allows such a consideration and what effect a finding of mitigating circumstances has on the ultimate recommendation of sentence.

Finney v. Zant, 709 F.2d 643, 647 (11th Cir.1983) (quoting *Westbrook*).

[6] While we conclude that the instruction failed to communicate clearly the weight and consideration the jury should give to mitigating evidence, we cannot say this affected the outcome of the trial. We have already discussed the fact that the jury heard no mitigating evidence because of the ineffectiveness of counsel. Thus, it is unnecessary to rule squarely upon whether the instruction was error, since we reverse because of the absence of mitigating evidence.

Prosecutorial Misconduct

Appellee argued in the district court that certain remarks made by the prosecutor during closing argument in the sentencing phase of her trial were prejudicial.

The district court did not determine whether the prosecutor's statements required relief in this case as it had already decided to grant the writ on two other grounds. Likewise, as we have affirmed the district court on the grounds of ineffective assistance of counsel, we also do not reach the merits on this issue.

The Death Penalty as Cruel and Unusual Punishment for a Domestic Homicide

[7] The appellee argues, in essence, that it is cruel and unusual punishment in violation of the Eighth Amendment to impose the death penalty in a domestic homicide case. Appellee relies upon the Supreme Court case of *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). This claim is without merit as *Godfrey* does not stand for a blanket proposition that the death penalty constitutes cru-

el and unusual punishment when imposed for a domestic homicide.

Denial of a Psychiatric Examination

[8] Defense counsel in this case twice petitioned for a psychiatric examination for the appellee. Prior to trial, counsel filed a motion for psychiatric examination for the purpose of determining appellee's competence to stand trial and appellee's sanity at the time of the offense. The trial judge denied the motion. Counsel later requested a psychiatric examination prior to the penalty phase of the trial in response to the trial court's inquiry regarding the presentation of mitigating evidence. Again, the trial court denied the motion. This second request was made upon trial counsel's belief that his client did not have the mental capacity to understand what she had done or what happened at trial and the fact that he had been unable to effectively communicate with her. However, at no point was there ever a special pleading of insanity. Under Georgia law, without a special plea of insanity, it is within the trial court's discretion to grant or deny a motion for a psychiatric examination. *Cobb v. State*, 244 Ga. 344, 260 S.E.2d 60 (1979). Appellee's contention is essentially that a psychiatric examination would have developed mitigating evidence regarding her mental state and would have been especially useful in the penalty phase of the trial.

[9] The law of this circuit controlling this issue is *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir.1983). In *Westbrook*, the court concluded that the state is required to furnish the services of a psychologist or psychiatrist only in those capital cases deemed appropriate by the state trial court. As we noted above, in the absence of a special plea of insanity which was not filed here, a request for a psychiatric examination is a matter of trial court discretion in Georgia. The panel in *Westbrook*, concluded there had been no abuse of discretion because the evidence which Westbrook sought could have been demonstrated by other methods such as testimony of friends, relatives, neighbors, or the defendant's own testimony. In this case, the district court concluded that similar evidence could have been presented in Ms. Tyler's case, although trial counsel did not attempt to do so. We are in agreement with the district court.

Because of the amorphous nature of counsel's request for a psychiatric examination as well as the fact that the court in *Westbrook* refused to grant relief based upon a denial of a psychiatric examination under a fact situation more compelling than this, we affirm the district court on this issue.

Therefore, the judgment of the district court is

AFFIRMED.



UNITED STATES of America, Plaintiff-Appellee,

v.

Wendell COLE, Howard Masters, B.K. Taylor, Larry Masters, Defendants-Appellants.

No. 82–5455.

United States Court of Appeals, Eleventh Circuit.

March 19, 1985.

Defendants were convicted in the United States District Court for the Southern District of Florida, C. Clyde Atkins, J., of drug offenses involving importation of marijuana, and they appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) evidence supported conviction of conspiracy to import marijuana; (2) district court did not err in denying motion to inspect grand jury records; (3) evidence supported jury finding that substance in question was marijuana; and (4) prosecutor's

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APPENDIX S

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(Cite as: 50 M.J. 4)

U.S. Court of Appeals for the Armed Forces.

UNITED STATES, Appellee,
v.
James T. MURPHY, Sergeant, U.S. Army, Appellant.

No. 64,926.
CMR No. 8702873.

Argued May 15, 1997.
Decided Dec. 16, 1998.

Accused was convicted by general court-martial, Craig C. Jacobsen, J., of three specifications of premeditated murder, larceny, bigamy, and false swearing, and was sentenced to death. Following affirmance, 30 M.J. 1040, case was remanded, 36 M.J. 8, and 34 M.J. 310. Upon remand, the United States Army Court of Military Review affirmed, 36 M.J. 1137. Review was granted. The United States Court of Appeals for the Armed Forces, Cox, Chief Judge, held that: (1) accused lacked standing to object to United States Army's exercise of jurisdiction over him, but (2) accused was denied effective assistance of counsel.

Decision set aside.

Sullivan and Crawford, JJ., filed dissenting opinions.

West Headnotes

[1] Military Justice k898
258Ak898
Accused lacked standing to object to United States Army's exercise of jurisdiction over him after German prosecutors waived jurisdiction. R.C.M. 201(d)(3).

[2] Military Justice k515
258Ak515
[2] Military Justice k893
258Ak893
Accused was lawfully subject to jurisdiction of court-martial, even if conduct of United States military authorities in Germany misled German authorities into decision not to seek accused's return to custody of Germany for prosecution; at all times pertinent, accused was member of United States

Army and subject to jurisdiction of court-martial, and he was taken into custody in United States and was never released to custody and control of Germany. UMCJ, Art. 2, 10 U.S.C.A. § 802.

[3] Military Justice k1242
258Ak1242
A military member is entitled to effective assistance of counsel. U.S.C.A. Const.Amend. 6.

[4] Military Justice k1242
258Ak1242
When the United States Court of Appeals for the Armed Forces looks for effective assistance of counsel, it does not scrutinize each and every movement or statement of counsel; rather, the Court satisfies itself that an accused has had counsel who, by his or her representation, made the adversarial proceedings work. U.S.C.A. Const.Amend. 6.

[5] Military Justice k1242
258Ak1242
The accused is entitled to have conflict-free counsel. U.S.C.A. Const.Amend. 6.

[6] Military Justice k1242
258Ak1242
The military judge has a sua sponte duty to resolve on the record questions concerning whether trial defense counsel has a conflict of interest. U.S.C.A. Const.Amend. 6.

[7] Military Justice k1421
258Ak1421
[7] Military Justice k1426
258Ak1426
Multiple representation by trial defense counsel, even if unexplained in the record of trial, does not, per se, mandate reversal; rather, it creates a presumption that a conflict of interest existed, one that can be rebutted by the actual facts. U.S.C.A. Const.Amend. 6.

[8] Military Justice k1242
258Ak1242
Accused who claimed to have been deprived of right to conflict-free counsel as result of trial defense counsel's recent representation of government witness was not prejudiced at guilt phase of trial by counsel's failure to object to that witness' testimony that accused stated that he murdered his son because his son had witnessed accused murder two other victims; accused's several confessions were corroborated by physical evidence. U.S.C.A. Const.Amend. 6.

[9] Military Justice k1419
258Ak1419
Accused's death sentence could not be affirmed absent determination of whether he was deprived of his right to conflict-free counsel at sentencing as result of trial defense counsel's recent representation of government witness who testified without objection that accused stated that he murdered his son because his son had witnessed accused murder two other victims. U.S.C.A. Const.Amend. 6.

[10] Military Justice k1242
258Ak1242
Accused was deprived of effective assistance of counsel in capital murder case; trial defense counsel were neither educated nor experienced in defending capital cases, such lack of training and experience led to questionable tactical judgments concerning investigation of mitigating circumstances of accused's allegedly traumatic family and social history, and evidence obtained post-trial raised doubts as to accused's mental responsibility. U.S.C.A. Const.Amend. 6; UMCJ, Arts. 59(a), 67(a)(1), 10 U.S.C.A. §§ 859(a), 867(a)(1).

*5 COX, C.J., delivered the opinion of the Court, in which GIERKE and EFFRON, JJ., joined. SULLIVAN and CRAWFORD, JJ., filed dissenting opinions.

For Appellant: Captain Richard E. Burns, Captain Mark I. Goodman, and Captain Kurt Mayer, USAR (argued); Colonel John T. Phelps, Major Fran W. Walterhouse, Captain Beth G. Pacella, and Captain Victor A. Tall (on brief); Captain Arden B. Levy.

For Appellee: Major Lyle D. Jentzer and Captain Steven H. Levin (argued); Colonel John M. Smith, Lieutenant Colonel Eva M. Novak, Captain Michael E. Mulligan, and Captain Kenneth G. Wilson (on brief); Lieutenant Colonel James L. Pohl.

Amicus Curiae urging reversal: Sandra Tvarian (law student) (argued); Richard J. Wilson and David M. Vaughn (law student) (on brief); Elliott S. Milstein.

Chief Judge COX delivered the opinion of the Court.

Appellant, Sergeant (SGT) James T. Murphy, stands convicted of three specifications of premeditated murder, in violation of Article 118, Uniform Code of Military Justice, 10 USC § 918, and single specifications of larceny, bigamy, and false swearing, in violation of Articles 121 and 134, UCMJ, 10 USC §§ 921 and 934, respectively. He was sentenced by a general court-martial to death. The Court of Military Review (now the Court of Criminal Appeals) affirmed his convictions and sentence to death. 36 MJ 1137 (1993). His appeal is mandated by Article 67(a)(1), UCMJ, 10 USC § 867(a)(1)(1994).

Appellant has raised numerous issues in his appeal, many of which are classic appellate issues relating to the trial, the jurisdiction of the court-martial, evidentiary rulings, discovery questions, and the like. However, interspersed among these are numerous collateral attacks on his conviction, primarily based upon his claims of ineffective assistance of counsel. See APPENDIX for a complete list of the issues raised by appellant.

Upon careful consideration of appellant's claims, we agree that he received ineffective assistance of counsel as to his sentencing case. Accordingly, we set aside the decision of the Court of Military Review and return the record to the Judge Advocate General of the Army for further action consistent with the decretal paragraph of this opinion.

Unlike the practice in the United States Courts of Appeals and District Courts, neither the UCMJ nor the Manual for Courts-Martial, United States, 1984, provides procedures for collateral, post-conviction attacks on guilty verdicts. See 28 USC § 2255, et seq. Nevertheless, we have relied upon a variety of procedures to ensure that a military accused's rights are fully protected. See, e.g., United States v. Henry, 42 MJ 231, 238 (1995) (remanded to Court of Criminal Appeals for consideration of affidavits of respective parties); United States v. DuBay, 17 USCMA 147, 37 CMR 411 (1967) (evidentiary *6 hearing). In this case, we have elected to consider not only the record of trial, but also numerous affidavits filed subsequent to the trial in order to determine if appellant has shown good cause for relief to be granted. Arts. 67 and 59(a), UCMJ, 10 USC §§ 867 and 859(a), respectively. In so doing, we have carefully considered all of the issues raised by appellant before the Court. However, we will discuss only two general areas of concern: one of these, in personam jurisdiction of the court-martial to try him, by its very nature must be resolved at the threshold; the other, in our view, is dispositive of his appeal.

First, we will consider whether there was jurisdiction, under principles of international law, to try appellant in Germany, by United States General Court-Martial, for the murder of his former wife and former stepson, who were German citizens and were not his "dependents" at the time of the homicide. Second, we will consider whether appellant is entitled to a new trial on the ground that he did not receive effective assistance of counsel.

THE FACTS

Petra Murphy, a citizen and resident of Germany, had been married to appellant. She had a 5-year-old son, Tim, before she married appellant, and she had a second son, James, Jr., by appellant. During the months prior to the murders, she and appellant had an ongoing, acrimonious divorce proceeding pending in the German courts. In June 1987, appellant married Beate, another German citizen, although he had not yet divorced Petra. In July 1987, appellant visited North Carolina, where he obtained a divorce from Petra on the grounds of a 1-year separation. In August 1987, appellant received military orders requiring him to transfer to Redstone Arsenal, Alabama.

Sometime between August 16, when Petra was last seen alive by a fellow church member, and August 20, when appellant left Germany, appellant went to Petra's apartment. There, according to his confessions, he killed her by smashing in her head with a hammer. He also admitted that he killed Tim and James, Jr.

The bodies were discovered on August 23, when Petra's pastor, Chief Warrant Officer Two Smith, tried to ascertain why she had missed several church activities. Smith went to her apartment, where he encountered an unusual odor. He reported his findings to the German police. They investigated and discovered the bodies of the three victims.

This discovery precipitated an investigation by both the German authorities and the U.S. Army Criminal Investigation Command (CID). On August 27, 1987, appellant gave the first of several confessions to the authorities. Ultimately, he gave a written statement to the CID, in which he admitted that he had killed his former wife and the two children.

Appellant was taken into custody at Redstone Arsenal and was returned to Germany, where he was placed in pretrial confinement by the U.S. Army in the Mannheim Confinement Facility, Germany. While there, he also confessed his guilt to two fellow inmates, and he made incriminating statements to Sergeant First Class James Marek.

THE JURISDICTIONAL QUESTIONS

The Constitution of Germany prohibits imposition of the death penalty. From that vantage point, appellant now asserts that he was "100 percent" in favor of having the German Government exercise jurisdiction over the offenses in question. His basic premise is that primary jurisdiction over the homicides of his former wife and her son was with the German Government, and that the German Government would have exercised jurisdiction over this case had the German authorities realized they had primary jurisdiction. See Art. VII.3, North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA), 4 UST 1800, as applicable to Germany effective July 1, 1963, 14 UST 531. More specifically, his attack is three-fold.

First, he asserts that, by operation of certain laws and regulations, he was denied effective assistance of counsel in presenting his views to the German authorities. Specifically, he claims that his detailed defense *7 counsel were prohibited by law, the Logan Act, 18 USC § 953 (1982), and by military regulation, U.S. Army Europe Regulation 550-56, from actively representing him in the negotiations with the local German prosecutors concerning the question of jurisdiction.

Second, he contends that the German prosecutors were acting under a false belief that the United States had primary jurisdiction over the case under the existing NATO SOFA, and he argues that American authorities had either mistakenly or purposely informed the German prosecutor that all of the victims in the case were "dependents" within the meaning of the treaty when, in fact, they

were not. If this is the case, argues appellant, jurisdiction over him was acquired in contravention of a treaty, the NATO SOFA. Relying on the distinctions made by the Supreme Court in two landmark cases, Ker v. Illinois, 119 U.S. 436, 7 S. Ct. 225, 30 L. Ed. 421 (1886), and United States v. Rauscher, 119 U.S. 407, 7 S. Ct. 234, 30 L. Ed. 425 (1886), appellant argues that, if he is correct, then the United States was without jurisdiction to try him.

Third, appellant argues that he was clearly prejudiced. In this regard, appellant contends that a letter from the German Minister of Justice to the Attorney General of the United States clearly shows that German authorities would have exercised jurisdiction if they had not been mistaken about the true facts.

Government counsel counter these arguments in several ways. They assert that: (a) appellant has no standing to raise the issue; (b) appellant waived any claim for relief because he did not object to the trial prior to completion of the court-martial; and (c) in any event, to the extent that any claim for relief must be based upon Government misconduct, the United States was free of any wrongdoing here.

[1] We resolve all of these claims against appellant. We agree with the Army Court of Military Review that appellant has no standing to object to the process. RCM 201(d)(3), Manual, supra, as amended, provides:

> Where an act or omission is subject to trial by court-martial and by one or more civil tribunals, foreign or domestic, the determination which nation, state, or agency will exercise jurisdiction is a matter for the nations, states, and agencies concerned, and is not a right of the suspect or accused.

This provision is based upon principles of sovereignty long recognized by the Supreme Court. See Ponzi v. Fessenden, 258 U.S. 254, 260, 42 S. Ct. 309, 66 L. Ed. 607 (1922), which states:

> One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that. . . . He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it.

See also Wilson v. Girard, 354 U.S. 524, 77 S. Ct. 1409, 1 L. Ed.2d 1544 (1957).

[2] Assuming, however, that appellant has standing to complain about the exercise of jurisdiction over him by the U.S. Army, he nevertheless loses. The Supreme Court in Solorio v. United States, 483 U.S. 435, 107 S. Ct. 2924, 97 L. Ed.2d 364 (1987), held that the test for whether a military court-martial has jurisdiction to try an accused is the military status of the accused. But cf. Loving v. United States, 517 U.S. 748, 774, 116 S. Ct. 1737, 135 L. Ed.2d 36 (1996) (Stevens,

J., concurring); compare with Relford v. Commandant, U.S. Disciplinary Barracks, Ft. Leavenworth, 401 U.S. 355, 365, 91 S. Ct. 649, 28 L. Ed.2d 102 (1971) (query whether appellant satisfies all twelve factors to defeat jurisdiction in military court-martial).

It is uncontested that, at all times pertinent to this case, appellant was a member of the U.S. Army and subject to the jurisdiction of the court-martial. Art. 2, UCMJ, 10 USC § 802. Furthermore, he was taken into custody in the United States and was never released to the custody and control of Germany. Accordingly, even if the conduct of United States military authorities in Germany misled German authorities into a decision ***8** not to seek the return of appellant to the custody of Germany for prosecution, appellant was, nevertheless, lawfully subject to the jurisdiction of the court-martial. In personam jurisdiction over him existed because of his status as a soldier in the Army, not as a result of his person being turned over to the United States by a foreign government pursuant to an extradition treaty. Therefore, his reliance on United States v. Rauscher is misplaced.

We need not decide whether the Logan Act or the U.S. Army Europe Regulation can indeed prevent a defense counsel from communicating with German prosecutors. Nor do we resolve the issue by holding that appellant waived his right to contest jurisdiction. That merely raises other questions as to the competence of his attorneys, which we discuss next.

THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant makes a broad-based attack upon the performance of his trial defense counsel. In order to evaluate properly appellant's multiple claims, it is first necessary for us to put the case into perspective. Thus, we must carefully review every aspect of the case and balance the claims against the total record before us. That review includes consideration of the training, experience, and abilities of trial defense counsel; the pretrial proceedings; the investigative efforts of the defense team; the selection of the court members; the trial strategy; the performance of counsel during the trial; the sentencing case; and the posttrial proceedings.

[3][4] It is beyond dispute that a military member is entitled to effective assistance of counsel. United States v. Scott, 24 MJ 186 (CMA 1987). When we look for effective assistance, however, we do not scrutinize each and every movement or statement of counsel. Rather, we satisfy ourselves that an accused has had counsel who, by his or her representation, made the adversarial proceedings work. United States v. DiCupe, 21 MJ 440 (CMA 1986). In evaluating claims of ineffective assistance of counsel, we have adopted the two-pronged test articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). See United States v. Loving, 41 MJ 213, 241 (1994), aff'd on other grounds, 517 U.S. 748, 116 S. Ct. 1737, 135 L. Ed.2d 36 (1996).

> 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, 104 S. Ct. 2052; See United States v. Scott, supra.

We wish to make it clear at the outset that our review of defense counsels' performance in this trial does not reveal anything which suggests that they were less than totally dedicated to the defense of SGT Murphy. Our review of the decisions, actions, or inactions of defense counsel is conducted in the calm atmosphere of appellate review. Our vision considers the fog of battle, but it is also clarified by the guiding lights of aggressive appellate counsel. We also have the benefit of having reviewed numerous cases over the years and developed a sense of the standards of performance that can reasonably be expected of defense counsel. We are not looking for perfection, but rather we are seeking to ensure that military accused are represented by "reasonably competent" counsel, and that the results obtained at trial are reliable. Strickland v. Washington, supra; United States v. Polk, 32 MJ 150 (CMA 1991). With these thoughts, we first look at the defense counsel in this case.

DEFENSE COUNSEL

Two U.S. Army Judge Advocates, Captains (CPT) Richard Vitaris and William Schneller, were "detailed" by CPT Vitaris, the Senior Defense Counsel, Hanau Field Office, U.S. Army Trial Defense Service, to represent appellant at trial. The only statement on the record as to the qualifications of these attorneys to defend appellant, in this capital case, ***9** was made by CPT Vitaris: "We are both qualified and certified in accordance with Article 27(b), [UCMJ, 10 USC § 827(b)]." Nothing in the record of trial gives any indication of the training, experience, or abilities of these counsel. The record of trial does not tell us the number of cases each counsel had tried, how long counsel had been admitted to a state bar, or whether either had actually represented a client in a contested felony case involving voir dire examination of witnesses, cross-examination, or opening and closing statements. Neither does the record indicate whether either counsel had ever requested a mental health examination of a client or consulted with a forensic psychiatrist; what kinds of investigative assistance or other resources were available; or whether counsel had any knowledge or experience in the use of collateral resources. **[FN1]**

> FN1. An enlightening exchange took place between CPT Schneller (one of appellant's trial defense counsel), Major (MAJ) Pianelli (the trial counsel), and the military judge, involving the use of the telephone by the defense counsel. In summary, the defense counsel was having a difficult time using ordinary military telephone channels to contact witnesses in the United States. In order to use the commercial German telephone system, he had to obtain permission from military authorities. MAJ Pianelli finally authorized CPT Schneller to make

calls, although he stated that he did so "knowing full well that I personally would probably have to pay for the call because proper authorization from Fifth Signal Command had not been obtained." It is difficult to believe that a defense counsel in a capital case would have to get permission from the prosecutor to use the telephone, much less that the prosecutor would have to pay for the calls out of his own pocket.

Posttrial affidavits tell us more about the two attorneys. For example, from CPT Vitaris, the lead counsel, we learn: "Prior to my representation of SGT Murphy, I never represented or served as associate counsel on a case before a capital sentencing proceeding." Also we learn that he "did not attend any capital training seminars prior to . . . [his] representation of SGT Murphy."

CPT Schneller, the assistant defense counsel, was "responsible for the voir dire and sentencing portions of the case," two of the most important aspects of any capital case. This division of responsibility was made despite the fact that CPT Schneller had been a defense counsel for only 4 months prior to being "detailed" by CPT Vitaris to assist in appellant's defense. CPT Schneller had no experience in defending capital cases, and he had not received any training in this area of practice.

The record tells us almost nothing about the pretrial investigation or preparation by counsel. Again, through the above-mentioned posttrial affidavits, we learn that both Captains Vitaris and Schneller were "burdened by tasks from the trial defense service." Counsel did not go to North Carolina to investigate the sentencing portion of the case, and no expert witnesses were employed by the defense.

In summary, the record of trial and the posttrial affidavits leave us with only one rational conclusion: SGT Murphy was defended by two attorneys who were neither educated nor experienced in defending capital cases, and they either were not provided the resources or expertise to enable them to overcome these deficiencies, or they did not request same.

In Loving, 41 MJ at 300, we expressly declined to mandate that military defense counsel meet the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines) (February 1989). Nor have we held that 18 USC § 3005 applies to courts-martial. That provision of law, as amended in 1994, requires that, in a capital case, the judge shall, "upon the defendant's request, assign 2 such counsel, of whom at least 1 shall be learned in the law applicable to capital cases." But both the ABA Guidelines and federal law are instructive. Counsel who are "learned in the law applicable to capital cases" are less likely to provide an inadequate or ineffective defense than those "not learned" in the law.

In looking at defense counsels' performance at trial, we have chosen the route illuminated by the Supreme Court in United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed.2d 657 (1984). See United States v. ***10** Loving, supra. That route compels us to look to the adequacy of counsels' performance, rather than viewing the limited experience of counsel as an inherent deficiency. See Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed.2d 180 (1993); Strickland v. Washington and United States v. Scott, both supra. Of course, as the ABA Guidelines

and 18 USC § 3005 implicitly suggest, and as we have just noted, inexperience — even if not a flaw per se — might well lead to inadequate representation. In the final analysis, what we must consider is whether counsels' performance was "deficient" and whether "counsels' errors were so serious as to deprive the defendant of a fair trial," one where the "result [of the trial] is reliable." Fretwell, supra at 369, 113 S. Ct. 838.

THE CLAIMS

Appellant's claims of ineffective assistance of counsel are numerous. However, we will discuss only what we feel are the three principal claims, as follows:

1. That appellant was denied "conflict-free" counsel. See Issues IV to IX, APPENDIX.

2. That appellant was denied effective assistance of counsel "because his trial defense counsel failed to investigate the mitigating circumstances of his traumatic family and social history." See Issue XVI, APPENDIX.

3. That appellant received ineffective assistance of counsel because "his trial defense counsel failed to adequately explore mental health evidence." See Issue XVII, APPENDIX.

Related to this last claim is Issue XV, APPENDIX, wherein appellant claims that he was denied "due process of law because he was denied competent psychiatric assistance in the evaluation, preparation, and presentation of his case."

THE CONFLICT OF INTEREST QUESTIONS

The Government called Private (PVT) French as a witness against appellant. French had been one of appellant's pretrial cell mates in the Mannheim Correctional Facility. While there, appellant engaged in a conversation with an inmate named Offill, in which appellant made certain incriminating statements. PVT French allegedly overheard this conversation and related what he had heard to his lawyer — CPT Schneller. Some weeks later, after CPT Schneller had negotiated a pretrial agreement for PVT French, CPT Schneller formally moved to withdraw from French's case. The military judge who granted the motion to withdraw was the same military judge who presided over appellant's trial. At appellant's trial, French gave his testimony regarding the confession, without objection by appellant's defense counsel. French was not cross-examined concerning the confession. Defense counsel made no effort to impeach the testimony of French, although he had recently been convicted of several crimes involving dishonesty and deceit.

At appellant's trial, CPT Schneller gave no notice to the military judge that there had been dual representation by him of both appellant and French. See Wheat v. United States, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed.2d 140 (1988); United States v. Breese, 11 MJ 17 (CMA 1981).

Although it can be argued that the military judge knew, or at a minimum should have known, of the potential conflict of interest between the representation of French and appellant, the military judge likewise made no inquiry on the record regarding the conflict. In any event, neither counsel nor the military judge discussed the potential conflict of interest on the record.

Appellant now claims on appeal that he was prejudiced by this conflict of interest because his counsel did not cross-examine French and did not object to any portion of French's testimony. See Hoffman v. Leeke, 903 F.2d 280 (4th Cir.1990); United States v. Iorizzo, 786 F.2d 52 (2d Cir.1986).

[5][6][7] Appellant correctly contends that he was entitled to have conflict-free counsel. Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed.2d 426 (1978). He is also correct that the military judge had a sua sponte duty to resolve conflict questions on the record. United States v. Breese, supra. Not only was he entitled to have the judge sort out conflict-of-interest claims, his attorneys ***11** had a duty to discuss potential or actual conflicts of interest with him. See RCM 901(d)(4); Henry, 42 MJ at 237. Our rationale for the rule enunciated in Breese was "to disarm future contentions that, by reason of multiple representation, an accused has been deprived of the effective assistance of counsel." 11 MJ at 23. However, multiple representation, even if unexplained in the record of trial, does not, per se, mandate reversal. Rather, it creates a presumption that a conflict of interest existed, one that can be rebutted by the actual facts. Id. The question is, and remains, whether the multiple representation in a particular setting resulted in an "actual conflict of interest." Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed.2d 333 (1980).

The Court of Military Review carefully considered, but rejected, appellant's conflict-of-interest claims. 36 MJ at 1143-45. However, the court below had no record of any trial or posttrial proceeding on which to base its judgment. See United States v. Smith, 36 MJ 455, 457 (CMA 1993). Rather, the court below decided the issue by finding the affidavit of defense counsel more credible than the affidavit of appellant. This method of judging credibility also involves the questionable practice of resolving pure disputes of material fact by mere affidavits, a practice which this Court has recently criticized and condemned. See United States v. Ginn, 47 MJ 236 (1997).

Likewise, we have searched the record of trial and the posttrial affidavits, and we have considered the arguments of counsel and the law. Assuming, arguendo, that there was a conflict of interest, we conclude that this conflict had no impact on the merits portion of the trial. PVT French's testimony was mostly cumulative. However, he did provide two additional facts, without objection by counsel for appellant.

First, French's testimony sealed appellant's motive for killing his own son:

> And he said it was like a voice that was in his mind, telling him to "Go get your other son because he knew you were there, as a witness," so he took his son out of bed and

took him into the bathroom and put I believe it was three or four inches of water in the bathtub, I'm not sure. And then, stuck the little boy's head down in the water and he was drowning him.

Second, French provided helpful testimony that might show why appellant would falsely confess to the killings. This testimony, as follows, was certainly harmless, if not actually helpful:

Q. Did he indicate to you involvement of anyone other than himself?
A: He didn't indicate, sir. He didn't indicate, sir. He did say that ah — I asked him, "When you came to the States, they didn't have any real evidence on you, so why did you confess so easily?" He told me that he was protecting somebody that he loved, but he never did say her name or anything else about it.
Q: Was [appellant's] concern that somebody else would be falsely accused? Was that the indication that he gave?
A: Yes.

[8] Regardless, because the several confessions by appellant were corroborated by the physical evidence in the case, we conclude that French's motive testimony could not have prejudiced appellant as to the findings of guilt in this case.

[9] Nevertheless, the question whether this conflict of interest had any impact on the sentencing proceedings remains unresolved. Under our case law, the court below erred by resolving this question solely on the basis of the contradictory affidavits. United States v. Ginn, supra. This issue should have and could have been resolved at trial by the simple exercise of CPT Schneller reminding the military judge of the prior representation, and by the judge conducting a suitable inquiry of counsel and appellant on the record.

Nevertheless, as to findings, we are convinced beyond any reasonable doubt that appellant was not prejudiced by the unresolved conflict of interest because of the admission of his multiple confessions and the corroborating physical evidence. However, we cannot say with confidence that French's testimony about why appellant killed his son had ***12** no impact on the members' deliberations on sentence. From this record, we are unable to answer the question whether counsels' failure to resolve the conflict clearly resolved the key questions, (1) did "counsel actively represent[ ] conflicting interests" or (2) was there an "actual conflict of interest [which] adversely affected counsel's performance." Smith, 36 MJ at 457. In such a circumstance, we are compelled not to affirm appellant's death sentence without resolving the conflict-of-interest question. Henry, supra at 238.

PRETRIAL INVESTIGATION AND THE TRIAL

[10] Before turning to appellant's claims of ineffective assistance of counsel, in that defense counsel did not properly prepare or try his case, it is necessary to look at the defense team's pretrial setting and the trial strategy. First and foremost, defense counsel were confronted with a gory and inexplicable family homicide. Appellant's first wife had been killed by repeated blows to the head by a blunt object, ultimately determined to be a hammer, and then drowned in her bathtub. Two small children, a stepson and son, had been violently killed. The killer had left them to decay in a civilian apartment in Germany.

Upon being questioned by police investigators in Alabama, appellant confessed his guilt and subsequently made numerous confessions to many different people. Confronted with this overwhelming evidence, appellant attempted to plead guilty to the charges. The military judge rejected appellant's guilty pleas because the case had been referred as a capital case. RCM 910(a)(1).

Prior to the commencement of proceedings, appellant's counsel requested that appellant be examined by a sanity board. See RCM 706. The purpose of such a board is to determine if an accused "lacks capacity to stand trial" or "lacked mental responsibility for any offense charged." Lack of mental responsibility is a complete defense under military law. Article 50a(a), UCMJ, 10 USC § 850a(a), states:

> It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

The psychiatric board reported that appellant did not suffer from a severe mental disease or defect, and that he was able to "cooperate intelligently in the defense."

Article 45(b), UCMJ, 10 USC § 845(b), and the Rules for Courts-Martial will not allow a capital defendant to plead guilty. Thus, appellant's defense team attempted to mount a defense to the capital murder charges. In light of the numerous confessions, some with inconsistencies, the defense tried to create the belief that perhaps the confessions were untrue and the killings were actually committed by appellant's second wife, Beate, a person whom appellant would try to protect with his false confessions. The defense strategy obviously did not work.

The sentencing case was handled by CPT Schneller. He did not travel to the United States in order to conduct personal interviews with witnesses in appellant's hometown of Clinton, North Carolina. Instead, he attempted to develop an extenuation and mitigation case by correspondence and telephone. The pretrial effort is best summed up by CPT Schneller in an affidavit of January 28, 1993. There, he stated:

> I obtained a list of witnesses from SGT Murphy and also sent letters out to many friends and relatives in SGT Murphy's home town. I . . . received responses to these letters and from the responses I made phone calls back to individuals inquiring into Murphy's life history. Based on the interviews, I selected the individuals I thought would be most helpful to our case and requested that they be flown over at government expense. Throughout my interviews there was never any mention of abuse or mistreatment against SGT Murphy or his mother. And further, SGT Murphy never gave any of this information to me.

As a result of this preparation, the defense offered evidence of SGT Murphy's previous *13 good character; the fact that he was not a violent man; that he was a good soldier; and that he desired to rehabilitate his life. See 36 MJ at 1146. SGT Murphy gave an unsworn statement in which he asked the members to spare his life, and he expressed remorse. SGT Murphy also told the members that he had tried to plead guilty.

CPT Schneller delivered a well-prepared and thoughtful summation for the members to consider, including reminding each member that it was a personal decision to return a death sentence. In spite of defense counsels' efforts, the court-martial returned a sentence including death.

The Army Court of Military Review blessed this sentencing effort by characterizing it as "trial defense counsel's tactical judgment." Id. In some cases, this effort might well satisfy the Strickland standard for adequate representation. What follows in this opinion, however, demonstrates 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. We have no quarrel with the Army Court regarding the obligation of an appellate court not to second-guess tactical judgments. Here, however, counsels' lack of training and experience contributed to questionable tactical judgments, leading us to the ultimate conclusion that there are no tactical decisions to second-guess.

POSTTRIAL CLAIMS REGARDING MENTAL RESPONSIBILITY: THE FACTS

While appellant's case was pending before the Army Court of Military Review, but about 5 years after his initial conviction, appellant was successful in obtaining funding from the Judge Advocate General of the Army to employ the services of an expert to conduct a posttrial social history. The investigation was completed by Ms. Jill Miller, a forensic social worker, in April 1993, just weeks after the Court of Military Review issued its opinion affirming appellant's conviction and sentence to death. Although appellant had asked the Army Court to defer its decision until after the investigation was complete, that court refused to continue the case. 36 MJ at 1149-54. In addition to the information produced directly by Ms. Miller's investigation, the results of this investigation paved the way for appellant to develop considerable new factual matters through affidavits filed with

this Court. The unfortunate result of the Army Court's unwillingness to delay its March 1993 decision, however, is that none of this "new matter" has been tested in an evidentiary hearing, and most of it is unchallenged by government evidence. Thus this Court — a non-factfinding court — is called upon to evaluate appellant's claim that he is entitled to a new trial because of substantial evidence which, if convincing, might well cause a different trial result.

Complementing the evidence assembled by Ms. Miller, appellant submitted additional affidavits, including several by medical specialists. Appellant retained the services of Dr. William A. O'Connor, a clinical psychologist. Dr. O'Connor administered clinical tests to appellant, conducted interviews with appellant, and examined much of the evidence gathered by the forensic sociologist. Dr. O'Connor concluded that SGT Murphy did,

> at the time of the alleged offense, suffer from a personality disorder and other psychological dysfunctions which would have affected his thoughts or actions. There are indications of minimal or slight cognitive and neuropsychological dysfunction; however, the primary origin or cause of the personality disorder with associated post-traumatic features can be specified based on clinical interview and records, as well as test results indicating persistent and severe traumatic childhood abuse.
>
> * * * * * *
>
> [T]he Sanity Board hearings were not correct or based on adequate and required assessment methods.

Dr. William H. Carson, a professor of psychiatry at the Medical University of South Carolina, also reviewed appellant's case and the psychological and sociological evidence. He concurred with Dr. O'Connor's findings.

*14 Appellant was also examined by Dr. Edward C. Kirby, a psychiatrist with over 33 years of practice. Dr. Kirby concluded that SGT Murphy's severe mental disease or defect rendered him unable to form the requisite intent to commit premeditated murder. Importantly, Dr. Kirby also concluded that SGT Murphy was unable to appreciate the nature and quality or wrongfulness of his acts, and moreover, that he could not have conformed his conduct to the requirements of the law at the time of the incident in question.

Appellant also offers the affidavit of Dr. James R. Merikangas, M.D., a clinical professor of psychiatry at Yale University School of Medicine, who concluded that SGT Murphy suffered from a severe mental illness and that his low intellectual functioning was consistent with organic brain damage, perhaps as a result of fetal alcohol syndrome.

Appellant then ties his evidence together with the opinion of Dr. Jon M. Aase, M.D., a pediatrician, who concluded that the amount of alcohol allegedly consumed by appellant's mother

during her pregnancy with appellant was sufficient to put him at risk of organic brain damage that would persist throughout his life. Dr. Aase also concluded that further examination for fetal alcohol syndrome was clinically indicated.

In summary, appellant's unrebutted posttrial submissions, at the very least, raise the question of whether a reasonable finder of fact, armed with this evidence, would come to the same conclusions that the court-martial did as to the findings and sentence. See United States v. Dock, 26 MJ 620 (ACMR 1988).

THE LAW

Article 73, UCMJ, 10 USC § 873, permits a military member to petition for a new trial "[a]t any time within two years after approval . . . of a court-martial sentence." RCM 1210(f) provides the procedures and grounds for such relief, as follows:

> (f) Grounds for new trial.
>
> * * * * * *
>
> (2) Newly discovered evidence. A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:
>
> (A) The evidence was discovered after the trial;
>
> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
>
> (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

Because the "newly discovered evidence" in this case came many years after the expiration of the 2-year time period authorized by Article 73, appellant has not based his plea for relief on a petition for new trial, and he has not sought relief utilizing the extraordinary writ authority of the Court. See All Writs Act, 28 USC § 1651(a). Rather, appellant has sought relief on direct appeal claiming constitutional deprivations. For example, appellant claims that he was denied the assistance of psychiatric experts in the preparation of his defense, relying on Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed.2d 53 (1985). He also seeks to have his posttrial evidence viewed through a kaleidoscope of ineffective-assistance-of-counsel claims. Specifically, as mentioned earlier, he focuses on an inadequate investigation into his sociological background and possible explanations for his behavior.

We are not helpless, however, to render justice when due. One continuous theme is found throughout the death-penalty cases handed down by the Supreme Court over the last 30 years. That theme is reliability of result. Thus, the sine qua non of Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed.2d 859 (1976); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed.2d 297 (1973); Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed.2d 346 (1972); and Lockhart v. Fretwell; Strickland v. Washington; and Ake v. Oklahoma, all supra, is that the Supreme Court has insisted there be a proper functioning of the adversarial ***15** system. A fair reading of these cases demonstrates that, in order for the adversarial system to work properly, the key ingredients are competent counsel; full and fair opportunity to present exculpatory evidence; individualized sentencing procedures; fair opportunity to obtain the services of experts; and fair and impartial judges and juries.

In this case, therefore, we will test the result obtained at trial against the entire record before us to determine whether we can affirm appellant's convictions and sentence. We must be satisfied that the adversarial process has worked, and that appellant has had a fair and complete trial.

As we have done in other capital cases, we use a standard of review which, in our judgment, comports with our obligation to review "all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death." Art. 67(a)(1). We will follow our statutory mandate that "[a] finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Art. 59(a), UCMJ, 10 USC § 859(a). But in so doing, we will ensure that fundamental notions of due process, full and fair hearings, competent counsel, and above all, a "reliable result," are part of the equation. In the final analysis, we have heretofore examined, and shall continue to examine, the record of trial in capital cases to satisfy ourselves that the military member has received a fair trial. See United States v. Loving, supra (all issues fully considered); United States v. Curtis, 32 MJ 252 (CMA 1991); 33 MJ 101 (CMA 1991); 46 MJ 129 (1997) (reversed on reconsideration).

With this standard of review, we turn to the case at hand. We are immediately confronted with two questions based upon the "newly discovered" psychiatric evidence. Historically, and when not restrained by the 2-year limitation of Article 73, we have given preferential treatment to the question of mental responsibility when raised for the first time on appeal. United States v. Young, 43 MJ 196 (1995), relying on United States v. Van Tassel, 38 MJ 91 (CMA 1993); United States v. Lilly, 25 MJ 403 (CMA 1988). Although there has been some disagreement as to the correct standard of review, there clearly is agreement that, if the requirements of RCM 1210(f)(2) are present, the accused is entitled to a new trial. Compare United States v. Van Tassel with United States v. Young, both supra; see also United States v. Dock, supra (compare majority opinion with dissenting opinion). As stated earlier, we cannot review appellant's claims here under RCM 1210, because he filed no petition for a new trial within the statutory time limit, and regardless, it is doubtful that he could meet the "due-diligence" requirement of the rule. See United States v. Fisiorek, 43 MJ 244, 249 (1995) (Crawford, J., dissenting). Nevertheless, the ultimate requirement found in RCM

1210(f)(2)(C) provides us with a clear rule for testing whether the result obtained in the court-martial proceeding is a reliable result. That test is whether

> [t]he newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

Id.

We have considered all of the affidavits and new evidence obtained by appellant as a result of the work of his forensic sociologist. Likewise, we have considered all of the affidavits and statements of the various psychologists, psychiatrists, and physicians. We do not know if what they say is indeed the true state of affairs, because the evidence has not been tested in the crucible of an adversarial proceeding.

Thus, when the dust settles on this record of trial, as supplemented by the substantial number of posttrial affidavits, we find ourselves in the following position. First, we are satisfied that appellant did not get a full and fair sentencing hearing. There are too many questions arising out of the conflict of interest issue, the potential mitigating effect of the posttrial evidence as to his mental status, and the lack of training and experience of his trial defense counsel in the defense ***16** of capital cases to allow us to affirm a death sentence here.

On the other hand, we are uncertain as to the impact of the posttrial information on the findings of guilt. There is substantial evidence of record that contradicts appellant's claims that he could not form the requisite premeditation required for the Government to prove his guilt of murder under Art. 118(1).

Nonetheless, we must recognize that the posttrial information, as contained in the barrage of affidavits filed with this Court, has never been tested by cross-examination or by the contrary testimony of government witnesses. See United States v. Van Tassel, supra. Therefore, what remedy do we provide appellant? The remedy we adjudge meets the statutory mandate of review prescribed by Article 59(a).

We are further cognizant of Judge Sullivan's admonition in his dissenting opinion in United States v. Young, to the effect that the proper court for determining these questions is the Court of Criminal Appeals. 43 MJ at 199; but see United States v. Ginn, supra. An appellant is entitled to an evidentiary hearing if his or her posttrial affidavits raise material questions of fact that might give rise to relief. In any event, we will leave it up to the Army Court of Criminal Appeals to determine if it can resolve this case on the evidence before it, or whether a new fact hearing shall be necessary. Article 66, UCMJ, 10 USC § 866(1994).

The decision of the United States Army Court of Military Review (36 MJ 1137) is set aside. The record of trial is returned to the Judge Advocate General of the Army for remand to the United States Army Court of Criminal Appeals for further review. That court may: (1) Review the new evidence to determine if a different verdict as to findings might reasonably result in light of posttrial evidence, United States v. Van Tassel, supra; (2) If it determines that the record before it is inadequate to resolve the factual issues regarding findings, it may order a DuBay hearing to consider the factual issues raised on appeal as to the findings; (3) If it determines that a different verdict would not reasonably result as to findings, then it may either affirm appellant's sentence only as to life imprisonment and accessory penalties, or it may order a rehearing as to the death sentence. Curtis, 46 MJ at 130; (4) If it determines that a different verdict on findings might reasonably result, then it shall order a rehearing on findings and sentence; (5) If on remand the Court of Criminal Appeals determines that further review under Article 66 is impracticable, then in the interest of judicial economy, it may order forthwith a rehearing on findings and sentence.

APPENDIX

ISSUES PRESENTED

I

MILITARY DUE PROCESS AND ARTICLES 66 AND 67, UCMJ, REQUIRE THE COURT OF MILITARY APPEALS AND THE COURTS OF MILITARY REVIEW TO REVIEW ALL CAPITAL CASES IN FAVOREM VITAE, SINCE CAPITAL LITIGATION IS IN ITS INFANCY IN THE MILITARY JUSTICE SYSTEM AND TRIAL AND APPELLATE DEFENSE COUNSEL LACK THE TRAINING AND EXPERIENCE NECESSARY TO PRESERVE THE RECORD OF ALL ISSUES AND PREVENT APPLICATION OF WAIVER.

II

THE MILITARY JUSTICE SYSTEM SHOULD TREAT ISSUES IN DEATH PENALTY CASES IN THE SAME MANNER AS IT DOES COMMAND INFLUENCE AND MANDATE DE NOVO REVIEW AT ALL LEVELS OF APPEAL.

III

A FACTFINDING COURT OF MILITARY REVIEW MUST UNANIMOUSLY AGREE ON BOTH THE FINDINGS OF GUILT AND THE SENTENCE IN A CAPITAL CASE AND MUST APPLY A POLICY OF IN FAVOREM VITAE.

COUNSEL FAILED TO INVESTIGATE THE MITIGATING CIRCUMSTANCES OF HIS TRAUMATIC FAMILY AND SOCIAL HISTORY.

XVII

SERGEANT MURPHY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL DEFENSE COUNSEL FAILED TO ADEQUATELY EXPLORE MENTAL HEALTH EVIDENCE.

XVIII

TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ADEQUATELY INTERVIEW AND PREPARE TO CROSS-EXAMINE GOVERNMENT WITNESSES AND PREPARE DEFENSE WITNESSES.

XIX

APPELLANT'S TRIAL DEFENSE COUNSEL CONDUCTED AN INADEQUATE AND INEFFECTIVE VOIR DIRE, THEREBY DENYING APPELLANT HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AN IMPARTIAL PANEL, DUE PROCESS, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.

XX

SERGEANT MURPHY'S TRIAL DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO OBJECT TO THE ADMISSIBILITY OF PROSECUTION EXHIBITS 19, 20, 26, 27, AND 30-52.

XXI

TRIAL DEFENSE COUNSEL WERE INEFFECTIVE BY FAILING TO OBJECT WHEN THE GOVERNMENT ADDRESSED DURING ITS OPENING STATEMENT AND PRESENTED TESTIMONY ON THE MERITS CONCERNING IRRELEVANT AND HIGHLY PREJUDICIAL VICTIM IMPACT EVIDENCE.

XXII

SERGEANT MURPHY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE COUNSEL FAILED TO OBJECT TO THE ADMISSIBILITY OF BOTH AN ORAL STATEMENT ALLEGEDLY MADE BY APPELLANT TO SA WOODALL AND A WRITTEN STATEMENT ***19** PRESENTED AS PROSECUTION EXHIBIT 60 BECAUSE THEY WERE OBTAINED IN VIOLATION OF ARTICLE 31(b), UCMJ, AS SERGEANT MURPHY WAS NOT ADVISED THAT HE WAS SUSPECTED OF FALSE SWEARING.

XXIII

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE COUNSEL FAILED TO OBJECT TO THE ADMISSIBILITY OF THE STATEMENTS APPELLANT ALLEGEDLY MADE TO SERGEANT FIRST CLASS MAREK AND STAFF SERGEANT LIPSCOMB AS THE STATEMENTS WERE MADE WITHOUT APPELLANT HAVING BEEN ADVISED OF HIS RIGHTS UNDER ARTICLE 31(b), UCMJ.

XXIV

SERGEANT MURPHY WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL DEFENSE COUNSEL FAILED TO INTERVIEW AND PRESENT AVAILABLE MILITARY WITNESSES AND MILITARY RECORDS.

XXV

SERGEANT MURPHY WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL DEFENSE COUNSEL FAILED TO SEEK, OBTAIN, AND PRESENT FAVORABLE CLEMENCY MATTERS TO THE CONVENING AUTHORITY.

XXVI

THE MILITARY JUDGE ERRED WHEN HE ADMITTED, OVER DEFENSE OBJECTION, GRUESOME PHOTOGRAPHS OF THE DECEDENTS.

XXVII

THE MILITARY JUDGE EFFECTIVELY PRECLUDED THE PANEL MEMBERS FROM CONSIDERING SERGEANT MURPHY'S DISADVANTAGED BACKGROUND, THEREBY DENYING HIM HIS RIGHTS TO CONSTITUTIONAL AND MILITARY DUE PROCESS AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.

XXVIII

SERGEANT MURPHY IS ENTITLED TO A REHEARING BECAUSE THE MILITARY JUDGE IMPROPERLY INSTRUCTED THE MEMBERS ON VOTING PROCEDURES, THEREBY DEPRIVING APPELLANT OF THE SUBSTANTIAL PROCEDURAL PROTECTIONS OF ARTICLE 51(a), UCMJ, ON FINDINGS AND SENTENCE.

XXIX

THE MILITARY JUDGE COMMITTED PLAIN ERROR BY FAILING TO INSTRUCT ON SENTENCING AS TO THE MEANING OF THE TERM "SUBSTANTIALLY OUTWEIGHED" AND HOW IT APPLIES TO THE

RELATIONSHIP BETWEEN MITIGATING CIRCUMSTANCES AND AGGRAVATING FACTORS, AND FAILING TO DEFINE AND EXPLAIN THE RELATIONSHIP BETWEEN CIRCUMSTANCES AND FACTORS.

XXX

THE MILITARY JUDGE ERRED IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS IN FAILING TO EXPLICITLY INSTRUCT THAT EVEN IF THE MEMBERS UNANIMOUSLY FOUND ONE OR MORE AGGRAVATING FACTORS, AND EVEN IF THE MEMBERS UNANIMOUSLY DETERMINED THAT THE EXTENUATING OR MITIGATING CIRCUMSTANCES WERE SUBSTANTIALLY OUTWEIGHED BY THE AGGRAVATING CIRCUMSTANCES, EACH *20 MEMBER STILL HAD THE ABSOLUTE DISCRETION TO DECLINE TO IMPOSE THE DEATH SENTENCE.

XXXI

THE MILITARY JUDGE ABANDONED HIS IMPARTIAL ROLE AND BECAME AN ADVOCATE FOR THE GOVERNMENT, THEREBY DENYING SERGEANT MURPHY A FAIR TRIAL.

XXXII

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE PERMITTED THE GOVERNMENT, OVER DEFENSE OBJECTION, TO INTRODUCE TESTIMONY ON SENTENCING CONCERNING THE PERSONAL CHARACTERISTICS OF A DECEDENT.

XXXIII

SERGEANT MURPHY DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS ARTICLE 38(b)(2) STATUTORY RIGHT TO CIVILIAN COUNSEL OR HIS ARTICLE 38(b)(3)(B) STATUTORY RIGHT TO MILITARY COUNSEL OF HIS OWN SELECTION WHERE THE MILITARY JUDGE MISLED SERGEANT MURPHY BY STATING THAT HIS COUNSEL WERE QUALIFIED WHEN NEITHER COUNSEL HAD CAPITAL TRAINING OR RESOURCE MATERIALS TO ASSIST THEM.

XXXIV

THE MILITARY JUDGE'S PERSISTENT INSTRUCTIONS TO SERGEANT MURPHY'S FAMILY AND FRIENDS WHO WERE WATCHING THE TRIAL THAT THEY COULD NOT DISPLAY ANY EMOTION AT ALL WHILE IN THE COURTROOM IMPROPERLY CAUSED THEM TO WITHHOLD THEIR EMOTIONS AT ALL TIMES, EVEN WHILE THEY TESTIFIED, AND THEREBY PREVENTED THE PANEL FROM SEEING THE TRUE FEELINGS OF

SERGEANT MURPHY'S MITIGATION WITNESSES, DIMINISHING THE IMPACT OF THEIR TESTIMONY.

XXXV

THE MILITARY DEATH PENALTY SCHEME IS INVALID DUE TO FURMAN V. GEORGIA, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed.2d 346 (1972), AND THE SEPARATION OF POWERS DOCTRINE.

XXXVI

SERGEANT MURPHY'S CONVICTION AND DEATH SENTENCE ARE INVALID BECAUSE THEY WERE IMPOSED BY A PANEL OF FEWER THAN TWELVE LAY PERSONS.

XXXVII

THE STANDARDLESS PROPORTIONALITY REVIEW CONDUCTED BY THE ARMY COURT OF MILITARY REVIEW IS FUNDAMENTALLY FLAWED, DEPRIVES THIS COURT OF MEANINGFUL APPELLATE REVIEW, AND VIOLATED SERGEANT MURPHY'S CONSTITUTIONAL AND MILITARY RIGHTS TO DUE PROCESS AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.

XXXVIII

SERGEANT MURPHY'S DEATH SENTENCE IS DISPROPORTIONATE TO OTHER SIMILARLY SITUATED DEATH-ELIGIBLE HOMICIDES.

XXXIX

THE PREDOMINANCE OF MISLEADING LANGUAGE IN THE REASONABLE DOUBT INSTRUCTIONS GIVEN BY THE MILITARY JUDGE FOR FINDINGS AND SENTENCING CREATED A HIGHER DEGREE OF DOUBT THAN IS REQUIRED UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

*21 XL

SERGEANT MURPHY'S DEATH SENTENCE MUST BE SET ASIDE AND ONLY A LIFE SENTENCE AFFIRMED BECAUSE SERGEANT MURPHY'S DEATH SENTENCE WAS IMPOSED AS A MATTER OF LAW IN A PROCEDURALLY INCORRECT MANNER BECAUSE THE OPTION OF IMPOSING A SENTENCE OF LIFE IMPRISONMENT WAS NOT GIVEN ITS DUE CONSIDERATION.

XLI

SERGEANT MURPHY'S DEATH SENTENCE MUST BE SET ASIDE AND ONLY A LIFE SENTENCE AFFIRMED BECAUSE THE DEATH SENTENCE WAS IMPOSED AS A MATTER OF LAW IN A PROCEDURALLY INCORRECT MANNER BECAUSE THE PANEL FAILED TO VOTE ON WHETHER "ANY EXTENUATING OR MITIGATING CIRCUMSTANCES [WERE] SUBSTANTIALLY OUTWEIGHED BY ANY AGGRAVATING CIRCUMSTANCES" AND THEREFORE FAILED TO MEET THE REQUIREMENT OF RCM 1004(b)(4)(C) THAT THERE BE A CONCURRENCE BY ALL THE MEMBERS ON THE MATTER.

XLII

SERGEANT MURPHY'S DEATH SENTENCE MUST BE SET ASIDE AND ONLY A LIFE SENTENCE AFFIRMED BECAUSE THE DEATH SENTENCE WAS IMPOSED AS A MATTER OF LAW IN A PROCEDURALLY INCORRECT MANNER BECAUSE THE PANEL DID NOT PROPOSE SENTENCES IN WRITING BUT DID SO ORALLY.

XLIII

SERGEANT MURPHY WAS CONVICTED AND SENTENCED TO DEATH IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS BECAUSE THE CONVICTIONS AND SENTENCE WERE RENDERED UPON MISINFORMATION CONCERNING HIS CULPABILITY AND MORAL BLAMEWORTHINESS.

XLIV

SERGEANT MURPHY WAS DENIED HIS RIGHT TO AN IMPARTIAL JURY BY THE ACCEPTED PRACTICE IN THE MILITARY OF ALLOWING PANEL MEMBERS TO INTERROGATE WITNESSES.

XLV

THE STAFF JUDGE ADVOCATE'S SPECIFIC INSERTION AND NOTATION OF RACIAL IDENTIFIERS FOR SERGEANT MURPHY AND A PANEL MEMBER INTO THE CLEMENCY PROCESS VIOLATED SERGEANT MURPHY'S RIGHTS TO EQUAL PROTECTION AND DUE PROCESS.

XLVI

RCM 1004 FAILS TO INCORPORATE CONGRESSIONALLY MANDATED PROTECTION TO PREVENT RACIALLY MOTIVATED IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF ARTICLE 55, UCMJ, AND THE EIGHTH AMENDMENT TO THE CONSTITUTION.

XLVII

THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE FAILED TO SUA SPONTE INSTRUCT THE PANEL MEMBERS THAT RACE COULD NOT BE CONSIDERED AS A FACTOR IN THE SENTENCING PROCESS.

XLVIII

THE PEREMPTORY CHALLENGE PROCEDURE IN THE MILITARY JUSTICE SYSTEM, WHICH ALLOWS THE GOVERNMENT TO REMOVE ANY ONE JUROR WITHOUT CAUSE, IS UNNECESSARY AND SUBJECT TO *22 ABUSE IN ITS APPLICATION AND WAS ABUSED IN SERGEANT MURPHY'S CASE.

XLIX

THE PRETRIAL ADVICE IN SERGEANT MURPHY'S CASE WAS DEFECTIVE BECAUSE THE STAFF JUDGE ADVOCATE FAILED TO ENUMERATE ANY MITIGATING CIRCUMSTANCES THE CONVENING AUTHORITY COULD BALANCE AGAINST THE AGGRAVATING CIRCUMSTANCES TO MAKE AN INFORMED DECISION WHETHER TO REFER THIS CASE CAPITAL.

L

THE STAFF JUDGE ADVOCATE WAS DISQUALIFIED FROM PARTICIPATING IN THE PROCEEDINGS AFTER THE INITIAL PRETRIAL ADVICE AND CAPITAL REFERRAL WERE CHALLENGED AS DEFECTIVE.

LI

THE CONVENING AUTHORITY WAS DISQUALIFIED FROM PARTICIPATING IN THE PROCEEDINGS AFTER THE INITIAL PRETRIAL ADVICE AND CAPITAL REFERRAL WERE CHALLENGED AS DEFECTIVE.

LII

THE FINDINGS MUST STATE EXPLICITLY THAT ALL MEMBERS CONCUR THAT ANY EXTENUATING OR MITIGATING CIRCUMSTANCES ARE SUBSTANTIALLY OUTWEIGHED BY THE AGGRAVATING CIRCUMSTANCES FOUND BY THE MEMBERS.

LIII

THE DEATH PENALTY SENTENCING STANDARD REQUIRING AGGRAVATING CIRCUMSTANCES TO "SUBSTANTIALLY OUTWEIGH" EXTENUATING OR MITIGATING CIRCUMSTANCES IS IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS IN THAT THE ONLY ACCEPTABLE STANDARD MUST BE "BEYOND A REASONABLE DOUBT." SEE ALSO ARTICLE 59(a), UCMJ.

LIV

THE AGGRAVATING FACTOR STATED IN RCM 1004(c)(7)(I) IS VAGUE, FAILS TO SUFFICIENTLY CLARIFY THE FACTOR INVOLVED, DOES NOT NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY, AND IS THEREFORE INVALID UNDER THE EIGHTH AMENDMENT TO THE CONSTITUTION.

LV

COURT-MARTIAL PROCEDURES DENIED SERGEANT MURPHY HIS ARTICLE III RIGHT TO A JURY TRIAL.

LVI

ARTICLE 18, UCMJ, AND RCM 201(f)(1)(C), WHICH REQUIRE TRIAL BY MEMBERS IN A CAPITAL CASE, VIOLATE THE FIFTH AND EIGHTH AMENDMENT GUARANTEES OF DUE PROCESS AND A RELIABLE VERDICT.

LVII

RCM 1004'S PROHIBITION AGAINST GUILTY PLEAS IN CAPITAL CASES DEPRIVED SERGEANT MURPHY OF A CRITICAL MITIGATING FACTOR AND CAUSED OTHER IRREPARABLE PREJUDICE.

LVIII

SERGEANT MURPHY IS ENTITLED TO REPRESENTATION BY QUALIFIED AND COMPETENT CAPITAL COUNSEL AND TO UNINTERRUPTED CONTINUITY OF COUNSEL UNAFFECTED BY PEACETIME MILITARY PERSONNEL DECISIONS.

*23 LIX

NEITHER THIS COURT NOR THE ARMY COURT HAS THE JURISDICTION OR THE AUTHORITY TO REVIEW THE CONSTITUTIONALITY OF THE RULES FOR COURTS-MARTIAL AND THE UNIFORM CODE OF MILITARY JUSTICE BECAUSE THIS COURT IS AN ARTICLE I COURT, NOT AN ARTICLE III COURT WHICH HAS THE POWER TO CHECK CONGRESS AND THE EXECUTIVE UNDER MARBURY V. MADISON, 5 U.S. (1 CRANCH) 137, 2 L. Ed. 60 (1803).

LX

THE MILITARY JUDGE ERRED IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, BY FAILING TO INSTRUCT THE PANEL MEMBERS THAT THE ONLY OFFENSE FOR WHICH SERGEANT MURPHY COULD BE SENTENCED TO DIE WAS PREMEDITATED MURDER

AND THAT SERGEANT MURPHY COULD NOT BE SENTENCED TO DIE ON THE BASIS OF THE AGGREGATE OR CUMULATIVE EFFECT OF ALL THE OFFENSES.

LXI

THERE IS NO MEANINGFUL DISTINCTION BETWEEN PREMEDITATED AND UNPREMEDITATED MURDER ALLOWING DIFFERENTIAL TREATMENT AND SENTENCING DISPARITY IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ.

LXII

THE MILITARY JUDGE'S INSTRUCTIONS BLURRED ANY DISTINCTION BETWEEN THE OFFENSES OF PREMEDITATED AND UNPREMEDITATED MURDER AND DELETED THE REQUIRED ELEMENT OF "PREMEDITATION" FROM THE OFFENSE OF PREMEDITATED MURDER IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ.

LXIII

THE MILITARY JUDGE'S INSTRUCTIONS RESTRICTED FREE CONSIDERATION OF THE EVIDENCE BY REQUIRING THE MEMBERS TO VOTE ON THE MOST SERIOUS OFFENSE FIRST.

LXIV

THE DESIGNATION OF THE SENIOR MEMBER AS THE PRESIDING OFFICER FOR DELIBERATIONS ESTABLISHED THE SENIOR MEMBER'S SUPERIORITY IN AND CONTROL OF THE DELIBERATION PROCESS AND DENIED SERGEANT MURPHY DUE PROCESS OF LAW AND A FAIR AND IMPARTIAL CONSIDERATION OF THE EVIDENCE BY THE MEMBERS.

LXV

THE MILITARY JUDGE'S INSTRUCTION THAT "YOU MAY NOT ADJUDGE A SENTENCE OF DEATH UNLESS YOU FIND THAT ANY AND ALL EXTENUATING OR MITIGATING CIRCUMSTANCES ARE SUBSTANTIALLY OUTWEIGHED BY ANY AGGRAVATING FACTORS" DID NOT SUFFICIENTLY INFORM THE MEMBERS THAT THIS FINDING MUST BE UNANIMOUS.

LXVI

THE IMPOSITION OF THE DEATH PENALTY VIOLATED SERGEANT MURPHY'S RIGHT TO EQUAL PROTECTION UNDER THE FIFTH AMENDMENT BECAUSE RCM 1004 SUBJECTED SERGEANT MURPHY, AS

A MEMBER OF THE ARMED FORCES, TO A PENALTY WHICH IS NOT OTHERWISE AVAILABLE UNDER THE CRIMINAL CODE OF THE *24 UNITED STATES FOR IDENTICAL CRIMINAL CONDUCT.

LXVII

THE TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY PRESENTING CONTRARY ARGUMENTS ON THE MERITS AND SENTENCING CONCERNING WHETHER AN AGGRAVATING CIRCUMSTANCE APPLIED IN THIS CASE.

LXVIII

A DUBAY HEARING IS NECESSARY TO EXPLORE THE NATURE, EXTENT, AND EFFECT OF A CONFLICT OF INTEREST CAUSED BY ONE OF SERGEANT MURPHY'S TRIAL DEFENSE COUNSEL'S FORMER REPRESENTATION OF ONE OF THE DECEDENTS.

LXIX

THE SECRETARY OF STATE AND OTHER OFFICIALS AT THE DEPARTMENT OF STATE, AS AGENTS AND REPRESENTATIVES OF THE PRESIDENT OF THE UNITED STATES, GUARANTEED HIGH OFFICIALS OF THE GERMAN GOVERNMENT THAT THE DEATH SENTENCE WILL BE COMMUTED IN APPELLANT'S CASE AND GAVE A MINISTERIAL COMMITMENT THAT CLEMENCY WOULD BE RECOMMENDED.

LXX

APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT WERE DENIED BY THE TRIAL COUNSELS', MILITARY JUDGE'S, AND PANEL'S RUSH TO COMPLETE THE APPELLANT'S COURT-MARTIAL.

LXXI

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LXXII

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LXXIII

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LXXIV

MILITARY DUE PROCESS AND FUNDAMENTAL NOTIONS OF FAIRNESS REQUIRE THAT EACH MEMBER OF THE COURT-MARTIAL SIGN HIS OR HER NAME TO THE DEATH-SENTENCE WORKSHEET OR THAT THE CONDEMNED ACCUSED BE AFFORDED THE RIGHT AND OPPORTUNITY TO POLL THE MEMBERS.

LXXV

THE CAPITAL SENTENCING PROCEDURE IN THE MILITARY IS UNCONSTITUTIONAL BECAUSE THE MILITARY ***25** JUDGE LACKS THE POWER TO ADJUST OR SUSPEND A SENTENCE OF DEATH WHICH IS IMPROPERLY IMPOSED.

LXXVI

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LXXVII

SERGEANT MURPHY'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

LXXVIII

SERGEANT MURPHY'S RIGHTS TO DUE PROCESS AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT WERE VIOLATED BY THE ARMY COURT'S REQUIREMENT THAT APPELLATE DEFENSE COUNSEL INVESTIGATE, RESEARCH, BRIEF, FILE, AND ARGUE ISSUES GERMANE TO HIS CASE WITHOUT HAVING ALL THE AVAILABLE RELEVANT MITIGATION EVIDENCE.

LXXIX

THE ARMY COURT ERRED BY DECIDING AND ISSUING AN OPINION IN THIS CASE WITHOUT WAITING FOR THE AVAILABLE RELEVANT MITIGATION EVIDENCE.

LXXX

SERGEANT MURPHY'S DEATH SENTENCE IS INVALID UNDER THE FIFTH AND EIGHTH AMENDMENTS TO THE CONSTITUTION AND ARTICLE 55, UCMJ, BECAUSE THE SENTENCING PANEL WAS IMPROPERLY PERMITTED TO CONSIDER "LACK OF REHABILITATION," "PRESERVATION OF GOOD ORDER AND DISCIPLINE," AND SPECIFIC DETERRENCE IN SENTENCING DELIBERATIONS.

LXXXI

THE GOVERNMENT'S FAILURE TO GIVE NOTICE OF THE AGGRAVATING CIRCUMSTANCES IT INTENDED TO PROVE, OTHER THAN THOSE SPECIFICALLY LISTED IN RCM 1004, VIOLATED THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND ARTICLE 55, UCMJ.

LXXXII

THE MILITARY JUDGE ERRED IN INSTRUCTING SERGEANT MURPHY'S SENTENCING PANEL THAT THEY COULD CONSIDER AGGRAVATING CIRCUMSTANCES OF WHICH THE DEFENSE HAD BEEN GIVEN NO NOTICE PRIOR TO TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, AND ARTICLE 55, UCMJ.

LXXXIII

TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT WHEN THE GOVERNMENT IMPROPERLY SPLIT ONE AGGRAVATING FACTOR INTO TWO.

LXXXIV

SERGEANT MURPHY HAS BEEN DENIED EQUAL PROTECTION UNDER THE LAW IN VIOLATION OF THE FIFTH AMENDMENT IN THAT OTHER CIVILIANS IN THE UNITED STATES ARE AFFORDED THE OPPORTUNITY TO HAVE THEIR CASES REVIEWED BY AN ARTICLE III COURT, BUT MEMBERS OF THE UNITED STATES ARMY, BY VIRTUE OF THEIR STATUS AS SERVICEMEMBERS, ARE NOT.

*26

LXXXV

SERGEANT MURPHY DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS ARTICLE 38(b)(2) STATUTORY RIGHT TO CIVILIAN COUNSEL

OR HIS ARTICLE 38(b)(3)(B) STATUTORY RIGHT TO MILITARY COUNSEL OF HIS OWN SELECTION BECAUSE THE TRIAL DEFENSE COUNSEL FAILED TO ADVISE SERGEANT MURPHY OF THEIR CAPITAL LITIGATION DEFICIENCIES (WHICH INCLUDED NO CAPITAL TRAINING AND NO EXPERIENCE IN PRESENTING A CAPITAL CASE) AND THE LEAD COUNSEL FAILED TO ADVISE SERGEANT MURPHY THAT HE HAD DETAILED HIMSELF TO THE CASE.

LXXXVI

SERGEANT MURPHY WAS DENIED HIS FIFTH AMENDMENT RIGHT TO A GRAND JURY PRESENTMENT OR INDICTMENT.

LXXXVII

THE MILITARY JUDGE ABUSED HIS DISCRETION BY REFUSING TO ORDER THE PRODUCTION OF FIVE OF THE ELEVEN SENTENCING WITNESSES REQUESTED BY THE DEFENSE.

LXXXVIII

THE MILITARY JUDGE ERRED BY NOT SUA SPONTE INSTRUCTING THE MEMBERS ON SENTENCING THAT THEY COULD CONSIDER THE FACT THAT SERGEANT MURPHY WAS ACTING IN SELF-DEFENSE WHEN THE PANEL DELIBERATED THE QUESTION OF WHETHER TO FIND AS AN AGGRAVATING FACTOR[S] THAT "THE MURDER OF PETRA MURPHY WAS PRECEDED BY THE INTENTIONAL INFLICTION OF SUBSTANTIAL PHYSICAL HARM OR PROLONGED, SUBSTANTIAL MENTAL OR PHYSICAL PAIN AND SUFFERING," GIVEN THAT SERGEANT MURPHY HAD BEEN ATTACKED BY PETRA MURPHY WITH A KNIFE BEFORE HE STRUCK HER WITH THE HAMMER.

LXXXIX

ASSUMING, ARGUENDO, THAT THE NUMBER OF ERRORS WHICH OCCURRED IN THE INSTANT CASE ARE NOT INDIVIDUALLY SUFFICIENT TO REQUIRE REVERSAL, THESE ERRORS CANNOT BE FOUND TO BE HARMLESS BEYOND A REASONABLE DOUBT WHEN CONSIDERED COLLECTIVELY.

SUPPLEMENTAL ISSUE I

WHETHER APPELLANT'S COURT-MARTIAL LACKED JURISDICTION TO TRY HIM IN THE FEDERAL REPUBLIC OF GERMANY FOR CAPITAL MURDER COMMITTED THERE DURING PEACETIME.

SUPPLEMENTAL ISSUE II

WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS BECAUSE HE WAS TRIED BY COURT-MARTIAL FOR CAPITAL MURDER IN THE FEDERAL REPUBLIC OF GERMANY IN PEACETIME.

SULLIVAN, Judge (dissenting):

In 1987, James Murphy had a problem — he had two wives. Initially, he was married to a German woman, Petra Murphy, and he was living in Germany with her and two small children — a 5 year-old boy named Tim (Petra's son before she married James) and James, Jr. (his natural son and namesake). However, James' and Petra's marriage was on the rocks, and divorce proceedings had been started in a German court. James Murphy decided he wanted out of this marriage quickly. In June 1987, he married another German woman, Beatra. In July 1987, appellant visited his home state, North Carolina, where he obtained a divorce from *27 Petra without her knowledge. In August 1987, James was back in Germany and received orders transferring him to Redstone Arsenal, Alabama. Sometime between August 16th and August 20th, when he left Germany for the United States, James Murphy took a hammer and went to the apartment where Petra was living. At that apartment he smashed Petra's head with the hammer and killed her.

Now Murphy had another problem. The two boys were in the apartment and would report him for the murder of their mother. James Murphy drowned each of the boys in the bath tub at the apartment before he left. The bodies were discovered on August 23rd, for the most part, because of the unusual odor coming from the hot apartment. I know the above facts primarily through Murphy's several confessions. In those confessions, he details three separate murders using two separate modes of killing.

The military attorneys assigned to defend Murphy now had a problem. Several detailed and corroborated confessions, as well as a series of incriminating acts showing the motive and intent of their client, gave them an uphill battle to save Murphy's life in a capital murder case.

First, the attorneys attempted to use the affirmative defense of insanity, after Murphy was mentally examined. However, a sanity board (one medical doctor and a Ph.D.) reported that Murphy was mentally responsible at the time of the crimes and had the mental capacity to stand trial. Without insanity as a defense, and doing the best they could with an overwhelming case against them, Murphy's lawyers tried the case, ultimately relying on a defense to the death penalty based on Murphy's utter remorse. See Harris v. Vasquez, 949 F.2d 1497, 1524 (9th Cir.1990) (within wide range of professionally competent assistance to not present a psychiatric defense theory but to rely on remorse in capital case), cert. denied, 503 U.S. 910, 112 S. Ct. 1275, 117 L. Ed.2d 501 (1992). He was found guilty by a jury and received the death penalty in December of 1987.

Now, 11 years after these murders, the majority reverses the death penalty because of the "lack of training and experience" of his trial defense counsel in the defense of capital cases, 50 MJ at 13, and because 3 doctors, hired for money by the defense appellate team over 5 years after Murphy's conviction, have stated in affidavits that, in their opinion, Murphy could not have formed the intent necessary for premeditated murder. One of these doctors also held that appellant, as a result of that mental defect, was not mentally responsible for his crimes. Two other doctors would not hold Murphy liable for the crimes because his mother drank too much when he was in her womb. Based on this material, the majority sets aside the death penalty in this case.

Now I, as an appellate judge, have a problem. I see no legal basis upon which the majority can reverse this case because the defense attorneys might have been better trained. Moreover, I do not agree with the majority that this case should be remanded, just because some defense-selected doctors, many years after the crime and a valid pretrial sanity board under RCM 706, Manual for Courts-Martial, United States, 1984, say Murphy did not intend to commit premeditated murder. The facts in the record and the law do not justify a reversal and remand on this basis. See United States v. Young, 43 MJ 196 (1995) (newly acquired psychiatric evidence does not require remand to Court of Criminal Appeals); Vasquez, supra at 1515-16 (post-trial defense psychiatric evidence in capital case where defense of remorse relied on at trial does not constitute colorable showing of factual innocence). The record overwhelmingly demonstrates a cold and calculating series of acts by Murphy, which show no defect of reason. The acts of Murphy show he planned and understood the nature and quality of his acts in killing three humans.

First, let us look at the record, which tells us the following facts:

1. James Murphy was a Sergeant, a non-commissioned officer in the U.S. Army.
2. Murphy was a good soldier serving in Germany.

*28 3. Murphy participated in legal divorce proceedings in a German court.

4. Murphy planned and executed international travel to procure a divorce in a North Carolina court.
5. Murphy traveled back to Germany to successfully out-process his unit.
6. Murphy took a hammer to meet with Petra, right before he was about to leave Germany.
7. Murphy successfully killed three people using two modes of killing, and successfully escaped the scene of the crime.
8. Murphy left the scene in such a manner that the murders were not discovered until 3 days after he left Germany.
9. Murphy's defense counsel successfully pursued and were granted a sanity board before the trial.
10. Despite several confessions and much incriminating evidence of motive, intent, and execution of planning the murders, the defense team mounted a reasonable and credible defense, attempting to put suspicion on Murphy's 2d wife, Beatra Murphy.

11. The defense called no witnesses on findings, but called 7 witnesses and offered 28 exhibits on sentencing, including appellant's unsworn statement of remorse.

In light of the above, the entire record shows a competent defense by counsel, and a proper resolution of the issue of Murphy's sanity at the time of the offenses. Federal law for civilians, under the facts in this case, would not allow partisan medical-opinion evidence to be controlling at this late stage of the appellate process, so as to reverse a death penalty case. Sellers v. Ward, 135 F.3d 1333, 1339 (10th Cir.1998); Shaw v. Delo, 971 F.2d 181, 187 (8th Cir.1992); Harris v. Vasquez, supra; see also Moody v. Johnson, 139 F.3d 477, 482 (5th Cir.1998). Neither does our own case law. In Young, 43 MJ at 199 (Sullivan, J., dissenting), I indicated that it might be proper to remand a case to the Court of Criminal Appeals when such evidence could bear on an appellant's lack of mental responsibility at the time of the offenses, but only if this issue was raised for the first time on appeal in our Court. However, in appellant's case, the sanity issue was raised and settled pretrial. See RCM 706. The record of trial in this case shows no evidence that Murphy failed in any way to appreciate the nature and quality of his acts of murder. At trial, there was no hint of defect in his capacity to reason. Finally, no contrary, post-trial evidence was brought within the 2-year period allowed for "newly discovered" evidence. See RCM 1210(f).

Now, the majority suddenly exalts defense-selected psychiatric evidence brought in years after the crime, while ignoring facts which clearly show that Murphy did, in a cold and calculating manner, plan and execute three murders. See Shaw v. Delo, supra at 186 (appellate court can consider accuser's actions on day of murder in determining whether a reasonable juror could still reject new psychiatric evidence).

The law that the majority establishes in this case generally allows mental responsibility to be an open question, practically forever. Contra Harris, supra at 1517-18, quoting Silagy v. Peters, 905 F.2d 986, 1013 (7th Cir.1990). Could we not find a paid doctor today to give an affidavit to prove John Wilkes Booth did not intend to murder President Lincoln? What if Murphy is sent back to a new judge and jury and sentenced to death again? Would we allow another sanity attack to be mounted post-trial and post-period of newly-acquired evidence? Death penalty cases must, of course, be closely scrutinized; however, they should not be allowed to continue forever.

The majority opinion more particularly holds that appellant had unqualified military lawyers representing him in this capital case. It also holds that their representation raised "too many questions" with respect to his death sentence. 50 MJ at 15. Finally, it holds that the post-trial information filed in this case has an uncertain impact on the findings of guilt. The bottom line of the majority is that these circumstances justify a remand to the Court of Criminal Appeals, with a strong suggestion that a findings and sentence rehearing be ordered.

I disagreed with the majority's position in United States v. Curtis, 46 MJ 129 (1997), ***29** that military lawyers are, in effect, unqualified to act in capital cases. I disagree with its holding here today to the same effect. Moreover, in light of the cumulative-evidence holding of the majority, what

questions are raised with respect to sentence that are not also raised with respect to findings? I do not understand how cumulative evidence of appellant's good motive in confessing would impact on his death sentence in any way.

I also disagree with the majority's "too many questions" standard of appellant review. This standard is entirely inconsistent with federal law (cf. Art. 36, UCMJ, 10 USC § 836), which requires an accused to meet a much higher standard to reverse a conviction or death sentence based on post-trial acquired psychiatric evidence. See Harris, supra at 1515; Sellers, 135 F.3d at 1339 (considering the new evidence with the old evidence, no reasonable juror would still convict). Moreover, it conflicts with the majority opinion in Young, because it avoids the requirement for a careful evaluation of the quality of the proffered evidence in light of evidence already in the record of trial. See 43 MJ at 199 (evidence in record showing mental state at time of offense). Finally, in view of the particular factual record before us (see United States v. Cosner, 35 MJ 278, 280 (CMA 1992) (no reasonable person would change his verdict)), I conclude beyond a reasonable doubt that no different result would be obtained in this case, based on the defense post-trial psychiatric materials. **[FN*]** See United States v. Young, supra (newly acquired psychiatric evidence not sufficient to produce more favorable result); Harris v. Vasquez, supra (newly acquired psychiatric evidence not sufficient to probably produce an acquittal).

FN*. This material, of course, could be submitted to the Chief Executive or other authorities for consideration in clemency as suggested by the Second and Tenth Circuits. Torres v. United States, 140 F.3d 392, 405 n. 7 (2d Cir.1998); Sellers v. Ward, 135 F.3d 1333, 1339-40 (10th Cir.1998).

Accordingly, I dissent.

CRAWFORD, Judge (dissenting):

Once again the majority, without explanation or justification, fails to follow Supreme Court precedent concerning the effective assistance of counsel when the sentence is death. See United States v. Curtis, 46 MJ 129, 131 (1997) (Crawford, J., dissenting). In Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984), a capital case, the Supreme Court set forth a two-pronged test for ineffective assistance of counsel, which this Court adopted in United States v. Scott, 24 MJ 186 (CMA 1987). Our opinions consistently have applied that two-pronged test, until Curtis and, now, Murphy.

By concluding that appellant's counsel were ineffective, the majority attempts to fit a square peg in a round hole. It relies upon the absence of information in the record regarding trial defense counsels' courts-martial experience to support its contention that appellant's defense counsel were ineffective at trial. It also fails to recognize the presumption of competence of counsel, and the high hurdle an appellant must overcome in order to establish prejudice.

VOLUME FIVE 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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FACTS

I find it telling that the majority gives short shrift to a discussion of the evidence in this case. Determining whether an attorney's conduct falls below an objective standard of reasonableness, and whether an appellant was prejudiced by that attorney's conduct, requires an analysis of the factual evidence introduced at trial.

Assuming for the sake of argument that the first prong of the ineffective assistance of counsel test has been met, one must still consider the prejudice prong. A prejudice analysis should encompass a review of all the evidence presented at trial. For this reason, I shall begin with a discussion of the facts.

Prior to the murders, appellant was involved in a lengthy, acrimonious divorce proceeding in which his ex-wife, Petra Murphy, was demanding more financial support. Appellant told fellow soldiers "that if he had to pay alimony he was going to kill her."

Appellant admitted that, approximately 10 or 11 days prior to the murders, he took a taxi to Petra's apartment complex because he *30 did not know its exact location. When he arrived, he did not exit the cab, but had the cab driver return him to his own car. Then he drove his own car back to the apartment complex and circled around it a couple of times to see if Petra and the children were there. Although appellant claimed to have an innocent intent in doing so, it is a reasonable inference that his actions were a prelude to the murders.

On the night of the murders, appellant drove to Petra's apartment and parked 100 yards from the apartment complex so that no one would associate his car with the complex. He arrived at 11:15 p.m. In his car he had both the hammer and gloves (the murders occurred in August) that he would use for the murder.

> The victims in this case were appellant's former wife, Petra Murphy, Petra's five-year-old son by a former marriage, Tim Herkstroeter, and appellant's twenty-one-month-old son, James Murphy. The bodies of the victims were found in the bathroom several days after their murders. The bodies of the children lay in a partially filled bathtub; Tim was lying face up, James face down. The forensic pathologist testified at trial that the children were alive and conscious at the time of drowning. Petra was found kneeling beside the tub, her head draped into the water. The forensic pathologist testified at trial that Petra died by drowning but had also suffered at least four severe blows to her head prior to death, one of which fractured her skull, and had injuries on her neck indicative of choking. Petra may have been unconscious when she was drowned.

Murphy, 36 MJ 8 (Crawford, J., dissenting).

After committing the murders, appellant wiped off all the fingerprints in the house, arranged the crime scene to make it look like someone else had committed the crime, and then removed and disposed of all the incriminating evidence, including the towel he used to wipe away his fingerprints, Petra's key, and Petra's military dependent identification card. He locked the door and threw the key away, knowing that no one could get into the apartment and that he was scheduled to leave Germany in a few days. The bodies were discovered several days after appellant returned to the United States.

Appellant provided the police with four separate versions of events. Each version is progressively more incriminating and more consistent with the physical evidence in the case. Appellant initially denied any involvement in the murders. He then claimed that he killed Petra because she killed the children. Appellant's third claim was that he killed Petra and his step-son because Petra killed his son. Finally, appellant admitted that he murdered all three of them. Appellant confessed not only to police, but to three others as well.

Appellant demonstrated that he was intimately familiar with the crimes by providing numerous diagrams of Petra's apartment before and after the murders. These diagrams accurately reflected the crime scene. Police also located the gloves and hammer appellant stated that he used during the murders.

DEFENSE COUNSELS' EXPERIENCE

An attorney's lack of experience is not a per se bar to trying capital cases. United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed.2d 657 (1984). See also Wisehart v. State, 693 N.E.2d 23 (Ind.1998). Admittedly, it is preferable for a defense attorney to have extensive experience in felony cases and jury trials. The majority concludes that, because trial defense counsel, Captains (CPT) Vitaris and Schneller, lacked experience trying capital cases, and did not request the use of experts in sentencing, they must have been ineffective. 50 MJ at 9. Case law does not support such a holding.

The Supreme Court in Cronic rejected the idea that the experience of counsel determines effectiveness. In that case, the Supreme Court reversed a lower court decision which found an appointed defense counsel ineffective because he was a young real estate lawyer and had never participated in a jury trial. 466 U.S. at 649, 104 S. Ct. 2039. The Court held that "[t]he character of a particular lawyer's experience may shed light in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness *31 in the absence of such an evaluation." The Court noted that "[e]very experienced criminal defense attorney once tried his first criminal case." Id. at 665, 104 S. Ct. 2039.

The majority emphasizes that trial defense counsel did not list their qualifications and experience on the record. 50 MJ at 8-9. However, there is no requirement that defense counsel do so. This Court should not imply that defense counsels' failure to reveal their experience and

qualifications in any way strengthens appellant's claim of ineffective assistance of counsel. Absent evidence to the contrary, we presume counsel is competent. Strickland, 466 U.S. at 689, 104 S. Ct. 2052.

Further, the lead defense counsel in appellant's trial was the Senior Defense Counsel of the Hanau Field Office, Trial Defense Service. A military attorney does not ascend to this position without extensive court-martial experience and strong qualifications.

Appellant was represented by two military lawyers who were not associated with appellant's command, but were part of a separate defense counsel organization with its own training, supervision, and headquarters in Washington, D.C. Both attorneys were members of the Judge Advocate General's Corps selected in a highly competitive atmosphere. Upon being selected and commissioned, they received training at the Army Judge Advocate General's School, an American Bar Association approved law school which Congress approved to award a Master of Laws degree (LL.M.). At that school, they received specialized training in litigation, trial practice, and criminal law. Additionally, they were members of a separate public defender organization that conducts periodic training.

Given the common experience of all judge advocates, and what we know of the experience of the lead defense counsel in this case, there is no reason to infer a lack of experience or qualifications absent some showing by appellant. Even if appellant were to present evidence of his trial defense counsels' inexperience or lack of training, this would not be a per se showing of ineffectiveness. Rather, under Cronic, such evidence would be only a factor to consider in determining the defense counsels' effectiveness.

CONFLICT-FREE COUNSEL

RCM 901(d)(4), Manual for Courts-Martial, United States, 1984, based on Fed.R.Crim.P. 44(c) and United States v. Breese, 11 MJ 17 (CMA 1981), provides:

> The military judge shall, in open session:
>
> * * *
>
> (D) Promptly inquire, whenever two or more accused in a joint or common trial are represented by the same detailed or individual military or civilian counsel, or by civilian counsel who are associated in the practice of law, with respect to such joint representation and shall personally advise each accused of the right to effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the military judge shall take appropriate measures to protect each accused's right to counsel[.]

The Discussion to RCM 910 states:

> Whenever it appears that any defense counsel may face a conflict of interest, the military judge should inquire into the matter, advise the accused of the right to effective assistance of counsel, and ascertain the accused's choice of counsel. When defense counsel is aware of a potential conflict of interest, counsel should discuss the matter with the accused. If the accused elects to waive such conflict, counsel should inform the military judge of the matter at an Article 39(a) session so that an appropriate record can be made.

When a conflict appears on the record, the judge should conduct an inquiry.

In his affidavit, appellant denies that his lawyers discussed representation of Private (PVT) French or advised him of any potential conflict. Now he indicates that, had he been so advised, he would not have consented to representation by CPT Vitaris or CPT Schneller.

The military judge stated in his affidavit that PVT French's case was one of a number *32 of trials that he presided over between July and December of 1987. He indicated that he did not remember, during appellant's trial, that CPT Schneller had represented PVT French. There was no indication on the record of the prior representation of PVT French.

CPT Schneller states in his affidavit that the representation of PVT French was discussed with appellant. He asserts that appellant agreed that he would continue to represent appellant and would seek release from representing PVT French.

In his affidavit, CPT Schneller states:

> Due to [appellant's] irresistible impulse to confess his alleged crimes to anyone who would listen, CPT Vitaris and I, on our own, developed the theory that "Beata [sic] might have done it" and [appellant] was protecting her. . . . [PVT] French's testimony fit the theory of our case.

CPT Vitaris was in charge of the trial of the case in chief. That is, I handled the opening statement and CPT Vitaris handled all matters thereafter through a verdict by the panel. It was our decision that should the panel not believe our theory that "Beata [sic] might have done it," they would not be in any mood to listen to CPT Vitaris plea for [appellant's] life. Therefore it was felt that it would be better if we separated the case and I presented the sentencing, as I might have more credibility than CPT Vitaris, at that time, with the panel. I can say . . . that CPT Vitaris and I were totally devoted to [appellant] and were determined to obtain an acquittal. There was no thought given to a possible conflict of interest with [PVT] French after I was relieved from his case. The decision not to cross-examine [PVT] French had nothing to do with my prior representation and to the best of my

knowledge was due solely to the fact that the information to be obtained from cross-examination would have been detrimental to [appellant's] case.

CPT Vitaris corroborates CPT Schneller's affidavit and remembers admonishing appellant to remain silent because PVT French's testimony was consistent with their trial strategy. There was no need or advantage to be gained by cross-examination.

No inquiry was required by the judge under RCM 901(d)(4), because there was not a joint or common trial involving the accused. Nor was the judge unreasonable in failing to remember one of many trials, in fact, a snapshot of one of many trials he presided over while "riding" a trial circuit in Europe during a 6-month period of time. Defense counsel, after they obtained appellant's consent for CPT Schneller to continue his representation, should have informed the judge pursuant to the non-binding discussion to RCM 901(d)(4). However, contrary to the majority's holding, this conflict had no impact on appellant's trial.

As the majority acknowledges, PVT French primarily reiterated information contained in appellant's confessions. 50 MJ at 11. Defense counsel are not required to cross-examine a witness. Indeed, they are only ineffective if their failure to cross-examine falls below the standards set forth under Strickland. See Brown v. United States, 625 F.2d 210 (9th Cir.1979); Sallie v. State, 587 F.2d 636 (4th Cir.1978). As the majority notes, some of PVT French's testimony was helpful to appellant, which may be why PVT French was not impeached on the stand. 50 MJ at 11.

On findings, the theory of the case was that appellant confessed repeatedly, to all who would listen, because he was protecting the real perpetrator, his wife Beate. In this context, PVT French's testimony supported the defense theory.

An attorney's conflict of interest does not amount to ineffective assistance of counsel unless an appellant was prejudiced by the conflict of interest. Burger v. Kemp, 483 U.S. 776, 785, 107 S. Ct. 3114, 97 L. Ed.2d 638 (1987). The majority determines that appellant may have been prejudiced by the witness' testimony that appellant stated he murdered his son because he did not want to leave any witnesses to the murder. 50 MJ at 11. I disagree.

Similar evidence was presented at trial by a different source and, thus, the challenged testimony could not have prejudiced appellant. ***33** During a police interrogation, appellant informed Special Agent Woodall that he killed James, his 2-year-old son, because "the authorities would 'automatically assume' that he was the perpetrator if James survived." See 36 MJ at 1141 (quoting R. 425).

Further, a reasonable member could reach this conclusion from the mere fact that appellant murdered everyone in the home. Appellant's reason for murdering his son did not tip the scales toward the death penalty in this case. Rather, the fact that appellant murdered a toddler, a 5-year-old, and his ex-wife, in a clearly premeditated act, convinced the members to sentence appellant to death.

Further, PVT French's testimony did not undercut appellant's contention that he felt remorse for his crime afterwards.

INVESTIGATION AND EXPLORATION OF APPELLANT'S MENTAL HEALTH AND ABUSE AS A CHILD

An appellant may not raise an ineffective assistance of counsel claim based on actions taken as part of a reasonable trial strategy. United States v. Curtis, 44 MJ 106, 119 (1996), rev'd as to sentence on recon., 46 MJ 129 (1997). A defense counsel's selection of witnesses and introduction of evidence are generally issues of trial strategy and "virtually unchallengeable." Leisure v. State, 828 S.W.2d 872, 875 (Mo.1992), cert. denied, 506 U.S. 923, 113 S. Ct. 343, 121 L. Ed.2d 259 (1992).

"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." Strickland, 466 U.S. at 691, 104 S. Ct. 2052. "[T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. at 689, 104 S. Ct. 2052 (citation omitted). "A criminal attorney has the duty to investigate, but the scope of investigation is governed by a reasonableness standard." Mitchell v. Kemp, 762 F.2d 886, 888 (11th Cir.1985). "[C]ounsel's duty to investigate depends critically on the information furnished by the defendant and his family." Curtis, 44 MJ at 121.

If there is compelling evidence of mitigation that, for no valid reason, an attorney failed to investigate, an 8th Amendment or a 6th Amendment claim may lie. See May v. Collins, 904 F.2d 228 (5th Cir.1990); Jones v. Thigpen, 788 F.2d 1101 (5th Cir.1986); and Blake v. Kemp, 758 F.2d 523 (11th Cir.1985). However, a tactical decision to forgo introducing mitigating evidence will not support a claim. May v. Collins, supra (8th Amendment); Middleton v. Dugger, 849 F.2d 491, 493-4 (11th Cir.1988) (6th Amendment).

The Supreme Court in Strickland warned that it is "tempting to second-guess" a lawyer's performance, but that a court's assessment of an ineffectiveness claim should try to "eliminate the distorting effects of hindsight." 466 U.S. at 689, 104 S. Ct. 2052. As the Supreme Court stated in Burger:

> [Defense counsel] could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, "[w]e address not what is prudent or appropriate, but only what is constitutionally compelled." . . . We have decided that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."

483 U.S. at 794, 107 S. Ct. 3114, quoting Cronic, 466 U.S. at 665 n. 38, 104 S. Ct. 2039, and Strickland, 466 U.S. at 690-691, 104 S. Ct. 2052.

Strickland was a capital case involving some of the same allegations as here, that is, ineffectiveness in failure to investigate and produce mitigating evidence at the penalty stage. Strickland's defense counsel did not produce presentencing evidence because "his conversations with his client gave no indication that [Strickland] had psychological problems." 466 U.S. at 673, 104 S. Ct. 2052. The Court found that there was not a violation of the Strickland two-pronged test. Id. at 700, 104 S. Ct. 2052. The Court did not, as the majority would, impose a more rigorous standard on the conduct of defense counsel in death penalty cases.

*34 The majority opinion criticizes defense counsel for not meeting face-to-face with appellant's character witnesses. 50 MJ at 12-13. There is no requirement that defense counsel interview witnesses in such a manner. Indeed, such a requirement would place an unreasonable burden upon defense attorneys. It is entirely possible to acquire necessary and relevant information from witnesses over the telephone. I know of no case law suggesting that telephonic interviews are unacceptable methods of communication, and the majority has not cited any.

Defense counsel in this case obtained the names of potential witnesses from appellant, contacted those witnesses, and asked those witnesses for information and names of other witnesses that might be helpful. He then contacted those potential witnesses. During the sentencing stage, seven witnesses from North Carolina testified for appellant. Additionally, there was a stipulation of expected testimony of seven others who were relatives and friends of appellant. These stipulations addressed appellant's hometown, his childhood, and his background. Numerous exhibits were introduced into evidence which favorably showed appellant's childhood background and good character.

Counsel is not ineffective simply because he or she relied on a less than complete psychiatric evaluation. State v. Sireci, 502 So.2d 1221, 1223 (Fla.1987). Further, the fact that an accused recently has secured a more favorable expert opinion is an insufficient basis for relief. Provenzano v. Dugger, 561 So.2d 541, 546 (Fla.1990). "Disagreements among professionals do not per se show incompetence." United States v. Loving, 41 MJ 213, 241 (1994). "[D]efense counsel is not obligated to shop for an expert witness who might provide more favorable testimony." State v. Kenley, 952 S.W.2d 250, 268 (Mo.1997) (holding that, in light of aggravating evidence, there was no reasonable probability the sentence would be different).

In Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994), the Supreme Court of Nevada held that a defense attorney was not ineffective for failing to hire an expert to examine the appellant's mental and physical health, where a pretrial evaluation report gave no indication that the appellant had a mental or physical illness, but only noted the appellant's extensive drug use. The court said, "As a result, we hold that it was not ineffective assistance of counsel, without stronger indications, for

[defense counsel] to have failed to order a psychiatric evaluation of [the appellant] based on the information contained in the pretrial evaluation." Id. at 280.

Appellant underwent a pretrial RCM 706 sanity board hearing. The sanity board found that he was competent to stand trial and was sane when he murdered his son, stepson, and ex-wife. The sanity board consisted of a psychiatrist and a psychologist, who concluded that appellant was able to "appreciate the nature and quality or wrongfulness of his conduct" and did not have "a severe mental disease or defect" at the time of the murders.

Neither appellant nor any of his character witnesses informed defense counsel that appellant or his mother had been victims of abuse. Thus, appellant's defense attorneys had no reason to investigate further appellant's childhood background or his mental health for either the findings or sentencing portion of the trial. Their failure to investigate further these claims was reasonable, based upon the information provided to them by appellant and his witnesses.

Even if defense counsel were ineffective during findings or sentencing for failing to investigate appellant's recently discovered childhood abuse and mental health evidence, there was no prejudice. In Buenoano v. Dugger, 559 So.2d 1116, 1119 (1990), the Florida Supreme Court held that appellant's mental health and childhood abuse "in no way would be sufficient to overcome the overwhelming evidence presented against her at trial." See also People v. Lear, 175 Ill.2d 262, 222 Ill.Dec. 361, 677 N.E.2d 895, 902 (1997) (appellant not prejudiced by counsel's failure to present evidence of psychological and physiological defects because aggravating evidence was overwhelming and mitigation evidence was weak); Johnston v. Dugger, 583 So.2d 657 (Fla.1991) (defense attorney ***35** was not ineffective for failing to pursue insanity defense where the court found the pretrial competency examination of appellant was adequate).

Given the strong evidence of appellant's sanity, it is unlikely that the post-trial psychiatric report would have convinced the members to acquit him, even if it had been presented to them. See Coogan v. McCaughtry, 958 F.2d 793, 795 (7th Cir.1992) (appellant did not demonstrate that new psychiatric evidence "would probably result in an acquittal"); United States v. Massa, 804 F.2d 1020, 1022 (8th Cir.1986) (jury was unlikely to acquit appellant based on new psychiatric report). Thus, even if defense counsel were ineffective in failing to investigate further appellant's mental health, there was no prejudice on findings. Evidence of appellant's guilt for these atrocious crimes was overwhelming. Even if he had presented evidence that he was abused as a child and suffers from a mental illness, it is hard to find any prejudice to appellant.

CONCLUSION

The majority's decision lowers an appellant's burden in ineffective assistance of counsel cases in which the death penalty has been imposed. Regardless of whether trial defense counsels' conduct was below an objective standard of reasonableness during some phase of appellant's trial,

there was no prejudice to appellant given the overwhelming evidence of his guilt. Even absent these alleged errors, the members would have found appellant guilty of the capital offenses and sentenced him to death. I would affirm appellant's conviction and sentence.

For the above reasons, I dissent.

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APPENDIX T

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21 Fla. L. Weekly S109
(Cite as: 675 So.2d 567)
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Supreme Court of Florida.

James Franklin ROSE, Appellant,
v.
STATE of Florida, Appellee.

No. 83623.

March 7, 1996.
Rehearings Denied June 18, 1996.

Following affirmance, 461 So.2d 84, of petitioner's conviction of murder and sentence of death, and remand, 601 So.2d 1181, of petitioner's motion for postconviction relief, the Circuit Court, Broward County, John Farris, J., denied motion for postconviction relief, and petitioner appealed. The Supreme Court held that: (1) defendant received effective assistance of counsel in guilt phase of trial, but (2) defendant did not receive effective assistance of counsel in resentencing phase of trial.

Affirmed in part, reversed in part, and remanded.

Wells, J., concurred in part and dissented in part and filed opinion.

West Headnotes

[1] Criminal Law k1429(2)
110k1429(2)
(Formerly 110k998(3))
Petitioner's claims that his in-custody statements were obtained and admitted over his assertion of his right to counsel, that state knowingly used misleading and false testimony of medical examiner who performed autopsy, that autopsy photographs were withheld by state, that petitioner's confrontation rights were violated when certain proceedings were conducted outside his presence, and that state withheld material information concerning his statements to police, should have been raised on direct appeal and thus were barred on petitioner's motion for postconviction relief.

[2] Criminal Law k641.13(1)
110k641.13(1)
To demonstrate that counsel was ineffective, defendant must establish that counsel's performance was deficient and that counsel's deficient performance prejudiced defense. U.S.C.A. Const.Amend. 6.

[3] Criminal Law k641.13(1)
110k641.13(1)
In claim of ineffective assistance of counsel, to establish that counsel's performance was deficient, defendant must establish that counsel made errors so serious that counsel was not functioning as the counsel guaranteed defendant by Sixth Amendment. U.S.C.A. Const.Amend. 6.

[4] Criminal Law k641.13(1)
110k641.13(1)
In claim of ineffective assistance of counsel, to demonstrate that counsel's deficient performance prejudiced defense, defendant must establish that counsel's errors were so serious as to deprive defendant of fair trial whose result is reliable. U.S.C.A. Const.Amend. 6.

[5] Criminal Law k641.13(6)
110k641.13(6)
Defense counsel's failure to call as witnesses several people who gave statements that they saw murder victim alive or that they saw defendant's van during same time period when state maintained that he had taken victim in his van and killed her, and counsel's failure to use statements from some of those witnesses to refute state's "jealous boyfriend" theory, did not constitute ineffective assistance; witnesses would have related testimony damaging to defendant, and counsel made informed strategic decision not to call them. U.S.C.A. Const.Amend. 6.

[6] Criminal Law k641.13(7)
110k641.13(7)
To prevail on claim of ineffective assistance of counsel in death penalty phase of trial, defendant must demonstrate that but for counsel's errors he would have probably received life sentence; such demonstration is made if counsel's errors deprived defendant of reliable penalty phase proceeding. U.S.C.A. Const.Amend. 6.

[7] Criminal Law k641.13(7)
110k641.13(7)
Counsel's failure to investigate and present available mitigating evidence in death penalty phase of trial is a relevant concern in claim of ineffective assistance of counsel, along with reasons for not doing so. U.S.C.A. Const.Amend. 6.

[8] Criminal Law k641.13(7)
110k641.13(7)
Defendant was denied effective assistance of counsel in death penalty phase of his trial; counsel failed to investigate defendant's background and to obtain records containing information as to defendant's extensive mental problems, counsel had never handled a capital case before being appointed to represent defendant, counsel testified that he felt restricted by limited time he had to prepare for sentencing, counsel expressed concern with trial judge's attitude that case was a simple one requiring little preparation, and counsel presented "accidental death" theory that counsel believed to be ill-conceived. U.S.C.A. Const.Amend. 6.

[9] Criminal Law k641.13(7)
110k641.13(7)
Defense counsel's failure to investigate mitigating factors in death penalty phase of defendant's second sentencing trial prejudiced defendant; counsel failed to present evidence of severe mental disturbance, and jury in original sentencing trial had deadlocked on six-to-six vote on recommendation of death, showing in effect that defendant had once received a recommendation of life imprisonment even without substantial mitigating evidence. U.S.C.A. Const.Amend. 6.

***568** An Appeal from the Circuit Court in and for Broward County, No. 76-5036CF10; John Ferris, Judge.

Gail E. Anderson and Daren L. Shippy, Assistant Capital Collateral Representatives, Office of the Capital Collateral Representative, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General and Sara D. Baggett, Assistant Attorney General, West Palm Beach, for Appellee.

PER CURIAM.

We have on appeal the judgment of the trial court denying James Franklin Rose, an inmate under sentence of death, relief requested under Rule 3.850, Florida Rules of Criminal Procedure. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. For the reasons expressed below, we affirm in part, reverse in part and remand for a new sentencing proceeding before a jury.

PROCEDURAL STATUS

A more detailed description of the facts of this case is contained in the initial direct appeal, Rose v. State, 425 So.2d 521 (Fla.1982), cert. denied, 461 U.S. 909, 103 S. Ct. 1883, 76 L. Ed.2d 812 (1983), wherein we affirmed Rose's convictions and vacated his death sentence and remanded for resentencing. Upon resentencing, the death sentence was reimposed and we affirmed. Rose v.

State, 461 So.2d 84 (Fla.1984), cert. denied, 471 U.S. 1143, 105 S. Ct. 2689, 86 L. Ed.2d 706 (1985).

In his subsequent rule 3.850 motion, Rose challenged the lawfulness of his conviction and death sentence on a variety of grounds. The trial court summarily denied Rose's motion without conducting an evidentiary hearing. On appeal, we reversed and directed the trial court to "reconsider Rose's motion and to hold an evidentiary hearing on the ineffective assistance of counsel claims and any other appropriate factual issues presented in the motion." Rose v. State, 601 So.2d 1181, 1184 (Fla.1992).

The trial court reconsidered Rose's 3.850 motion and held an evidentiary hearing on Rose's claims that he received ineffective assistance of counsel at both the guilt and penalty phases of his trial. The trial court again denied relief as to all claims and ruled that Rose's claims of ineffective assistance of counsel did not meet the standards set forth in Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed.2d 668 (1984).

APPEAL

[1] In this appeal, Rose raises numerous claims, most of which are procedurally ***569** barred, **[FN1]** meritless, **[FN2]** or moot in light of this opinion. **[FN3]** The remaining issues consist of Rose's claims that he received ineffective assistance of counsel at both the guilt and penalty phases of his trial. We affirm the trial court's denial of relief as to Rose's claim of ineffective assistance of counsel at the guilt phase. Because we find that counsel at the penalty phase was ineffective for failing to investigate and present mitigation evidence, we reverse the trial court's order denying postconviction relief and remand for a new sentencing proceeding.

FN1. Claims barred because they were or should have been raised on direct appeal are: (1) that Rose's in-custody statements were obtained and admitted over his assertion of his right to counsel; (2) that the State knowingly used the misleading and false testimony of the medical examiner who performed the autopsy in violation of Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed.2d 104 (1972); (3) that autopsy photographs were withheld by the state in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963); (4) that Rose's confrontation rights were violated when certain proceedings were conducted outside his presence; and (5) that the State withheld material information concerning Rose's statements to police in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963), and the related assertion that the officer's testimony at the suppression hearing was false. See Medina v. State, 573 So.2d 293, 295 (Fla.1990) (holding that allegations of ineffective assistance cannot be used to circumvent rule that post-conviction proceedings cannot serve as second appeal).

FN2. We find the claim that Rose was prejudiced by an alleged conflict of interest based on Broward County's budgeting for capital improvements and special assistant public defenders meritless on its face. As to Rose's claim that he did not receive a full and fair 3.850 hearing, we find that the trial court did not abuse its discretion in the way it conducted the evidentiary hearing. See Medina v. State, 573 So.2d at 295.

FN3. Because we remand this case for a new sentencing proceeding, the fact that the jury was not instructed on the definitions of premeditated and felony murder at the penalty phase is now a moot issue.

GUILT PHASE PERFORMANCE OF COUNSEL

[2][3][4] First, we consider the trial court's ruling that appellant's claims of ineffective assistance of trial counsel, based on counsel's inadequate performance during the guilt phase of his trial, were insufficient to meet the standards set forth under Strickland 's two-prong test. Under Strickland, a defendant must establish two components in order to demonstrate that counsel was ineffective: (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense. As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 104 S. Ct. at 2064. As to the second prong, the defendant must establish that, "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. "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." Id. **[FN4]** Applying this standard, we find no error ***570** by the trial court in rejecting these claims.

FN4. In Strickland, the Supreme Court explained in some detail the standard chosen:

> 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, 3445-3446, 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. 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.
>
> 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 2397-98, 2401-02], 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 3449-50]. 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.

466 U.S. at 693-94, 104 S. Ct. at 2067-68.

[5] Rose simply has failed to demonstrate both a deficient performance and the probability of a different outcome based on the alleged deficiencies. Rose alleges trial counsel was ineffective for failing to call as witnesses several people who were at the bowling alley on the night of the victim's disappearance and who gave statements to the police that they saw the victim alive, or saw Rose's van during the time period when the State maintained that Rose had taken the victim from the bowling alley in his van and killed her. In addition, Rose alleges trial counsel was ineffective for failing to use statements from some of these witnesses to refute the State's "jealous boyfriend" theory.

At the evidentiary hearing below, trial counsel testified that each of these witnesses had inherent problems. Some were key witnesses for the State, others were very emotional and counsel felt he would be unable to control them if called to testify. Most importantly, all of these witnesses would relate testimony damaging to Rose. Many of these witnesses had told police that they saw blood on Rose's pants when he returned to the bowling alley and then saw him go to the bathroom and try to cover it up with grease. Others saw blood on Rose's van and heard Rose say the blood was from cutting himself while changing a tire. These same witnesses checked Rose's van and did not believe that a tire had been changed. At the evidentiary hearing, trial counsel testified that he was well aware of the problems with each witness and consciously decided not to call any of these witnesses who said they had seen the victim or Rose's van because their testimony would have been more detrimental than helpful.

Applying the Strickland standard to these claims, we conclude that the trial court did not err in concluding that Rose's claims of ineffective assistance of trial counsel during the guilt phase constitute claims of disagreement with trial counsel's choices as to strategy. See Cherry v. State, 659 So.2d 1069 (Fla.1995) (concluding standard is not how current counsel would have proceeded in hindsight). In light of counsel's testimony at the hearing, it is apparent that counsel was aware of

the witnesses in question and knowledgeable about the pros and cons of calling them as witnesses. Based upon this knowledge, counsel made an informed strategic decision not to call them. In light of the strong likelihood that the State could have successfully impeached each of these witnesses, it is apparent that there was a reasoned basis for counsel's decision. Hence, the trial court did not err in concluding that Rose failed to demonstrate that trial counsel's performance was deficient, or that these alleged errors undermined confidence in the outcome of the guilt phase proceedings. Therefore, we affirm the trial court's denial of relief as to Rose's claims of ineffective assistance of counsel at the guilt phase of his trial.

PENALTY PHASE PERFORMANCE OF COUNSEL

[6][7] We reach a contrary result on Rose's claim of ineffective assistance of counsel at the penalty phase. In this context, assuming there were errors, Rose "must demonstrate that but for counsel's errors he would have probably received a life sentence." Hildwin v. Dugger, 654 So.2d 107, *571(Cite as: 675 So.2d 567, *571) 109 (Fla.), cert. denied, 516 U.S. 965, 116 S. Ct. 420, 133 L. Ed.2d 337 (1995). Such a demonstration is made if "counsel's errors deprived [defendant] of a reliable penalty phase proceeding." Id. at 110 (emphasis added). The failure to investigate and present available mitigating evidence is a relevant concern along with the reasons for not doing so. Id. at 109-10.

In Baxter v. Thomas, 45 F.3d 1501, 1512-13 (11th Cir.), cert. denied, 516 U.S. 946, 116 S. Ct. 385, 133 L. Ed.2d 307 (1995), the United States Court of Appeals for the Eleventh Circuit outlined the legal framework for considering a claim of ineffective assistance of counsel at the penalty phase of a capital trial:

> An ineffective assistance of counsel claim is a mixed question of law and fact subject to plenary review under the test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed.2d 674 (1984). *See Cunningham v. Zant*, 928 F.2d 1006, 1016 (11th Cir.1991). In order to obtain a reversal of his death sentence on the ground of ineffective assistance of counsel, Baxter
>
> > must show both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different.
>
> *Bolender v. Singletary*, 16 F.3d 1547, 1556-57 (11th Cir.) (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064), *cert. denied*, 513 U.S. 1022, 115 S. Ct. 589, 130 L. Ed.2d 502 (1994).

> "An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir.), *cert. denied*, 513 U.S. 1009, 115 S. Ct. 532, 130 L. Ed.2d 435 (1994). The failure to do so "may render counsel's assistance ineffective." *Bolender*, 16 F.3d at 1557.

Rose claims that he is entitled to relief under Hildwin and Baxter since the record reflects that counsel made practically no investigation of mitigation and presented little evidence of mitigation in the sentencing proceedings despite the existence of substantial evidence of mitigating circumstances that would have been uncovered if counsel had made a reasonable investigation.

[8] Rose presented evidence at the hearing below that the following information was available had counsel conducted a reasonable investigation: (1) Rose grew up in poverty; (2) Rose was emotionally abused and neglected throughout his childhood; (3) Rose's mother locked him in a closet for extended periods of time as a child and tried to lose him and leave without him when they were out; (4) Rose was a slow learner and was retained in the fourth, fifth, and seventh grades; (5) Rose's I.Q. is 84; (6) Rose was severely injured in a 30-foot fall and suffered head trauma, chronic blackouts, dizziness, and blurred vision; (7) Rose is a chronic alcoholic; and (8) Rose had previously been characterized by a physician as schizoid.

In addition, Dr. Jethro Toomer, a clinical and forensic psychologist, testified that: (1) Rose suffers from organic brain damage; (2) Rose has a longstanding personality disorder; (3) Rose is a chronic alcoholic; (4) Rose meets the criteria for the statutory mitigator of being under the influence of an extreme emotional or mental disturbance at the time of the offense, see § 921.141(6)(b) Fla.Stat. (1993); and (5) Rose's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired at the time of the offense, see id. § 921.141(6)(f). Dr. Toomer's opinion was based on a psychosocial evaluation of Rose in which he administered a battery of psychological tests and reviewed Rose's school, hospital, medical and prison records. His testimony was essentially uncontested. In addition to the evidence outlined above, Rose presented substantial lay testimony regarding mitigation at the postconviction hearing which had not been investigated or was not presented by counsel during the penalty phase proceedings.

***572** It is apparent from the record that counsel never attempted to meaningfully investigate mitigation, and hence violated the duty of counsel "to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." Baxter, 45 F.3d at 1513. In short, Rose has demonstrated, largely without dispute, that there was substantial mitigation present and available in this case that was not investigated or presented by defense counsel. In fact, the trial court, in subsequently sentencing Rose after the penalty phase in question, found no mitigating circumstances to have been established by the defense. See Rose v. State, 461 So.2d 84, 85 (Fla.1984), cert. denied, 471 U.S. 1143, 105 S. Ct. 2689, 86 L. Ed.2d 706 (1985).

However, we must also consider the reasons advanced at the evidentiary hearing as to why resentencing counsel did not investigate and present available mitigating evidence at the penalty phase. In evaluating the competence of counsel, we must examine the actual performance of counsel in preparation for and during the penalty phase proceedings, as well as the reasons advanced therefor. As we have already noted in our rejection of the claim of ineffectiveness during the guilt phase, counsel is entitled to great latitude in making strategic decisions.

Initially, we note that Rose was not represented by the same counsel at resentencing as the counsel who represented him in the original guilt phase of the trial. In contrast to the experience of guilt phase counsel, resentencing counsel had never handled a capital case before being appointed to represent Rose, and counsel was totally unfamiliar with the concept of aggravating and mitigating factors. He failed to investigate Rose's background and obtain the school, hospital, prison, and other records and materials that contained the information outlined above as to Rose's extensive mental problems, etc. Moreover, counsel testified that he felt restricted by the limited time (79 days) he had to prepare for sentencing, during a part of which counsel was married and went away on a ten-day honeymoon. Counsel also expressed concern with the trial judge's attitude that the case was a simple one requiring little preparation since there had already been one sentencing hearing.

Under these circumstances resentencing counsel chose to present an "accidental death" theory urged upon him by an appellate attorney who had previously represented Rose on appeal, but had not been appointed to represent Rose at sentencing or in any other capacity at the time. It appears that counsel acquiesced in this strategy simply because of the pressure of time and his lack of competence and experience in handling a capital sentencing proceeding. Resentencing counsel also chose to present this theory even though he thought it was far-fetched at the time. At the hearing below, resentencing counsel testified that,

> I would have never in my wildest dreams gone on the theory that it was an accidental death and that it may have been a manslaughter instead of a murder and that he freaked and disposed of the body. That was something that I would have never formulated, okay. To me the better strategy would have been to constantly maintain that he did not do the crime, it's a circumstantial case, and gone with other areas of mitigation or things of that nature.

When specifically asked if appellate counsel's assistance was more help or hindrance, counsel replied, "Hindrance. He took me off track of what I would have done. I would have focused on things that would have hopefully established to a jury that he should get life."

We find counsel's performance, when considered under the standards set out in Hildwin and Baxter, to be deficient. It is apparent that counsel's decision, unlike experienced trial counsel's informed choice of strategy during the guilt phase, was neither informed nor strategic. Without ever investigating his options, counsel latched onto a strategy which even he believed to be ill-conceived. **[FN5]** Here, there was no investigation ***573** of options or meaningful choice. See Horton v. Zant,

received a recommendation of life imprisonment from a jury even without the substantial mitigation set out above. **[FN10]**

FN9. See Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896).

FN10. We note the jury's vote only as part of the factual background we must consider in determining the issue of prejudice. We have previously determined that this vote, which the trial court erroneously found to be unacceptable, did not have the legal effect of a jury recommendation for life, which recommendation in turn would have sharply limited the judge's sentencing discretion under Tedder v. State, 322 So.2d 908 (Fla.1975). See Rose v. State, 461 So.2d 84 (Fla.1984). In our initial review of Rose's conviction, we held:

> Defendant also challenges his death sentence. He contends that the trial court reversibly erred in giving the "Allen charge" during the penalty phase of the trial. We agree. The record indicates that the charge was given after the jury advised the court by a note which read, "We are tied six to six, and no one will change their mind at the moment. Please instruct us." At that point, the trial judge should have advised the jury that it was not necessary to have a majority reach a sentencing recommendation because, if seven jurors do not vote to recommend death, then the recommendation is life imprisonment. There was no reason to give the "Allen charge" during the penalty phase of the trial. Rose v. State, 425 So.2d 521, 524-25 (Fla.1983).

CONCLUSION

In light of the substantial mitigating evidence identified at the hearing below as compared to the sparseness of the evidence actually presented, we find that counsel's errors deprived Rose of a reliable penalty phase proceeding. We further conclude that Rose was prejudiced by the ineffective assistance of counsel at the penalty phase for failing to investigate and present available mitigating evidence. See Hildwin, 654 So.2d at 110.

We affirm the trial court's denial of relief as to all claims raised in the 3.850 motion and hearing below except for Rose's claim alleging that counsel was ineffective during the resentencing proceeding. We reverse the denial of relief as to that claim, vacate the death sentence, and remand for a new sentencing proceeding before a jury during which the jury may properly consider available evidence of aggravation and mitigation before rendering a verdict.

It is so ordered.

*575 GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING and ANSTEAD, JJ., concur.

WELLS, J., concurs in part and dissents in part with an opinion.

WELLS, Justice, concurring in part and dissenting in part.

In order to fairly and adequately analyze this case, it is necessary to review its judicial path from the date of the death of eight-year-old Lisa Berry, who was kidnapped, murdered, and disposed of in a canal in October 1976, to the present. This case was first reviewed by the Florida Supreme Court in 1982, with the opinion filed on December 9, 1982. Rose v. State, 425 So.2d 521 (Fla.1982), cert. denied, 461 U.S. 909, 103 S. Ct. 1883, 76 L. Ed.2d 812 (1983). In that decision, we affirmed the convictions of first-degree murder and kidnapping but vacated the death sentence because the trial court improperly gave the jury an Allen **[FN11]** charge when it could not break a six-to-six vote in recommending life or death. The trial court promptly held a resentencing hearing in 1983, resulting in a jury recommendation of death by a vote of eleven to one. The trial court followed that recommendation and sentenced Rose to death. This sentence was reviewed by this Court in 1984, with a unanimous decision rendered on December 6, 1984, affirming the death sentence. Rose v. State, 461 So.2d 84 (Fla.1984), cert. denied, 471 U.S. 1143, 105 S. Ct. 2689, 86 L. Ed.2d 706 (1985). The majority decision specifically found that the prior jury's deadlock did not rise to the level of an advisory recommendation to the sentence imposed and that the advisory recommendation in this resentencing was the same as that of the prior sentencing: death. Id. at 86.

FN11. Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896).

In 1987, this Court considered Rose's petition for writ of habeas corpus and motion for stay of execution following the governor's issuance of a death warrant. Rose v. Dugger, 508 So.2d 321 (Fla.), cert. denied, 484 U.S. 933, 108 S. Ct. 308, 98 L. Ed.2d 267 (1987). The Court, in a five-to-one decision with Justice Barkett concurring in part and dissenting in part, denied the petition for writ of habeas corpus and vacated the stay of execution. The case next came to this Court in 1992 for review of a summary denial by the trial court of a Florida Rule of Criminal Procedure 3.850 motion. In an opinion authored by Justice Barkett, this Court reversed the trial court and directed the trial court to hold a hearing on the motion. Rose v. State, 601 So.2d 1181 (Fla.1992). In discussing the factual matters alleged in the motion, the opinion only sets forth guilt-phase facts, and it specifically states that the guilt-phase facts alleged formed the issue requiring an evidentiary hearing. Id. at 1184. The opinion notes that the State conceded an evidentiary hearing was required on some factual matters; however, these concessions specifically related to Rose's ineffectiveness claim to the guilt phase of the trial. Thus, even though the last line of the opinion directs the trial court to reconsider the motion and to hold an evidentiary hearing on the ineffectiveness of counsel claims, **[FN12]** the thrust of that decision was clearly as to allegations about the guilt phase of Rose's trial, the trial court's disposition of which the present majority affirms. But in the piecemeal style which feeds the frustration of finality in capital cases, the present majority remands this case for another sentencing hearing on a subject about which the majority was silent in 1992.

FN12. The opinion also directed the trial court to consider any other appropriate factual matters presented in the motion. Rose, 601 So.2d at 1184.

I believe that the majority's decision totally ignores what a unanimous majority of this Court approved in Remeta v. Dugger, 622 So.2d 452 (Fla.1993), a case upon which the trial court relied in its order denying the rule 3.850 motion. In Remeta, we stated:

> 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 *576 must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .

Id. at 454 (quoting Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed.2d 674 (1984)).

To the contrary, the majority totally disparages trial counsel's decisions which trial counsel testified were made for strategic purposes. The majority presumes that trial counsel was ineffective because this was counsel's first sentencing proceeding. This presumption was rejected by this Court in Remeta, which also involved defense counsel's first sentencing proceeding. Id. Moreover, the present majority opinion omits the fact that trial counsel under scrutiny here had been an assistant state attorney for three years prior to this sentencing proceeding. **[FN13]**

> FN13. Additionally, I note that the majority points to counsel's testimony that appellate counsel's assistance was a hinderance. However, this statement was in response to the question of whether, in retrospect, counsel felt that his assistance was more of a help or hinderance. This backward-looking inquiry is exactly the type in which Strickland and Remeta instruct us not to engage.

Likewise, the majority omits any reference to trial counsel's testimony before the trial judge that his strategy decisions were dictated by Rose. **[FN14]** The attorney testified in response to the question of whether he had a strategic reason for not getting a mental health expert to address mitigation:

> FN14. The majority opinion, at note 6, quotes counsel stating that this accidental death theory was actually appellate counsel's and not Rose's. However, the full statement was:
>
> > In the time that I had with this file that I had we spent a lot of time talking to doctors and blood experts and things of that nature to try to translate this resentencing into something that would enlighten the Court that he may have been involved in a manslaughter instead of a murder. Which changed everything that Mr. Rose ever stood for as far as his view of the case. He never admitted to me he did this crime. Never. Okay.
> >
> > So I mean this theory was a Mr. Carres theory. I had never done a capital case, he had done a lot of them, I relied on the man who had been with this case for five or six years. Did he distort my professional view of what I would have done, yes, he did at the time. If I did this today, would I have done the same thing, no, I probably would have been a lot more forceful because I've done a lot of these murders since. But, you know, this is something you have

> to ask him because he came in with memos and thoughts and witnesses and ideas and everyone — Mr. Rose seemed to agree and this is where we are going to go with this thing.
>
> Okay. Okay, I mean — I'm going to answer this the only way I know how to answer it. Mr. Rose was more concerned with a new trial than getting life. Mr. Carres was more concerned with guilt or innocent than getting life. They both sidetracked me to some degree from mitigation as to the events that occurred. Okay.
>
> Mr. Rose didn't offer me a lot to work with when we sat down and discussed it except alternative theories that I was going over with Mr. Carres. I took the witnesses he gave me and I developed whatever he gave me and I went with it. He wouldn't testify on his own behalf at the sentencing phase for his life. There was a certificate of merit signed by Ralph Ray which probably was, I think, one of the most important things I could put in because here is the man who is trying to have him sentenced to death commending him as a good citizen for thwarting some crime. He wouldn't let that in for fear that he would be classified as a snitch. I mean, I took what he gave me and I went with it in the period that I had to do everything.

Given this testimony, the majority fails to explain why this case is different in this respect to what this Court said in a capital case involving a different Rose. See Rose v. State, 617 So.2d 291 (Fla.), cert. denied, 510 U.S. 903, 114 S. Ct. 279, 126 L. Ed.2d 230 (1993). In that case, the defendant similarly wanted penalty-phase counsel to continue pursuing the defense that he was innocent and that he was not present at the scene of the murder. This Court said in that opinion:

> Against Rousen's advice, Rose would not allow counsel to pursue other defenses such as insanity or intoxication. According to Rousen, Rose did not change his posture at the penalty phase. "When a defendant preempts his attorney's strategy by insisting ***577** that a different defense by followed, no claim of ineffectiveness can be made." Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir.1985), cert. denied, 483 U.S. 1026, 107 S. Ct. 3248, 97 L. Ed.2d 774 (1987).

Id. at 294.

It is apparent that the present majority has decided not to follow that Rose decision. But in my view, that decision has the force of logic. It is obvious to me that the majority does not want to give any weight to what Rose himself wanted to do. In so doing, I believe this Court exchanges its judicial role for that of a guardianship role. This Court should respect the right of a competent defendant to decide upon his own defense strategy. This also requires a respect for the consequences of that strategy. Moreover, since the trial judge had the benefit of counsel's live and in-person testimony, it should be for the trial judge, not this Court, to determine the weight that should be given to a defendant's cooperation and instructions to counsel in evaluating counsel's performance. Since the record shows that there was competent, substantial evidence to support the judge's findings and conclusions, I would affirm the denial of the motion for postconviction relief.

I specifically point out that the majority decision today expressly contradicts what this Court said in the 1984 decision in this case in upholding the death sentence. In that prior opinion, we specifically found that the first sentencing jury's vote of six to six, before the court gave the jury an Allen charge, did not rise to the level of an advisory recommendation of life. This is directly conflicting with the present majority's statement that "[i]n effect, Rose has once received a recommendation of life imprisonment from a jury, even without the substantial mitigation set out above." The present majority casts aside the law of the case on that point.

I further expressly disagree with the majority opinion that in his sentencing order, the trial judge misconstrued the effect of our 1987 opinion in this case when he stated that "[t]he Florida Supreme Court has already ruled in the case at bar that the aggravating circumstances were so severe that even a jury override would have been upheld." I read the trial court's statement to mean that this Court had already held that this is a strong case for death and that even if it is assumed that counsel was deficient in the way Rose argued in 1994, the contended deficiencies were not sufficient to demonstrate that the result would be probably be different. I believe this is a correct interpretation of how the majority of this Court viewed this case in 1987.

I concur that Rose did not receive ineffective assistance of counsel at the guilt phase of his trial. However, I cannot agree that Rose did not receive effective assistance of counsel at the penalty phase or that even assuming arguendo that counsel was ineffective, there was the probability of a different outcome.

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APPENDIX U

398, 434 S.E.2d at 273. The Court found a jury could reasonably conclude that when taken together, the menacing words and the actions constituted a legal provocation sufficient to produce sudden heat of passion. *Id.* at 399, 434 S.E.2d at 274. In *State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130 (1951), there was evidence the defendant and the victim were in a physical fight *at the time* of the stabbing.

We find no evidence of either heat of passion *or* sufficient legal provocation. The trial judge did not err in refusing to charge voluntary manslaughter. We therefore **AFFIRM** Appellant's conviction.

TOAL, Acting C.J., MOORE, WALLER, JJ., and Acting Associate Justice GEORGE T. GREGORY, Jr., concur.



338 S.C. 103

Robert J. CAPROOD, Respondent,

v.

The STATE of South Carolina, Petitioner.

No. 25039.

Supreme Court of South Carolina.

Submitted Sept. 22, 1999.

Decided Jan. 4, 2000.

Rehearing Denied Feb. 3, 2000.

Movant, whose direct appeal of conviction for armed robbery was dismissed, petitioned for postconviction relief. The Circuit Court, Colleton County, J. Ernest Kinard, Jr., J., granted the petition. State appealed. The Supreme Court, Burnett, J., held that: (1) statements by police officers that referenced other robberies were not hearsay, and (2) ruling that counsel was ineffective by failing to act when police officer referred to a "rap sheet," when asked if officer ran a vehicle license check, was the law of the case and would not be considered on appeal.

Affirmed in part, and reversed in part.

1. Criminal Law ⇐641.13(1)

There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐641.13(1)

To establish a claim for ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient based on a standard of reasonableness under prevailing professional norms, and that the deficient performance prejudiced defendant to the extent 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 ⇐998(16)

The postconviction relief applicant has the burden of proving that counsel provided ineffective assistance. U.S.C.A. Const. Amend. 6.

4. Criminal Law ⇐1158(1)

The Supreme Court gives great deference to the postconviction relief court when reviewing the court's findings of fact and conclusions of law.

5. Criminal Law ⇐1158(1)

The existence in the record of any evidence of probative value is sufficient to uphold the postconviction relief judge's ruling on appeal.

6. Criminal Law ⇐641.13(2.1)

Counsel did not provide ineffective assistance in prosecution for armed robbery by not asking for a curative instruction when his objection to a hearsay description of the getaway car was sustained, where counsel employed a valid strategy in that he did not request a limiting instruction because it would focus on the item he successfully kept out through his objection. U.S.C.A. Const. Amend. 6.

7. Criminal Law ⇐641.13(1)

Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐641.13(6)

Counsel did not provide ineffective assistance in prosecution for armed robbery by introducing into evidence a police report that contained hearsay descriptions of the car defendant allegedly used and of the defendant; there was no reasonable probability that the outcome of the trial would have been different, in that the victim thoroughly described the car at trial, and identified the defendant both at trial and in a lineup. U.S.C.A. Const. Amend. 6.

9. Criminal Law ⇐419(3)

Statements by police officers in prosecution for armed robbery that referenced other robberies that were committed in different counties during the day defendant was arrested were not offered to prove that defendant committed the other robberies, and thus, were not hearsay and were admissible to explain why officers were pursuing defendant.

10. Criminal Law ⇐419(1)

Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted.

11. Criminal Law ⇐419(3)

An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken.

12. Criminal Law ⇐998(3)

Postconviction relief court's ruling that counsel was ineffective in prosecution for armed robbery by failing to act when police officer referred to defendant's "rap sheet," when asked whether officer ran a license check on defendant, was the law of the case and would not be considered on appeal, where state did not appeal that ruling. U.S.C.A. Const.Amend. 6.

J.D. Bryan, of Walterboro, for respondent.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Teresa A. Knox, Assistant Attorney General J. Benjamin Aplin, of Office of the Attorney General, of Columbia, for petitioner.

BURNETT, Justice:

Respondent was convicted of armed robbery. His direct appeal was dismissed. His petition for post-conviction relief (PCR) was granted. We affirm in part, reverse in part, and remand for a new trial.

FACTUAL/PROCEDURAL BACKGROUND

On May 20, 1993 between 3:00 and 4:00 in the afternoon, a man entered a Texaco convenience store directly off Interstate 95 in Colleton County. Ruth Filmon, the employee on duty, was behind the counter stocking cigarettes when the man entered and asked if the store sold money orders. When Ms. Filmon told him "no," the man walked to the end of the counter toward a display, and Ms. Filmon resumed her stocking. A moment later, out of the corner of her eye, she saw the man coming up behind her. The man held against her back something sharp and silver she believed was a knife, and ordered Ms. Filmon to give him the money in the cash register. The man told Ms. Filmon not to look at him as he left, or he would kill her. Once she heard the man leave, Ms. Filmon activated the silent alarm, then tried to call the police, forgetting the alarm shuts down the telephones. She then ran out into the parking lot to get help. As she exited the store, she saw the man pull away in a small blue station wagon bearing Florida license tags and proceed north on I–95. A truck driver in the parking lot called the police.

According to the description Ms. Filmon gave the police, the robber was a deeply tanned white male with shoulder length medium brown hair, thickly parted in the middle and no facial hair. He wore wrap-around, reflective sunglasses, a white tee shirt and faded, grease-stained blue jeans, and was approximately 5 feet 9 inches tall and 140

pounds. According to the truck driver, the man had tattoos on both shoulders.

Detective Donald Pooser of the Colleton County Sheriff's Department was crossing I–95 on Highway 61 when he observed a small import medium blue station wagon on I–95. Apparently within moments, a dispatch went out describing the vehicle involved in the Texaco robbery, and Detective Pooser pursued the vehicle. Traffic was heavy and he was unable to regain sight of the vehicle.

Meanwhile, Detective Ted Stanfield, also of the Colleton County Sheriff's Department, was responding to a call regarding an earlier armed robbery in Jasper County when he heard the dispatch about the Texaco robbery. Both robberies involved vehicles of the same description and both were said to be proceeding north on I–95. Several other Colleton County officers joined the pursuit. Soon thereafter, Detective Stanfield heard Detective Pooser's transmission of the vehicle sighting. Knowing Detective Pooser was not in a patrol car, Detective Stanfield radioed ahead to Clarendon County, asking the Sheriff's Department to set up a roadblock for the suspect vehicle. When the officers reached the roadblock, they realized the vehicle must have exited the interstate. As they searched for the vehicle, they received a call from Clarendon County and Summerton police about a third armed robbery involving the same described vehicle. The Summerton police caught the vehicle and rammed it, but the driver escaped.

As Clarendon County gathered manpower, dogs, and a helicopter team to search for the fleeing suspect, Detective Stanfield took photographs and helped inventory the vehicle. Among other things, the vehicle contained 71 one dollar bills in the glove compartment, $14.50 in rolled coins, an Old Hickory knife, and two pairs of wrap-around sunglasses.

The suspect captured was Respondent. He was dressed in dark jeans and a light gray tank top, and had tattoos on both shoulders. He had some light facial hair, though not a full moustache and goatee. Officers found an additional $296 in Respondent's sock, $61.11 in his wallet, $150 in a pocket, and $6.71 in another pocket.

Respondent's questions at PCR suggest that at some point after the arrest, Ms. Filmon identified Respondent from a photographic lineup prepared for Clarendon County. His questions also indicate officers attempted a physical lineup which was aborted because Respondent was fighting with the police. Shortly thereafter, Ms. Filmon moved out of South Carolina. Five months after the robbery, Detective Stanfield composed a photographic lineup and flew to Ms. Filmon's home to show it to her. From that lineup, Ms. Filmon identified Respondent. She also made an in-court identification.

The jury convicted Respondent of armed robbery, and he was sentenced to 20 years, consecutive to time he was already serving.[1] Respondent's direct appeal was dismissed. The PCR judge granted Respondent's petition for PCR based on ineffective assistance of counsel. This Court granted the State's petition for writ of certiorari.

ISSUES

I. Did the PCR court err in granting relief on the grounds that defense counsel was deficient in waiving Respondent's right to cross examine witnesses and allowing prejudicial hearsay evidence?

II. Did the PCR court err in granting relief on the grounds that defense counsel was deficient in not moving for a mistrial or objecting when witnesses for the State referred to other crimes Respondent may have committed?

DISCUSSION

I. Waiver of Right of Cross Examination

The PCR court ruled defense counsel was ineffective in waiving Respondent's right to cross examine witnesses and allowing in prejudicial hearsay evidence. The court concluded counsel was ineffective in four particulars:

1) He did not move to strike or ask for limiting instructions when his objection to

1. Respondent pled guilty to the Clarendon County robbery and was given a sentence of 21 years. A jury in Jasper County acquitted him of the third robbery.

a hearsay description of the getaway car was sustained;

2) He introduced into evidence a report by Detective Medlar containing

a) a hearsay description of the car given by an absent witness,

b) reference to an armed robbery in Clarendon County and a statement that Respondent committed the crime,

c) a hearsay description of the robber and the robbery by the victim;

3) He asked Detective Medlar to read the description of the suspect given to him by the uncalled witness;

4) He did not object when the State exceeded the scope of redirect examination and introduced hearsay evidence by asking Detective Medlar for a description of the getaway car given mainly by an uncalled witness.

We disagree.

[1–3] There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). *Strickland* set forth a two-prong test for determining ineffective assistance of counsel, adopted by this Court in *Cherry*. First, Respondent must show that his counsel's performance was deficient based on a standard of "reasonableness under prevailing professional norms." *Id.* Second, Respondent must show that the deficient performance prejudiced Respondent to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* The PCR applicant has the burden of proving both prongs. *McCray v. State*, 317 S.C. 557, 559, 455 S.E.2d 686, 687 (1995).

[4, 5] This Court gives great deference to the PCR court's findings of fact and conclusions of law. *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995). The existence in the record of "any evidence" of probative value is sufficient to uphold the PCR judge's ruling. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984).

[6, 7] There is no probative evidence in the record to support the PCR court's ruling on this issue. First, defense counsel testified at the PCR hearing that as a trial strategy, he did not request curative instructions because they tend to bring into focus precisely the item the objector has kept out. Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992).

[8] Second, the descriptions of the suspect vehicle and the perpetrator contained in Detective Medlar's report were cumulative to testimony given at trial by Ms. Filmon, the victim. It is unclear how much of the description in the report came from Ms. Filmon and how much came from the uncalled witness. At most, it appears that the foreign make of the car and the description of the tattoos on Respondent's arms came from the uncalled witness alone. In any case, Ms. Filmon thoroughly described the car at trial, including the Florida license plate. She also identified Respondent in both the lineup and in court. With Ms. Filmon's testimony and the ample circumstantial evidence linking Respondent to the crime, there is no reasonable probability that the outcome of the trial would have been different without the minimal hearsay. Furthermore, defense counsel introduced the police report to show the jury the ways in which the description of the robber *differed* from that of Respondent. This was a valid trial strategy, and should not be the basis of a finding of ineffective assistance of counsel. *See id.*

Finally, Detective Medlar's report does not refer to the armed robbery in Clarendon or state that Respondent committed that crime. The PCR court's ruling on that basis is therefore clearly erroneous.[2]

II. Failure to Object or Move for Mistrial Based on Reference to Other Crimes

The PCR court also ruled defense counsel was ineffective in failing to object or move

2. The PCR court apparently confused Detective Medlar's report with one made by Detective Stanfield, which was not introduced at Respondent's trial.

for a mistrial based on numerous references by police officers to other crimes. We address these references separately below.

A. Clarendon and Jasper County Robberies

[9] Most of the references to other crimes were made in the course of the officers describing their pursuit of the vehicle involved in the various robberies in the tri-county area that day, as set forth above.[3] Specifically, the PCR court found these statements concerning the other robberies constituted hearsay and they were not established by clear and convincing evidence and therefore were not admissible under any of the exceptions in *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). The State asserts three bases for admitting the statements: (1) they are not hearsay, (2) they fall into a *Lyle* exception, and (3) they form part of the *res gestae*. We agree the statements are not hearsay and do not address the State's other grounds for admittance.

[10, 11] Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted. *State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994) (internal citations omitted). An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken. *Id.* In *Brown*, the Court held police officers' testimony about complaints they had received in the neighborhood prior to setting up their surveillance was admissible for the nonhearsay purpose of explaining why officers began their surveillance of defendant's apartment. The officers' statements here were similar to those in *Brown* in that in both cases the officers were explaining their actions in pursuing the defendants and the statements were not offered for their truth.

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B. Rap Sheet Testimony

[12] During cross examination, defense counsel asked Detective Stanfield whether he ran a license check on Respondent. Counsel's intent was to elicit from the officer the fact that Respondent was driving under suspension, to explain why Respondent ran. The following dialogue ensued:

A: A license check? Yes, sir, I ran a rap sheet and—

Q: Did the Defendant have—the Defendant was driving under suspension, was he not?

A: I believe there was some type of violation, also.

Q: I—

The Court: Wait just a minute. Wait a minute. Come forward, please.

During the subsequent bench conference, the court admonished Detective Stanfield and stated, "No harm has been done in my opinion, but you came dangerously close to jeopardizing this trial...."

Evidence of other crimes or bad acts is inadmissible to show propensity to commit a crime. Rule 404(b), SCRE. The PCR court ruled counsel was ineffective in failing to act to protect his client's interests when Detective Stanfield referred to Respondent's "rap sheet" and "some type of violation." The State has not appealed that ruling. It is therefore the law of the case and this Court will not consider it. *ML–Lee Acquisition Fund v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997).

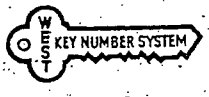
CONCLUSION

We reverse the PCR court's ruling that defense counsel was deficient in waiving Respondent's right to cross examine witnesses and in not moving for a mistrial or objecting when witnesses for the State referred to other armed robberies that took place that day. Because the State has not appealed the PCR court's ruling that counsel was deficient in failing to protect his client's interests when a witness referred to Respondent's "rap sheet," that ruling is the law of the case, and Respondent is entitled to a new trial.

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AFFIRMED IN PART; REVERSED IN PART.

FINNEY, C.J., TOAL, MOORE, and WALLER, JJ., concur.



3. The references to other crimes not taking place that same day are addressed in part II.B.

APPENDIX V

sal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

As an equity action, a retaliatory discharge claim is tried without a jury. *Wallace v. Milliken & Co.*, 305 S.C. 118, 406 S.E.2d 358 (1991). Under Rule 41 in a nonjury trial, the trial judge clearly may dismiss the action even though the plaintiff may have established a *prima facie* case. Rule 41(b) allows the judge as the trier of facts to weigh the evidence, determine the facts and render a judgment against the plaintiff at the close of his case if justified. H. Lightsey & J. Flanagan, *South Carolina Civil Procedure* at 368 (1985).

[3] Additionally, we find dismissal proper under the facts of this case. Johnson admits the reasons given by his employer were bona fide. We find the stated reasons to be permissible. The record is devoid of any evidence of a retaliatory motive other than the proximity between the injury and the termination. In light of the conceded legitimate, nonretaliatory motives for the termination, this proximity in time does not meet the employee's burden of proof. S.C.Code Ann. § 41-1-80 (Supp. 1991).

[4] The employer additionally argues Johnson's claim should have been dismissed since he filed the Workers' Compensation claim after his termination. Although not necessary to our decision in this case, we address the issue to clarify it for future claims. The retaliatory discharge statute provides, "no employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the South Carolina Workers' Compensation Law (Title 42 of the 1976 Code), or has testified or is about to testify in any such proceeding." We do not read this provision to require a formal filing of a Workers' Compensation Claim by the employee. The purpose of this statute cannot be avoided by firing an injured employee before he or she files a claim. *Wright v. Fiber Industries, Inc.*, 60 N.C.App. 486, 299 S.E.2d 284 (1983). Other jurisdictions have held other conduct sufficient to have instituted a proceeding including the employer's agreement to pay or payment of medical care or the employer's receipt of written notice from an independent health care provider in the form of a bill for medical services rendered to an injured employee. *Roseborough v. N.L. Industries*, 10 Ohio St.3d 142, 10 OBR 478, 462 N.E.2d 384 (1984); *Webb v. Dayton Tire & Rubber Co.*, 697 P.2d 519 (Okla.1985). We hold these types of conduct will suffice to constitute instituting a proceeding under our statute as well.

AFFIRMED.

HARWELL, C.J., FINNEY and MOORE, JJ., and ALEXANDER M. SANDERS, Jr., Acting J., concur.



308 S.C. 119

John WHITEHEAD, Petitioner.

v.

STATE of South Carolina, Respondent.

No. 23607.

Supreme Court of South Carolina.

Submitted June 12, 1991.

Decided March 30, 1992.

Defendant convicted of possession of marijuana with intent to distribute filed application for postconviction relief. The Circuit Court, Lexington County, Walter J. Bristow, Jr, Special Circuit Judge, denied relief. Certiorari was granted. The Supreme Court, Finney, J., held that trial counsel was not ineffective.

Affirmed.

1. Criminal Law ⇐641.13(6)

Counsel was not ineffective for failing to cross-examine State's witness, who was originally charged with same offense as defendant, concerning promises made in exchange for witness' testimony; counsel articulated valid reasons for his trial strategy. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐641.13(6)

Counsel was not ineffective for "failing to make motion in limine to determine whether solicitation to commit murder was crime of moral turpitude"; postconviction relief court determined that since solicitation to commit murder is crime of moral turpitude, motion in limine would have been futile. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐641.13(6)

In prosecution for possession of marijuana with intent to distribute, counsel was not ineffective for "failing to object to testimony which inferred that defendant had committed driving offenses"; trial counsel articulated valid reasons for his trial strategy. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐1158(1)

Supreme Court is constrained to uphold ruling of postconviction relief judge if there is any evidence in record to support postconviction relief court's determination.

Asst. Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, Columbia, for petitioner.

Atty. Gen. T. Travis Medlock, Chief Deputy Atty. Gen. Donald J. Zelenka and Asst. Atty. Gen. Delbert H. Singleton, Jr., Columbia, for respondent.

FINNEY, Justice:

This Court granted certiorari to review the circuit court's denial of post-conviction relief (PCR) to Petitioner John Whitehead. We have reviewed the trial record pursuant to *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986); and *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). After fully considering the entire record, briefs of the parties and the applicable law, we affirm.

In *Davis*, the Court adopted procedural guidelines for PCR cases where the knowing and intelligent waiver of the right to a direct appeal is at issue. Notwithstanding its holding that appellate courts are without jurisdiction over an appeal where notice of a direct appeal has not been given and timely served, the Court in *White* provided for full review of the trial record on this issue in connection with review for a PCR appeal.

Our review of the record in the case before us reflects that a confidential informant provided information upon which a search warrant was obtained for the mobile home where petitioner resided. He was home alone and asleep on a couch when the police arrived to execute the search warrant. The search produced a quantity of marijuana, plastic bags with marijuana residue, small cards, and a black notebook containing drug sale records. The officers discovered during the search that the mobile home was registered in the name of petitioner's co-occupant, Clarence Bowen. The petitioner and Bowen were arrested and charged with possession with intent to distribute marijuana. Subsequently, the charges against Bowen were dismissed, and he testified for the state at petitioner's trial.

Petitioner was tried December 5–6, 1988, before a judge and jury and convicted of possession of marijuana with intent to distribute. The judge revoked one year of petitioner's prior probation for another offense and imposed a consecutive sentence of imprisonment for five years and a fine of $5,000 for the marijuana conviction. There was no direct appeal.

[1–3] On April 3, 1989, petitioner filed an application for PCR which set forth several allegations of error by his attorney prior to and during the course of his trial and alleged that petitioner was denied his right to appeal. Thereafter, petitioner's application was amended to include the additional grounds that his trial counsel:

1. Failed to cross-examine Clarence Bowen concerning promises in exchange for his testimony;

2. Failed to make a *motion in limine* to determine whether solicitation to commit murder is a crime of moral turpitude;
3. Failed to object to testimony which inferred that petitioner had committed driving offenses; and
4. Failed to advise petitioner of his right to appeal his conviction.

122 An evidentiary hearing was held January 9, 1990, and the PCR court issued its order dated March 5, 1990, dismissing petitioner's application. The PCR judge found that trial counsel was not ineffective and that petitioner had failed to establish any constitutional violations or deprivations before or during his trial proceedings.

In order to prevail on the basis of ineffective assistance of trial counsel, the petitioner must show, first, that counsel's performance was deficient; and second, that such deficient performance prejudiced the outcome of his trial. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988).

The record reflects that petitioner's trial counsel articulated valid reasons for his trial strategy. Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. *Goodson v. United States*, 564 F.2d 1071 (4th Cir.1977). Moreover, the PCR Court determined that since solicitation to commit murder is a crime of moral turpitude, a *motion in limine* would have been futile.

After hearing the testimony adduced at the evidentiary hearing, the PCR judge made a specific finding that the representation provided by petitioner's trial counsel, both prior to and during trial, was well within the standards of competence demanded in criminal matters and within the wide range of reasonable professional assistance. *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir.1977).

[4] This Court is constrained to uphold the ruling of the PCR judge if there is any evidence in the record to support the PCR court's determination. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Among petitioner's allegations of ineffective assistance of counsel or deprivation of his constitutional rights, we find that the only issue of arguable merit is whether or not the petitioner was advised of his right to appeal from the judgment and sentence of the trial court. Having considered the record on this issue in compliance with *Davis v. State*, *supra*, and *White v. State*, *supra*, we affirm the denial of PCR.

Accordingly, this Court concludes 1) that the representation provided to petitioner by trial counsel was within the standard of 123 competence demanded of attorneys in criminal matters, *Marzullo v. Maryland*, *supra*; and 2) that the petitioner was not prejudiced thereby. *Strickland v. Washington*, *supra*. The judgment of the PCR court is affirmed.

AFFIRMED.

GREGORY, C.J., and HARWELL, CHANDLER and TOAL, JJ., concur.



David Ray THOMAS, Petitioner,

v.

STATE of South Carolina, Respondent.

No. 23608.

Supreme Court of South Carolina.

Submitted Jan. 21, 1992.

Decided March 30, 1992.

Defendant found guilty of first-degree burglary and first-degree criminal sexual conduct sought postconviction relief. The Circuit Court, Spartanburg County, James B. Stephen, J., denied relief and defendant sought certiorari. The Supreme Court,

APPENDIX W

63 since post-trial relief should have been denied based on the record before him.

4. *Weight of the evidence.*

[7] Judge Mallard concluded Judge Rivers' finding of inappropriate sexual conduct was against the clear weight of the evidence. As discussed above, a successor judge may not substitute his judgment for that of the trial judge. Accordingly, Rule 63 gives a successor judge no discretion to reweigh the evidence where the trial judge has made findings of fact supported by evidence in the record. *See Lever v. United States*, 443 F.2d 350 (2d Cir.1971).

The order granting a new trial under Rule 63 is

REVERSED.

CHANDLER, C.J., and FINNEY, TOAL and WALLER, JJ., concur.



317 S.C. 292

Samuel Lee ROSEBORO, Petitioner,

v.

STATE of South Carolina, Respondent.

No. 24186.

Supreme Court of South Carolina.

Submitted Nov. 16, 1994.

Decided Jan. 23, 1995.

After being convicted of second-degree criminal sexual conduct, petitioner sought postconviction relief on ground of ineffective assistance of trial counsel. The Circuit Court, York County, John C. Hayes, III, J., denied petition, and petitioner appealed. The Supreme Court, Moore, J., held that trial counsel provided ineffective assistance by failing to request alibi charge.

Reversed.

1. Criminal Law ⇐641.13(2.1)

Trial counsel provided ineffective assistance by failing to request alibi charge in criminal sexual conduct prosecution, though trial counsel testified that he felt alibi testimony did not come off too well, and that he made tactical decision to focus jury's attention on state's failure to meet its burden of proof instead of on alibi testimony, where evidence against defendant was entirely circumstantial and solicitor disparaged accused's alibi during argument to jury; counsel's professed strategy was invalid under objective standard of reasonableness, and there was reasonable probability that result of trial would have been different had alibi charge been requested. U.S.C.A. Const. Amend. 6.

2. Criminal Law ⇐778(8)

Alibi charge places no burden on criminal defendant, but emphasizes that it is state's burden to prove defendant was present and participated in crime.

3. Criminal Law ⇐775(2)

Alibi charge is considered especially crucial when evidence is entirely circumstantial.

M. Anne Pearce, Asst. Appellate Defender, SC Office of Appellate Defense, Columbia, for petitioner.

T. Travis Medlock, Atty. Gen., James Patrick Hudson, Chief Deputy Atty. Gen., Delbert H. Singleton, Jr., Asst. Atty. Gen. and Carl W. Stent, Staff Atty., Columbia, for respondent.

MOORE, Justice:

Petitioner was convicted of second degree criminal sexual conduct. After his conviction was affirmed on direct appeal, petitioner brought this action seeking post-conviction relief (PCR) on the ground trial counsel was ineffective for failing to request an alibi charge. The PCR judge denied relief. We reverse.

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FACTS

At trial, the victim testified she was walking home from the Star Lite Lounge when she was struck on the head from behind. She lost consciousness. When she came to she was in a nearby churchyard and a man was straddling her. She struggled with him and he raped her. The offense occurred sometime between 11:50 p.m. on February 23, 1989, and 1:00 a.m. on February 24. The victim was unable to identify her assailant except to say he was black, wore a dark jacket and a toboggan cap, and had hair on his face.

Evidence linking petitioner to the crime was circumstantial. The victim testified petitioner, who is black, approached her while she was at the Star Lite Lounge on February 23 and attempted to talk with her. She rebuffed him. He had a light beard and was wearing a toboggan cap and a dark jacket. A state agency employee identified a scrap of paper with figures on it that was found in the churchyard where the rape occurred as one given to petitioner on February 21. Seriological testing indicated petitioner has type A blood and is a secreter which means his blood type is secreted in his bodily fluids. From semen present on the victim's clothing, the assailant was identified as a secreter having either type A or type B blood. This profile would fit 25% of the black male population including petitioner.

Petitioner denied he committed the assault, denied the scrap of paper found at the churchyard belonged to him, and denied he had been at the Star Lite Lounge at any time during the evening of February 23. He testified on February 23 he left his mother's house at 11:45 p.m. and walked to the home of a friend, Roy Miller, where he watched a basketball game until 1:00 a.m. and was then driven home. Petitioner's mother and Miller both lived in the general vicinity of the Star Lite Lounge. Miller took the stand and corroborated petitioner's testimony.

Counsel testified at the PCR hearing that he intentionally did not request an alibi charge because he felt the alibi testimony "did not come off too well in front of the jury." He made a tactical decision to focus the jury's attention on the State's failure to meet its burden of proof rather than place more emphasis on the alibi testimony by requesting an alibi charge. The PCR judge found counsel's trial strategy credible and denied petitioner relief.

ISSUE

Was counsel ineffective for failing to request an alibi charge?

DISCUSSION

[1–3] In *Ford v. State*, — S.C. —, 442 S.E.2d 604 (1994), this Court recently held trial counsel's failure to request an alibi charge is deficient representation where there is evidence presented the defendant was in another place at the time the crime was committed. Moreover, counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). We find counsel's professed strategy in this case invalid under an objective standard of reasonableness. An alibi charge places no burden on a criminal defendant but emphasizes that it is the State's burden to prove the defendant was present and participated in the crime. *See State v. Bealin*, 201 S.C. 490, 23 S.E.2d 746 (1943). An alibi charge is considered especially crucial when the evidence is entirely circumstantial as in this case. *Id.*

> Further, the Solicitor argued to the jury: I ask you to consider the facts in total. *Consider what the defense has put up. What did his so-called alibi witness testify to?* That he came to his house and he came to his home about the time that this incident occurred. He lives eight or nine blocks away and this defendant has testified he was in that area.

The Solicitor's disparagement of petitioner's alibi further renders counsel's strategy unreasonable since an alibi charge would have corrected any impression petitioner bore any burden of proof at trial. Accordingly, we find counsel ineffective for failing to request an alibi charge.

Further, we find there is a reasonable probability the result of the trial would have

been different in this case in light of the circumstantial nature of the State's case against petitioner and the Solicitor's closing argument. *Cf. Ford v. State*, *supra* (no prejudice from failure to request alibi charge where there is overwhelming evidence of guilt); *See also State v. Riddle*, 308 S.C. 361, 418 S.E.2d 308 (1992) (prejudice from Solicitor's closing argument where no alibi charge was requested).

REVERSED.

CHANDLER, C.J., and FINNEY, TOAL and WALLER, JJ., concur.



In the Matter of Jerry W. CRAIG, Respondent.

No. 24187.

Supreme Court of South Carolina.

Submitted Nov. 28, 1994.

Decided Jan. 23, 1995.

Disciplinary proceeding was brought against attorney. The Supreme Court held that negligence in management of trust account, failure to supervise employees, lack of diligence, failure to avoid appearance of impropriety, and failure to cooperate with Grievance Board investigation warrants 15–month suspension from practice of law.

Attorney suspended.

Attorney and Client ⇐58

Negligence in management of trust account, failure to supervise employees, lack of diligence, failure to avoid appearance of impropriety, and failure to cooperate with Grievance Board investigation warrants 15–month suspension from practice of law. Appellate Court Rule 407, Rules of Prof.Conduct, Rules 1.2–1.4, 1.15, 5.3, 8.1, 8.4.

Atty. Gen. T. Travis Medlock, Deputy Atty. Gen. William K. Moore, and Asst. Atty. Gen. James G. Bogle, Columbia, for complainant.

Justin O'Toole Lucey, Mount Pleasant, for respondent.

PER CURIAM:

In this attorney grievance matter, respondent admits he has committed ethical violations and consents to a definite suspension pursuant to Paragraph 28 of the Rule on Disciplinary Procedure, Rule 413, SCACR. We accept respondent's admission and suspend him from the practice of law for a period of fifteen (15) months, retroactive to December 20, 1993, the date respondent was temporarily suspended by this Court.

The Chepenick Matter

Respondent was retained by the Chepenicks to handle the refinancing of a mortgage on their home. The loan proceeds from the refinancing were deposited into respondent's trust account. Respondent subsequently issued a check on the trust account payable to Barclays American Mortgage in the amount of $116,018.82 to satisfy a prior mortgage. The check was twice returned by the bank for insufficient funds. Respondent's title insurance company, First American Title Company, paid off the mortgage and sought reimbursement from respondent. Respondent paid $24,000 to First American, and subsequently agreed to an out-of-pocket settlement with First American in satisfaction of a civil action it brought for the balance due.

Respondent admits his negligence in the management of the trust account and his failure to properly supervise his employees and to maintain proper accounting procedures.

The Turner Matter

Susan Goodman Turner hired respondent to represent her to collect a debt in the amount of $5,500.00. Ms. Turner paid respondent $1,500.00 in attorney's fees and $500.00 as costs. Respondent negotiated

APPENDIX X

APPENDIX TO OPINION OF THE COURT—Continued

this part upon the taxpayer declaring the dividends."

528 U.S. 470

Ernest C. ROE, Warden, Petitioner,

v.

Lucio FLORES-ORTEGA.

No. 98-1441.

Argued Nov. 1, 1999.

Decided Feb. 23, 2000.

Petitioner, who had pled guilty to second-degree murder, sought habeas corpus relief, alleging that his defense counsel had been ineffective in failing to file notice of appeal. The United States District Court for the Eastern District of California, Garland E. Burrell, J., denied petition, and petitioner appealed. The United States Court of Appeals for the Ninth Circuit, 160 F.3d 534, reversed, and certiorari was granted. Abrogating, *Stearns*, 68 F.3d 328; *Lozada*, 964 F.2d 956, and *Tajeddini*, 945 F.2d 458, the Supreme Court, Justice O'Connor, held that counsel's failure to file notice of appeal without defendant's consent is not per se deficient.

Vacated and remanded.

Justice Breyer filed concurring opinion.

Justice Souter concurred in part and dissented in part, and filed opinion in which Justices Stevens and Ginsburg joined.

Justice Ginsburg filed separate opinion concurring in part and dissenting in part.

1. **Criminal Law** ⇐641.13(1)

Defendant claiming ineffective assistance of counsel must show (1) that counsel's representation fell below objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced defendant. U.S.C.A. Const.Amend. 6.

2. **Criminal Law** ⇐641.13(7)

Counsel's failure to file notice of appeal without defendant's consent is not per se deficient; abrogating, *United States v. Stearns*, 68 F.3d 328; *Lozada v. Deeds*, 964 F.2d 956, *United States v. Tajeddini*, 945 F.2d 458. U.S.C.A. Const.Amend. 6.

3. **Criminal Law** ⇐641.13(1)

Courts must judge reasonableness of counsel's conduct on facts of particular case, viewed as of time of counsel's conduct. U.S.C.A. Const.Amend. 6.

4. **Criminal Law** ⇐641.13(1)

Judicial scrutiny of counsel's performance must be highly deferential. U.S.C.A. Const.Amend. 6.

5. **Criminal Law** ⇐641.13(7)

Where defendant neither instructs counsel to file appeal nor asks that appeal not be taken, question whether counsel has performed deficiently by not filing notice of appeal is best answered by first asking whether counsel in fact consulted with defendant about appeal; if counsel consulted with defendant, counsel performed in professionally unreasonable manner only by failing to follow defendant's express instructions with respect to appeal, but if counsel did not consult with defendant, court must determine whether counsel's failure to consult with defendant itself was deficient performance. U.S.C.A. Const. Amend. 6.

6. **Criminal Law** ⇐641.13(7)

Better practice is for counsel routinely to consult with defendant regarding possibility of appeal. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐641.13(1)

Prevailing norms of practice as reflected in American Bar Association standards and the like are only guides, and imposing specific guidelines on counsel is not appropriate. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐641.13(7)

Counsel has constitutionally-imposed duty to consult with defendant about appeal when there is reason to think either (1) that rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐641.13(7)

In determining whether counsel has constitutionally-imposed duty to consult with defendant about appeal, highly relevant factor is whether conviction follows trial or guilty plea; guilty plea reduces scope of potentially appealable issues and such a plea may indicate that defendant seeks end to judicial proceedings. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐641.13(7)

Even when defendant pleads guilty, in determining whether counsel had constitutionally-imposed duty to consult with defendant about appeal, court must consider such factors as whether defendant received sentence bargained for as part of plea and whether plea expressly reserved or waived some or all appeal rights. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐641.13(1)

Magnitude of deprivation of right to effective assistance of counsel determines whether defendant must show actual prejudice or whether prejudice will be presumed. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⇐641.13(1)

Normally, there is strong presumption of reliability of judicial proceedings which defendant asserting ineffective assistance must overcome by showing how specific errors of counsel undermined reliability of finding of guilt. U.S.C.A. Const.Amend. 6

13. Criminal Law ⇐641.13(1)

In cases involving mere "attorney error," defendant must demonstrate that error actually had adverse effect on defense. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⇐641.12(1)

Denial of assistance of counsel altogether, either actually or constructively, is presumably prejudicial. U.S.C.A. Const. Amend. 6.

15. Criminal Law ⇐641.13(7)

Counsel's alleged failure to file notice of appeal, depriving defendant of appellate proceeding altogether, was presumably prejudicial. U.S.C.A. Const.Amend. 6.

16. Criminal Law ⇐641.13(7)

To show prejudice from counsel's deficient failure to consult with him about appeal, defendant must demonstrate that there is reasonable probability that, but for counsel's deficient performance, he would have timely appealed. U.S.C.A. Const.Amend. 6.

17. Criminal Law ⇐641.13(7)

When counsel's constitutionally deficient performance deprives defendant of appeal that he otherwise would have taken, defendant has made out successful ineffective assistance of counsel claim entitling him to an appeal. U.S.C.A. Const.Amend. 6.

Syllabus *

Respondent pleaded guilty to second-degree murder. At his sentencing, the trial judge advised him that he had 60

* 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.

days to file an appeal. His counsel, Ms. Kops, wrote "bring appeal papers" in her file, but no notice of appeal was filed within that time. Respondent's subsequent attempt to file such notice was rejected as untimely, and his efforts to secure state habeas relief were unsuccessful. He then filed a federal habeas petition, alleging constitutionally ineffective assistance of counsel based on Ms. Kops' failure to file the notice after promising to do so. The District Court denied relief. The Ninth Circuit reversed, however, finding that respondent was entitled to relief because, under its precedent, a habeas petitioner need only show that his counsel's failure to file a notice of appeal was without the petitioner's consent.

Held:

1. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, provides the proper framework for evaluating a claim that counsel was constitutionally ineffective for failing to file a notice of appeal. Under *Strickland*, a defendant must show (1) that counsel's representation "fell below an objective standard of reasonableness," *id.*, at 688, 104 S.Ct. 2052, and (2) that counsel's deficient performance prejudiced the defendant, *id.*, at 694, 104 S.Ct. 2052. Pp. 1034–1040.

(a) Courts must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct," 466 U.S., at 690, 104 S.Ct. 2052, and "[j]udicial scrutiny of counsel's performance must be highly deferential," *id.*, at 689, 104 S.Ct. 2052. A lawyer who disregards a defendant's specific instructions to file a notice of appeal acts in a professionally unreasonable manner, see *Rodriquez v. United States*, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340, while a defendant who explicitly tells his attorney not to file an appeal plainly cannot later complain that, by following those instructions, his counsel performed deficiently, see *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987. The Ninth Circuit adopted a bright-line rule for cases where the defendant has not clearly conveyed his wishes one way or the other; in its view, failing to file a notice of appeal without the defendant's consent is *per se* deficient. The Court rejects that *per se* rule as inconsistent with *Strickland*'s circumstance-specific reasonableness requirement. The question whether counsel has performed deficiently in such cases is best answered by first asking whether counsel in fact consulted with the defendant about an appeal. By "consult," the Court means advising the defendant about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the defendant's wishes. Counsel who consults with the defendant performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions about an appeal. If counsel has not consulted, the court must ask whether that failure itself constitutes deficient performance. The better practice is for counsel routinely to consult with the defendant about an appeal. Counsel has a constitutionally imposed duty to consult, however, only when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. In making this determination, courts must take into account all the information counsel knew or should have known. One highly relevant factor will be whether the conviction follows a trial or a guilty plea, because a plea both reduces the scope of potentially appealable issues and may indicate that the defendant seeks an end to judicial proceedings. Even then, a court must consider such factors as whether the defendant received the sentence bargained for and whether the plea expressly reserved or waived some or all appeal rights. Pp. 1034–1036.

(b) The second part of the *Strickland* test requires the defendant to show prejudice from counsel's deficient performance. Where an ineffective assistance of counsel claim involves counsel's performance dur-

ing the course of a legal proceeding, the Court normally applies a strong presumption of reliability to the proceeding, requiring a defendant to overcome that presumption by demonstrating that attorney errors actually had an adverse effect on the defense. The complete denial of counsel during a critical stage of a judicial proceeding, however, mandates a presumption of prejudice because "the adversary process itself" has been rendered "presumptively unreliable." *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657. The even more serious denial of the entire judicial proceeding also demands a presumption of prejudice because no presumption of reliability can be accorded to judicial proceedings that never took place. Respondent claims that his counsel's deficient performance led to the forfeiture of his appeal. If that is so, prejudice must be presumed. Because the defendant in such cases must show that counsel's deficient performance actually deprived him of an appeal, however, he must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed. This standard follows the pattern established in *Strickland* and *Cronic*, and mirrors the prejudice inquiry applied in *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203, and *Rodriquez v. United States*, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340. The question whether a defendant has made the requisite showing will turn on the facts of the particular case. Nonetheless, evidence that there were nonfrivolous grounds for appeal or that the defendant promptly expressed a desire to appeal will often be highly relevant in making this determination. The performance and prejudice inquiries may overlap because both may be satisfied if the defendant shows nonfrivolous grounds for appeal. However, they are not in all cases coextensive. Evidence that a defendant sufficiently demonstrated to counsel his interest in an appeal may prove deficient performance, but it alone is insufficient to establish that he would have filed the appeal had he received counsel's advice. And, although showing nonfrivolous grounds for appeal may give weight to the defendant's contention that he would have appealed, a defendant's inability to demonstrate the merit of his hypothetical appeal will not foreclose the possibility that he can meet the prejudice requirement where there are other substantial reasons to believe that he would have appealed. Pp. 1037–1040.

2. The court below undertook neither part of the *Strickland* inquiry and the record does not provide the Court with sufficient information to determine whether Ms. Kops rendered constitutionally inadequate assistance. The case is accordingly remanded for a determination whether Ms. Kops had a duty to consult with respondent (either because there were potential grounds for appeal or because respondent expressed interest in appealing), whether she satisfied her obligations, and, if she did not, whether respondent was prejudiced thereby. P. 1040.

160 F.3d 534, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, THOMAS, and BREYER, JJ., joined, and in which STEVENS, SOUTER, and GINSBURG, JJ., joined as to Part II–B. BREYER, J., filed a concurring opinion. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which STEVENS and GINSBURG, JJ., joined. GINSBURG, J., filed an opinion concurring in part and dissenting in part.

For U.S. Supreme Court briefs, see:

1999 WL 451708 (Pet.Brief)

1999 WL 606999 (Resp.Brief)

1999 WL 717828 (Reply.Brief)

Justice O'CONNOR delivered the opinion of the Court.

In this case we must decide the proper framework for evaluating an ineffective as-

sistance of counsel claim, based on counsel's failure to file a notice of appeal without respondent's consent.

I

The State of California charged respondent, Lucio Flores–Ortega, with one count of murder, two counts of assault, and a personal use of a deadly weapon enhancement allegation. In October 1993, respondent appeared in Superior Court with his court-appointed public defender, Nancy Kops, and a Spanish language interpreter, and pleaded guilty to second-degree murder. The plea was entered pursuant to a California rule permitting a defendant both to deny committing a crime and to admit that there is sufficient evidence to convict him. See *People v. West*, 3 Cal.3d 595, 91 Cal.Rptr. 385, 477 P.2d 409 (1970). In exchange for the guilty plea, the state prosecutor moved to strike the allegation of personal use of a deadly weapon and to dismiss both assault charges. On November 10, 1993, respondent was sentenced to 15 years to life in state prison. After pronouncing sentence, the trial judge informed respondent, "You may file an appeal within 60 days from today's date with this Court. If you do not have money for Counsel, Counsel will be appointed for you to represent you on your appeal." App. 40.

Although Ms. Kops wrote "bring appeal papers" in her file, no notice of appeal was filed within the 60 days allowed by state law. See Cal.Penal Code § 1239(a) (West Supp.2000); Cal. Appellate Rule 31(d). (A notice of appeal is generally a one-sentence document stating that the defendant wishes to appeal from the judgment. See Cal. Appellate Rule 31(b); Judicial Council of California, Approved Form CR–120 (Notice of Appeal—Felony) (Jan. 5, 2000), http://www.courtinfo.ca.gov/cgi-bin/forms/.cgi.) Filing such a notice is a purely ministerial task that imposes no great burden on counsel. During the first 90 days after sentencing, respondent was apparently in lockup, undergoing evaluation, and unable to communicate with counsel. About four months after sentencing, on March 24, 1994, respondent tried to file a notice of appeal, which the Superior Court Clerk rejected as untimely. Respondent sought habeas relief from California's appellate courts, challenging the validity of both his plea and conviction, and (before the California Supreme Court) alleging that Ms. Kops had not filed a notice of appeal as she had promised. These efforts were uniformly unsuccessful.

Respondent then filed a federal habeas petition pursuant to 28 U.S.C. § 2254, alleging constitutionally ineffective assistance of counsel based on Ms. Kops' failure to file a notice of appeal on his behalf after promising to do so. The United States District Court for the Eastern District of California referred the matter to a Magistrate Judge, who in turn ordered an evidentiary hearing on the limited issue of whether Ms. Kops promised to file a notice of appeal on respondent's behalf. At the conclusion of the hearing, the Magistrate Judge found:

> "The evidence in this case is, I think, quite clear that there was no consent to a failure to file [a notice of appeal].
>
> ....
>
> "It's clear to me that Mr. Ortega had little or no understanding of what the process was, what the appeal process was, or what appeal meant at that stage of the game.
>
> "I think there was a conversation [between Ortega and Kops] in the jail. Mr. Ortega testified, and I'm sure he's testifying as to the best of his belief, that there was a conversation after the pronouncement of judgment at the sentencing hearing where it's his understanding that Ms. Kops was going to file a notice of appeal.
>
> "She has no specific recollection of that. However, she is obviously an extremely experienced defense counsel. She's obviously a very meticulous person. And I think had Mr. Ortega re-

quested that she file a notice of appeal, she would have done so.

"But, I cannot find that he has carried his burden of showing by a preponderance of the evidence that she made that promise." App. 132–133.

The Magistrate Judge acknowledged that under precedent from the Court of Appeals for the Ninth Circuit, *United States v. Stearns*, 68 F.3d 328 (C.A.9 1995), a defendant need only show that he did not consent to counsel's failure to file a notice of appeal to be entitled to relief. The judge concluded, however, that *Stearns* announced a new rule that could not be applied retroactively on collateral review to respondent's case. See *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Thus, the Magistrate Judge recommended that the habeas petition be denied. App. 161. The District Court adopted the Magistrate's findings and recommendation, and denied relief. *Id.*, at 162–163, 109 S.Ct. 1060.

The Court of Appeals for the Ninth Circuit reversed, reasoning that the rule it applied in *Stearns*—that a habeas petitioner need only show that his counsel's failure to file a notice of appeal was without the petitioner's consent—tracked its earlier opinion in *Lozada v. Deeds*, 964 F.2d 956 (C.A.9 1992), which predated respondent's conviction. 160 F.3d 534 (1998). Because respondent did not consent to the failure to file a notice of appeal—and thus qualified for relief under *Stearns*—the court remanded the case to the District Court with instructions to issue a conditional habeas writ unless the state court allowed respondent a new appeal. We granted certiorari, 526 U.S. 1097, 119 S.Ct. 1574, 143 L.Ed.2d 669 (1999), to resolve a conflict in the lower courts regarding counsel's obligations to file a notice of appeal. Compare *United States v. Tajeddini*, 945 F.2d 458, 468 (C.A.1 1991) (*per curiam*) (counsel's failure to file a notice of appeal, allegedly without the defendant's knowledge or consent, constitutes deficient performance); *Morales v. United States*, 143 F.3d 94, 97 (C.A.2 1998) (counsel has no duty to file a notice of appeal unless requested by the defendant); *Ludwig v. United States*, 162 F.3d 456, 459 (C.A.6 1998) (Constitution implicated only when defendant actually requests an appeal and counsel disregards the request); *Castellanos v. United States*, 26 F.3d 717, 719–720 (C.A.7 1994) (same); *Romero v. Tansy*, 46 F.3d 1024, 1030–1031 (C.A.10 1995) (defendant does not need to express to counsel his intent to appeal for counsel to be constitutionally obligated to perfect defendant's appeal; unless defendant waived right, counsel was deficient for failing to advise defendant about appeal right); *United States v. Stearns*, *supra*, (counsel's failure to file a notice of appeal is deficient unless the defendant consents to the abandonment of his appeal).

II

[1, 2] In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we held that criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance, *id.*, at 687, 104 S.Ct. 2052, and announced a now-familiar test: A defendant claiming ineffective assistance of counsel must show (1) that counsel's representation "fell below an objective standard of reasonableness," *id.*, at 688, 104 S.Ct. 2052, and (2) that counsel's deficient performance prejudiced the defendant, *id.*, at 694, 104 S.Ct. 2052. Today we hold that this test applies to claims, like respondent's, that counsel was constitutionally ineffective for failing to file a notice of appeal.

A

[3, 4] As we have previously noted, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel." *Id.*, at 688–689, 104 S.Ct. 2052. Rather, courts must "judge the reasonableness of counsel's conduct on the facts of the particular case,

viewed as of the time of counsel's conduct," *id.*, at 690, 104 S.Ct. 2052, and "[j]udicial scrutiny of counsel's performance must be highly deferential," *id.*, at 689, 104 S.Ct. 2052.

We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. See *Rodriquez v. United States*, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969); cf. *Peguero v. United States*, 526 U.S. 23, 28, 119 S.Ct. 961, 143 L.Ed.2d 18 (1999) ("[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit"). This is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes. At the other end of the spectrum, a defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently. See *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (accused has ultimate authority to make fundamental decision whether to take an appeal). The question presented in this case lies between those poles: Is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?

The Courts of Appeals for the First and Ninth Circuits have answered that question with a bright-line rule: Counsel must file a notice of appeal unless the defendant specifically instructs otherwise; failing to do so is *per se* deficient. See, *e.g.*, *Stearns*, 68 F.3d, at 330; *Lozada*, *supra*, at 958; *Tajeddini*, *supra*, at 468. Such a rule effectively imposes an obligation on counsel in all cases either (1) to file a notice of appeal, or (2) to discuss the possibility of an appeal with the defendant, ascertain his wishes, and act accordingly. We reject this *per se* rule as inconsistent with *Strickland's* holding that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." 466 U.S., at 688, 104 S.Ct. 2052. The Court of Appeals failed to engage in the circumstance-specific reasonableness inquiry required by *Strickland*, and that alone mandates vacatur and remand.

[5] In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, we believe the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal. We employ the term "consult" to convey a specific meaning—advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes. If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal. See *supra*, at 1034–1035. If counsel has not consulted with the defendant, the court must in turn ask a second, and subsidiary, question: whether counsel's failure to consult with the defendant itself constitutes deficient performance. That question lies at the heart of this case: Under what circumstances does counsel have an obligation to consult with the defendant about an appeal?

[6, 7] Because the decision to appeal rests with the defendant, we agree with Justice SOUTER that the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal. See ABA Standards for Criminal Justice, Defense Function § 4–8.2(a) (3d.

spect the reasonable strategic choices made by lawyers, and that failing to consult about an appeal cannot be a strategic choice. *Post*, at 1042. But we have consistently declined to impose mechanical rules on counsel—even when those rules might lead to better representation—not simply out of deference to counsel's strategic choices, but because "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation.... [but rather] simply to ensure that criminal defendants receive a fair trial." 466 U.S., at 689, 104 S.Ct. 2052. The relevant question is not whether counsel's choices were strategic, but whether they were reasonable. See *id*, at 688, 104 S.Ct. 2052 (defendant must show that counsel's representation fell below an objective standard of reasonableness). We expect that courts evaluating the reasonableness of counsel's performance using the inquiry we have described will find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal. We differ from Justice SOUTER only in that we refuse to make this determination as a *per se* (or "almost" *per se*) matter.

B

The second part of the *Strickland* test requires the defendant to show prejudice from counsel's deficient performance.

1

[11] In most cases, a defendant's claim of ineffective assistance of counsel involves counsel's performance during the course of a legal proceeding, either at trial or on appeal. See, *e.g.*, *id.*, at 699, 104 S.Ct. 2052 (claim that counsel made poor strategic choices regarding what to argue at a sentencing hearing); *United States v. Cronic*, 466 U.S. 648, 649–650, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (claim that young lawyer was incompetent to defend complex criminal case); *Penson v. Ohio*, 488 U.S. 75, 88–89, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988) (claim that counsel in effect did not represent defendant on appeal); *Smith v. Robbins*, 528 U.S. ——, 120 S.Ct. 746, —— L.Ed.2d —— (2000) (claim that counsel neglected to file a merits brief on appeal); *Smith v. Murray*, 477 U.S. 527, 535–536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (claim that counsel failed to make a particular argument on appeal). In such circumstances, whether we require the defendant to show actual prejudice—"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, *supra*, at 694, 104 S.Ct. 2052—or whether we instead presume prejudice turns on the magnitude of the deprivation of the right to effective assistance of counsel. That is because "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial," *Cronic*, *supra*, at 658, 104 S.Ct. 2039, or a fair appeal, see *Penson*, *supra*, at 88–89, 109 S.Ct. 346. "Absent some effect of challenged conduct on the reliability of the ... process, the [effective counsel] guarantee is generally not implicated." *Cronic*, *supra*, at 658, 104 S.Ct. 2039.

[12, 13] We "normally apply a 'strong presumption of reliability' to judicial proceedings and require a defendant to overcome that presumption," *Robbins*, *supra*, at ——, 120 S.Ct., at 765 (citing *Strickland*, *supra*, at 696, 104 S.Ct. 2052), by "show[ing] how specific errors of counsel undermined the reliability of the finding of guilt." *Cronic*, *supra*, at 659, n. 26, 104 S.Ct. 2039. Thus, in cases involving mere "attorney error," we require the defendant to demonstrate that the errors "actually had an adverse effect on the defense." *Strickland*, *supra*, at 693, 104 S.Ct. 2052. See, *e.g.*, *Robbins*, *supra*, at ——, 120 S.Ct., at 765 (applying actual prejudice requirement where counsel followed all required procedures and was alleged to have missed a particular nonfrivolous argument); *Strickland*, *supra*, at 699–700, 104

violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent. See *Strickland*, 466 U.S., at 493–496; *Cronic*, 466 U.S., at 658–659, 104 S.Ct. 2039; *Robbins*, 528 U.S., at ——, 120 S.Ct., at 764–765. Today, drawing on that line of cases and following the suggestion of the Solicitor General, we hold that when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal.

We believe this prejudice standard breaks no new ground, for it mirrors the prejudice inquiry applied in *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), and *Rodriquez v. United States*, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969). In *Hill*, we considered an ineffective assistance of counsel claim based on counsel's allegedly deficient advice regarding the consequences of entering a guilty plea. Like the decision whether to appeal, the decision whether to plead guilty (*i.e.*, waive trial) rested with the defendant and, like this case, counsel's advice in *Hill* might have caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled. We held that "to satisfy the 'prejudice' requirement [of *Strickland*], the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, *supra*, at 59, 106 S.Ct. 366. Similarly, in *Rodriquez*, counsel failed to file a notice of appeal, despite being instructed by the defendant to do so. See *Rodriquez*, 395 U.S., at 328, 89 S.Ct. 1715. We held that the defendant, by instructing counsel to perfect an appeal, objectively indicated his intent to appeal and was entitled to a new appeal without any further showing. Because "[t]hose whose right to an appeal has been frustrated should be treated exactly like any other appellan[t]," we rejected any requirement that the would-be appellant "specify the points he would raise were his right to appeal reinstated." *Id.*, at 330, 89 S.Ct. 1715. See also *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (defendant entitled to new appeal when counsel's deficient failure to comply with mechanistic local court rules led to dismissal of first appeal).

As with all applications of the *Strickland* test, the question whether a given defendant has made the requisite showing will turn on the facts of a particular case. See 466 U.S., at 695–696, 104 S.Ct. 2052. Nonetheless, evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination. We recognize that the prejudice inquiry we have described is not wholly dissimilar from the inquiry used to determine whether counsel performed deficiently in the first place; specifically, both may be satisfied if the defendant shows nonfrivolous grounds for appeal. See *Hill*, *supra*, at 59, 106 S.Ct. 366 (when, in connection with a guilty plea, counsel gives deficient advice regarding a potentially valid affirmative defense, the prejudice inquiry depends largely on whether that affirmative defense might have succeeded, leading a rational defendant to insist on going to trial). But, while the performance and prejudice prongs may overlap, they are not in all cases coextensive. To prove deficient performance, a defendant can rely on evidence that he sufficiently demonstrated to counsel his interest in an appeal. But such evidence alone is insufficient to establish that, had the defendant received reasonable advice from counsel about the appeal, he would have instructed his counsel to file an appeal.

By the same token, although showing nonfrivolous grounds for appeal may give weight to the contention that the defendant would have appealed, a defendant's inability to "specify the points he would raise were his right to appeal reinstated," *Rodriquez*, 395 U.S., at 330, 89 S.Ct. 1715,

See also ABA Standards for Criminal Justice, Defense Function 4–8.2(a) (3d ed.1993) (stating that trial counsel "should explain to the defendant the meaning and consequences of the court's judgment and defendant's right of appeal" and "should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal"); *id.*, 4–8.2, Commentary ("[C]ounsel [has the duty] to discuss frankly and objectively with the defendant the matters to be considered in deciding whether to appeal.... To make the defendant's ultimate choice a meaningful one, counsel's evaluation of the case must be communicated in a comprehensible manner.... [T]rial counsel should always consult promptly with the defendant after making a careful appraisal of the prospects of an appeal"); ABA Standards for Criminal Justice 21–3.2(b)(i).

So also the ABA Model Code of Professional Responsibility, EC 2–31 (1991), provides: "Trial counsel for a convicted defendant should continue to represent his client by advising whether to take an appeal...." Likewise ABA Model Rule of Professional Conduct 1.3, Comment (1996): "[I]f a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter." Restatement (Third) of the Law Governing Lawyers § 31(3) (Proposed Final Draft No. 1, Mar. 29, 1996) embodies the same standards: "A lawyer must notify a client of decisions to be made by the client . . . and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Indeed, California has apparently eliminated any option on a lawyer's part to fail to give advice on the appeal decision (whether the failure be negligent or intentional). California Penal Code Ann. § 1240.1(a) (West Supp.2000) provides that trial counsel has a duty to "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal." California thus appears to have adopted as an unconditional affirmative obligation binding all criminal trial counsel the very standard of reasonable practice expressed through the Restatement and the ABA standards.

I understand that under *Strickland*, "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides," and that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." 466 U.S., at 688–689, 104 S.Ct. 2052. But that qualification has no application here.

While *Strickland's* disclaimer that no particular set of rules should be treated as dispositive respects the need to defer to reasonable "strategic choices" by lawyers, *id.*, at 690, 104 S.Ct. 2052, no such strategic concerns arise in this case. Strategic choices are made about the extent of investigation, the risks of a defense requiring defendant's testimony and exposure to cross-examination, the possibility that placing personal background information before a jury will backfire, and so on. It is not, however, an issue of "strategy" to decide whether or not to give a defendant any advice before he loses the chance to appeal a conviction or sentence. The concern about too much judicial second-guessing after the fact is simply not raised by a claim that a lawyer should have counseled her client to make an intelligent decision to invoke or forgo the right of appeal or the opportunity to seek an appeal.

The Court's position is even less explicable when one considers the condition of the particular defendant claiming *Strickland* relief here. Flores–Ortega spoke no English and had no sophistication in the ways

of the legal system. The Magistrate Judge found that "[i]t's clear ... that Mr. Ortega had little or no understanding of what the process was, what the appeal process was, or what appeal meant." App. 133. To condition the duty of a lawyer to such a client on whether, *inter alia*, "a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal)," *ante*, at 1036, is not only to substitute a harmless-error rule for a showing of reasonable professional conduct, but to employ a rule that simply ignores the reality that the constitutional norm must address.[2] Most criminal defendants, and certainly this one, will be utterly incapable of making rational judgments about appeal without guidance. They cannot possibly know what a rational decisionmaker must know unless they are given the benefit of a professional assessment of chances of success and risks of trying. And they will often (indeed, usually) be just as bad off if they seek relief on habeas after failing to take a direct appeal, having no right to counsel in state postconviction proceedings. See *Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); *Murray v. Giarratano*, 492 U.S. 1, 12, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989); cf. *Peguero v. United States*, 526 U.S., at 30, 119 S.Ct. 961 (O'CONNOR, J., concurring) ("To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding *pro se* in an initial 28 U.S.C. § 2255 motion").

In effect, today's decision erodes the principle that a decision about appeal is validly made only by a defendant with a fair sense of what he is doing. Now the decision may be made inadvertently by a lawyer who never utters the word "appeal" in his client's hearing, so long as that client cannot later demonstrate (probably without counsel) that he unwittingly had "nonfrivolous grounds" for seeking review. This state of the law amounts to just such a breakdown of the adversary system that *Strickland* warned against. "In every case the court should be concerned with 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." 466 U.S., at 696, 104 S.Ct. 2052; see also *Rodriquez v. United States*, 395 U.S., at 330, 89 S.Ct. 1715; *Penson v. Ohio*, 488 U.S., at 85, 109 S.Ct. 346.

I would hold that in the aftermath of the hearing at which Flores–Ortega was sentenced, his lawyer was obliged to consult with her client about the availability and prudence of an appeal, and that failure to do that violated *Strickland's* standard of objective reasonableness. I therefore respectfully dissent from Part II–A of the majority's opinion.

Justice GINSBURG, concurring in part and dissenting in part.

This case presents the question whether, after a defendant pleads guilty or is convicted, the Sixth Amendment permits defense counsel simply to walk away, leaving the defendant uncounseled about his appeal rights. The Court is not deeply divided on this question. Both the Court and Justice SOUTER effectively respond: hardly ever. Because the test articulated by Justice SOUTER provides clearer guidance to lower courts and to counsel, and because I think it plain that the duty to consult was not satisfied in this case, I join Justice SOUTER's opinion.



2. The Court holds that a duty to consult will also be present if "this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Ante*, at 1036.Because for most defendants, and certainly for unsophisticated ones like Flores–Ortega who are unaware even of what an appeal means, such a demonstration will be a practical impossibility, I view the Court as virtually requiring the defendant to show the existence of some nonfrivolous appellate issue.

APPENDIX Y

be an independent action for personal judgments against appellants based upon their agreements to assume the mortgage. As a result, the court interpreted Norman's pleading to indicate she was foreclosing her mortgage to preserve the subordination limitation in Standard Federal's foreclosure action.[3] The special referee also found that Norman sought to foreclose only appellants' note and not the associated mortgage. We disagree.

[2] The appraisal statute provides that "[i]n any real estate foreclosure proceeding a defendant against whom a personal judgment be taken or asked ... may within thirty days after the sale of the mortgaged property apply ... for an order of appraisal." Section 29–3–680. A person who is personally liable for the debt remaining after the sale of real property in a mortgage foreclosure action may petition the circuit court for an appraisal. *South Carolina National Bank v. Central Carolina Livestock Market, Inc.*, 289 S.C. 309, 345 S.E.2d 485 (1986).

Based on the literal language of the statute and Norman's Answer and Cross-claim, we conclude appellants were defendants in the foreclosure proceeding and entitled to application of the appraisal statute.[4] Clearly, Norman sought to foreclose the mortgage and note against appellants. Further, it is undisputed that appellants remained personally liable for the debt after the foreclosure sale.

[3] The trial judge incorrectly found that the appraisal statute does not apply because appellants are not mortgagors. In *Anderson Brothers Bank v. Adams*, 305 S.C. 25, 406 S.E.2d 173 (1991), guarantors for the deficiency remaining after sale of the mortgaged property sought application of the appraisal statute, § 29–3–680. We found that under "the plain and unambiguous terms of the statute, [guarantors] were entitled to its benefit." *Id.* Whether a party is a defendant in a real estate foreclosure proceeding is the determining factor when applying the appraisal statute. The trial judge incorrectly concluded that whether appellants were mortgagors was the crucial factor.

Accordingly, we reverse the trial judge's decision for the above reasons.

REVERSED.

MOORE, J., and C. TOLBERT GOOLSBY, BRUCE LITTLEJOHN and M.D. SHULER, Acting Associate Justices, concur.



323 S.C. 28

Delaney Thomas SIKES, Petitioner,

v.

STATE of South Carolina, Respondent.

No. 24140.

Supreme Court of South Carolina.

Submitted April 20, 1994.

Decided Sept. 6, 1994.

Rehearing Denied Oct. 5, 1994.

Defendant, who was convicted of possession with intent to distribute cocaine, applied

3. Norman subordinated her second mortgage only to the extent the loan with Standard Federal would not exceed the appraised value of the improvements constructed on the property. Standard Federal effectively held a third lien on the balance due above the value of the building and Norman's mortgage.

4. Norman pled the following in her Answer and Cross-claim:

> 19. That [appellants] have failed to make any payments of principal or interest on their said indebtedness to Defendant Norman and are in default ... Norman is entitled to the foreclosure of her said Mortgage....
>
> 21. (c) For a judgment of foreclosure for the amount so found to be due and owing to Defendant Norman....
>
> 21. (e) For a judgment against such Defendants as the Court finds indebted to Defendant Norman for the full amount found to be due Defendant Norman on her said Note *and* Mortgage indebtedness, with the right to enter personal judgment against said Defendants for any deficiency remaining after sale of the subject premises.

(Emphasis added).

for postconviction relief. The Circuit Court, Greenville County, Larry R. Patterson, J., dismissed application. Certiorari was granted. The Supreme Court, Toal, J., held that: (1) detention of defendant, who was passenger in vehicle stopped by police officers, violated Fourth Amendment, and (2) counsel was ineffective for failing to raise Fourth Amendment claim.

Reversed.

Moore, J., dissented and filed opinion.

1. **Criminal Law** ⇐641.13(1)

To establish claim of ineffective assistance of counsel, defendant must show that counsel's representation fell below objective standard of reasonableness and that defendant was prejudiced by such deficient performance. U.S.C.A. Const.Amend. 6.

2. **Criminal Law** ⇐641.13(5)

When defendant claims that counsel's failure to articulate Fourth Amendment claim on motion to suppress was ineffective assistance, defendant must show that such claim is meritorious and that verdict would have been different absent evidence that should have been excluded. U.S.C.A. Const. Amends. 4, 6.

3. **Automobiles** ⇐349(18)

When officer stops vehicle for traffic violation, he may briefly detain vehicle and its occupants while he examines vehicle registration and driver's license. U.S.C.A. Const.Amend. 4.

4. **Arrest** ⇐68(4)

Individual is "seized" when officer restrains his freedom, even if detention is brief and falls short of arrest. U.S.C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

5. **Arrest** ⇐63.5(9)

Scope and duration of seizure must be strictly tied to and justified by circumstances which rendered its initiation proper. U.S.C.A. Const.Amend. 4.

6. **Arrest** ⇐63.5(6)

Officer may stop automobile and briefly detain occupants if he has reasonable suspicion that occupants are involved in criminal activity. U.S.C.A. Const.Amend. 4.

7. **Automobiles** ⇐349(17)

Police officers did not have reasonable suspicion to detain defendant, who was passenger in vehicle which officers stopped, for 20 minutes while they conducted investigation; officers stopped vehicle in high crime area only because it had paper tags and vehicles with paper tags are often stolen or uninsured, and neither of those suspicions extended to passenger in vehicle. U.S.C.A. Const.Amend. 4.

8. **Criminal Law** ⇐641.13(5)

Defense counsel was ineffective for failing to argue that detention of defendant, who was passenger in vehicle which officers stopped, violated Fourth Amendment; Fourth Amendment claim was meritorious, counsel failed to raise issue based on his belief that officers' actions were justified, and, as cocaine discovered as result of unlawful detention was only evidence of defendant's possession of cocaine, counsel's failure to raise issue prejudiced defendant. U.S.C.A. Const.Amends. 4, 6.

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Lisa T. Gregory, Asst. Appellant Defender, Office of Appellate Defense, Columbia, for petitioner.

Atty. Gen. T. Travis Medlock, Chief Deputy Atty. Gen. James Patrick Hudson, Asst. Atty. Gen. Delbert H. Singleton, Jr., and Deputy Atty. Gen. J. Emory Smith, Jr., Columbia, for respondent.

TOAL, Justice:

We granted certiorari to review the dismissal of Delaney Thomas Sikes' (Sikes) application for post conviction relief (PCR). Sikes contends that the PCR judge erred in finding that he received effective assistance of counsel. We agree and reverse.

FACTS

Police arrested Sikes on an outstanding warrant during a routine traffic stop. When removing Sikes from the patrol car at the police station, an officer found a bag of crack cocaine in the back seat. Sikes was convicted of possession with intent to distribute and subsequently filed a PCR application alleging that his attorney was ineffective in failing to challenge the admissibility of the cocaine at trial on the ground that his seizure at the traffic stop was unlawful.

The record indicates that police, while in a high crime area, stopped the vehicle in which Sikes was a passenger because it had paper tags which, according to the officers indicated that the car may have been stolen or lacked insurance. After stopping the car, police requested identification from the driver and the passengers, Sikes, and his common-law wife, Jacqueline Hardin. Sometime after obtaining Sikes' identification, police searched him for weapons and placed him in the patrol car where he was detained for at least twenty minutes. At the PCR hearing, counsel testified that he did not challenge police detention of Sikes because "it didn't appear to [him] that they (the police) were doing anything out of the ordinary." The PCR judge dismissed the application after a hearing, finding that counsel was not ineffective because his decision not to challenge the seizure was a strategic choice designed to minimize the impact of testimony regarding the outstanding warrant for Sikes' forgery charges. We granted certiorari.

LAW/ANALYSIS

Sikes contends that the PCR judge erred in ruling that he received effective assistance of counsel when his counsel did not move to suppress evidence that was obtained in violation of the Fourth Amendment of the United States Constitution. We agree.

[1, 2] To establish a claim of ineffective assistance of counsel, petitioner must show counsel's representation fell below an objective standard of reasonableness and that defendant was prejudiced by such deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Gallman v. State*, 307 S.C. 273, 414 S.E.2d 780 (1992). When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

[3–6] When an officer stops a vehicle for a traffic violation, he may *briefly* detain the vehicle and its occupants while he examines the vehicle registration and the driver's license. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (emphasis added). Although Sikes does not challenge the officers' initial stop of the automobile, Sikes claims that the officers improperly seized him to run a warrant check with no reasonable cause. An individual is "seized" when an officer restrains his freedom, even if the detention is brief and falls short of arrest. The scope and duration of seizure must be strictly tied to and justified by the circumstances which rendered its initiation proper. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In South Carolina, we have gone a little further by holding that an officer may stop a car and briefly detain the occupants if he has a *reasonable suspicion* that the occupants are involved in *criminal activity*. *Knight v. State*, 284 S.C. 138, 325 S.E.2d 535 (1985) (emphasis added).

Petitioner was merely a passenger in a car with paper dealer tags that had the misfortune of being in a "high crime area." [1] The arresting officers readily admitted the only reason they stopped the car was because vehicles with paper tags are often stolen or lack insurance. While the car was stopped, the officers asked for the identification of both the driver and the Petitioner. They then removed the Petitioner from the car and placed him in the back of the patrol car for twenty minutes while they conducted their investigation. At the end of twenty minutes, after diligently searching for evidence of criminal activity, the officers discovered that:

1. The lesson here is that if you live in or near a "high crime area" do not purchase a new car.

the car was not stolen, the driver had insurance, and that there was an outstanding forgery warrant for Petitioner. The Petitioner was arrested and transported to jail. A search of the back seat of the patrol car revealed a bag containing several pieces of crack cocaine. The record contains evidence that Petitioner was searched twice prior to his placement into the police car.

[7] Here the officers' "reasonable suspicion" was that the car was either stolen or that the driver was uninsured. Under *Knight, supra*, neither of these reasons gave the officers the right to seize or question the car's passenger. Moreover, even assuming *arguendo* that this stop was reasonable, certainly a twenty minute detention while the officers "went fishing" for evidence of some crime was not brief within the definition announced in *Prouse, supra*, or in *Knight, supra*. *See also State v. Damm*, 246 Kan. 220, 787 P.2d 1185 (1990) (seizure of occupants of the vehicle while routine records checks were made of the occupants was unreasonable); *State v. Johnson*, 805 P.2d 761 (Utah 1991) (the leap from asking for the passenger's name and date of birth to running a warrants check on her severed the rational inference from specific and articulable facts and degenerated into an attempt to support an as yet unparticularized suspicion or hunch).

132 The detention and arrest of the Petitioner was unlawful; therefore, the evidence of the Petitioner's possession of crack cocaine would have been inadmissible as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981). Trial counsel testified at the post conviction relief hearing that he did not challenge the stop because "it didn't appear to me they were asking him to do anything out of the ordinary." The post conviction relief court found that trial counsel's decision was a matter of proper trial strategy; however, this can not be correct in the face of such a blatant violation of Petitioner's Fourth Amendment rights.

[8] Having found in this record that Sikes's Fourth Amendment claim is meritorious, we must determine if he has satisfied the performance and prejudice prongs of *Strickland*. At the PCR hearing, Sikes' trial counsel testified that he did not question Sikes' seizure because it didn't appear to him that "they [the officers] were asking him to do anything out of the ordinary." Because counsel's failure to motion to suppress evidence was based on the fact that he thought the officers' action were justified, we find counsel's decision fell below an objective standard of reasonableness. Additionally, because the unlawfully-obtained evidence was the only evidence of Sikes' possession of cocaine, we find that counsel's performance prejudiced Sikes such that it rendered the proceeding fundamentally unfair. *See Lockhard v. Fretwell*, — U.S. ——, ——, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993).

In our view, the PCR judge's finding that Sikes received effective assistance of counsel is not supported by the record. *See Gallman v. State*, 307 S.C. 273, 414 S.E.2d 780 (1992). "A PCR judge's findings will not be upheld if such findings are not supported by probative evidence." *Id.* at 277, 414 S.E.2d at 782. Based on our holding, we need not address Sikes' remaining exception. Accordingly, the PCR judge is REVERSED.

CHANDLER and FINNEY, JJ., concur.

MOORE, J., dissenting in separate opinion.

HARWELL, C.J., not participating. 133

MOORE, Justice, dissenting:

I respectfully dissent. At the PCR hearing, Sikes did not claim the initial stop of the car was unlawful. Further, Sikes did not raise the issue regarding the length of the subsequent warrants check. Therefore, these issues are not properly before the Court. *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983) (issues not raised or ruled upon below are not preserved for review).

Sikes claims the officers improperly seized him without probable cause only when they requested identification. The PCR judge ruled the officers' request for identification was not a fourth amendment seizure. I agree. A request for identification by police does not, by itself, constitute a fourth amend-

ment seizure. *I.N.S. v. Delgado*, 466 U.S. 210, 215, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984); *see State v. Foster*, 269 S.C. 373, 237 S.E.2d 589 (1977). The PCR judge's finding that Sikes received effective assistance of counsel is supported by the record. Therefore, I would affirm the PCR judge's order.



Mary DOE, a minor, by her Guardian ad litem John DOE, and John Doe, Individually, Respondent–Appellant,

v.

GREENVILLE HOSPITAL SYSTEM, Appellant–Respondent.

No. 2178.

Court of Appeals of South Carolina.

Heard March 10, 1994.

Decided April 25, 1994.

Rehearing Denied Oct. 6, 1994.

Minor plaintiff and her father sued hospital alleging negligent hiring and supervision of male employee who sexually assaulted minor, who was candy striper at hospital. The Circuit Court, Greenville County, Frank P. McGowan, Jr., J., reduced $545,000 jury verdict in favor of minor plaintiff to $250,000 pursuant to South Carolina Tort Claims Act and entered judgment on jury verdict in favor of hospital on derivative claim of father. Both parties appealed. The Court of Appeals, Shaw, J., held that: (1) testimony of clinical social worker was relevant to hospital's claim that minor plaintiff willingly participated in sexual activity; (2) instruction that unmarried female under age of 16 could not legally consent to sexual intercourse with adult was proper in civil assault and battery case; (3) minor plaintiff could recover damages for mental pain and suffering, even absent actual physical injury; and (4) hospital had prior notice of inappropriate sexual behavior on part of male employee so as to be liable for negligent hiring and supervision.

Affirmed.

1. Evidence ⇐536

Expert testimony of clinical social worker couched in terms of general patterns of conduct exhibited by adolescent sexual assault victims and that it was not uncommon for young adolescents to be sexually active and to engage in consensual sexual activity was properly admitted in trial of tort action against hospital for negligent supervision of employee who sexually assaulted candy striper under the age of 16, where record was clear that hospital made candy striper's alleged willingness to participate in sexual activity issue in case.

2. Evidence ⇐546

Qualification of expert witness and admissibility of expert's testimony are each matters largely within trial court's discretion.

3. Assault and Battery ⇐43(1)

Instruction that unmarried female under age of 16 cannot legally consent to sexual intercourse with adult was law of state whether it was applied in criminal or civil context and was proper in civil assault and battery case involving victim under the age of 16, particularly where issue before jury was whether hospital negligently hired or supervised employee who committed criminal act of sexual assault against victim. Code 1976, § 16–3–655(3).

4. Master and Servant ⇐332(4)

Instruction that evidence of intentional alteration of document by party could be used by jury for limited purpose of assessing credibility of evidence presented by party was proper in suit against hospital for negligent hiring or supervision of employee who committed sexual assault against volunteer candy striper, where there was testimony concerning addition of certain notes to male employee's personnel file after alleged sexual encounter with candy striper concerning prior incident involving male employee and candy striper and court clearly instructed jury

APPENDIX Z

compass repair or replacement of a prosthesis which is a replacement for a natural body part when the prosthesis is damaged or destroyed in a work related accident and accompanied by other physical injury.

Next, the carrier argues that under this court's interpretation of S.C.Code Ann. § 42–15–60 (1976 & 1980) in *Smith v. Eagle Construction Co.*, 282 S.C. 140, 318 S.E.2d 8 (1984) recovery is barred. S.C.Code § 42–15–60 reads in part:

> Medical, surgical, hospital and other treatment, including medical and surgical supplies as may reasonably be required, ... to effect a cure or give relief ... and, in addition thereto, *such original artificial members* as may be reasonably necessary at the end of the healing period shall be provided by the employer. [Emphasis added.]

In *Smith* this Court held that under S.C.Code Ann. § 42–15–60 (1976) an employer was not responsible for replacement prosthesis when the employer provided an original prosthesis for the natural body parts lost in the accident. *Id.* at 143, 318 S.E.2d at 9. S.C.Code Ann. § 42–15–60 was amended in 1980 to provide that the employer must supply lifetime replacement prostheses when the accident produced the need for the prosthesis. This Court in *Smith* applied the amendment retroactively. Thus, the worker in *Smith* was allowed to recover. The New York court addressed this precise issue under a similar statute in *LaRose v. Wurzburger Hof*, 28 A.D.2d 185, 283 N.Y.S.2d 902 (1967). The New York statute was also amended to provide for replacement prostheses when the accident caused the need for the prosthesis. The New York court held that the language in the statute requiring the employer to provide only the original prosthesis had no further meaning after the amendment. We find the logic in *LaRose* to be sound and we believe the term "original prosthesis" in S.C.Code Ann. § 42–15–60 (1976 & 1980) has no further meaning after the 1980 amendment to the statute.

We note that at least eleven states and the federal workers' compensation statutes have been amended since 1951 to provide for repair or replacement of prosthesis when the prosthesis is damaged or destroyed in a work-related accident. *See* 1B Arthur Larson, *The Law of Workmen's Compensation*, §§ 42.12–42.13 (1991). The rule we adopt today is much narrower than many of our sister states. However, we are constrained by our statute as it exists.

The carrier's remaining exceptions are without merit. We AFFIRM the circuit court.

HARWELL, C.J., FINNEY, MOORE, JJ., and Acting Associate Justice ALEXANDER M. SANDERS, Jr., concur.



307 S.C. 273

Glenn GALLMAN, Petitioner,

v.

STATE of South Carolina, Respondent.

No. 23582.

Supreme Court of South Carolina.

Submitted Dec. 6, 1991.

Decided Feb. 24, 1992.

Petitioner filed application for postconviction relief on ground of ineffective assistance of counsel. The Circuit Court, Aiken County, Hubert E. Long, J., denied petitioner's application, and petitioner appealed. The Supreme Court, Finney, J., granted certiorari and held that defense counsel's failure to object to comments made by trial judge to jury constituted ineffective assistance of counsel.

Reversed and remanded.

Gregory, C.J., dissented and filed an opinion.

1. Criminal Law ⇐641.13(1)

In order to establish claim of ineffective assistance of counsel, defendant must show that counsel's representation fell be-

low objective standard of reasonableness, and that, but for counsel's error, there is reasonable probability that result would have been different.

2. Criminal Law ⇐641.13(1)

For purposes of establishing ineffective assistance of counsel claim, "reasonable probability" that outcome of trial would have been different is probability sufficient to undermine confidence in outcome of trial.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇐855(1)

Jury should not begin discussing case or deciding issues until all evidence has been introduced, arguments of counsel have been completed, and applicable law has been charged.

4. Criminal Law ⇐852

Jurors should be admonished not to discuss case with anyone, including each other, prior to submission of case to them.

5. Criminal Law ⇐641.13(2)

Defense counsel was ineffective for failing to object to trial court's comment, prior to arguments of counsel and charge on law, that jurors were free to talk about case among themselves.

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Asst. Appellate Defender Daniel T. Stacey, of the South Carolina Office of Appellate Defense, Columbia, for petitioner.

Attorney Gen. T. Travis Medlock, Chief Deputy Atty. Gen. Donald J. Zelenka and Asst. Atty. Gen. Lisa G. Jefferson, Columbia, for respondent.

FINNEY, Justice:

This Court granted certiorari to review the denial of post-conviction relief (PCR) to Petitioner Glenn Gallman. After due consideration of the record, briefs of the parties and the applicable law, we reverse and remand.

275 Petitioner was tried January 18, 1990, in the Aiken County Court of General Sessions before a judge and jury for the offense of assault and battery of a high and aggravated nature. Petitioner was convicted and sentenced to imprisonment for ten years. No direct appeal was taken.

On July 3, 1990, petitioner filed an application for PCR on the ground of ineffective assistance of counsel asserting, *inter alia*, that his trial counsel failed to object to an allegedly prejudicial statement the trial court made to the jury. A PCR hearing was held on September 28, 1990, at which testimony was presented by the petitioner, petitioner's trial counsel, Public Defender Robert Bloedorn, and Wallace Gallman, petitioner's father. In its order dated October 23, 1990, the PCR court denied relief and dismissed petitioner's application based upon its finding that the petitioner had failed to meet his burden of proof. The PCR judge found that trial counsel's decision not to object to the trial court's alleged prejudicial remarks was sound trial strategy, and that the petitioner had not established any constitutional violations or deprivations before or during his trial. These proceedings followed.

The sole issue before this Court is whether petitioner is entitled to PCR on the basis of ineffective assistance of counsel. Petitioner contends his trial counsel was ineffective for failing to interpose an objection when the trial court made the following statement, prior to arguments of counsel or the charge on the law, in his instructions to the jury before they recessed for lunch.

> You're not in a posture yet to decide the case because you haven't heard the closing argument and you haven't heard the charge on the law. Please don't let anybody talk to you about it. *Obviously, you can talk about it among yourselves but you are not to render a decision* ... (Emphasis added.)

Petitioner argues that the trial judge's comments explicitly invited the jury to prematurely discuss the case among themselves, that trial counsel was ineffective for failing to object, and that petitioner was prejudiced thereby. We agree.

[1, 2] The two-prong test which a defendant must meet in order to establish a claim of ineffective assistance of counsel

are 1) that counsel's representation fell below an objective standard of reasonableness; and 2) that, but for counsel's error, there is a reasonable probability the result would have been different. *Martinez v. State*, 304 S.C. 39, 403 S.E.2d 113 (1991). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Martinez v. State, supra* [*quoting Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)]; and *Mitchell v. State*, 298 S.C. 186, 379 S.E.2d 123 (1989).

At the PCR hearing, petitioner's trial counsel testified that he did not recall the judge making the challenged statement. However, he conceded that the transcript was accurate as to the remarks and asserted that, in his opinion, the petitioner was not prejudiced by the statement. Trial counsel indicated that the lack of objection was part of his trial strategy because "objections would give the jury the idea that something was being hidden." [1]

[3, 4] This Court has held that jury instructions identical in substance to the instructions in the present case are inherently prejudicial in that they, in essence, invite the jurors to begin deliberations before the close of the case. A jury should not begin discussing the case, nor deciding the issues, until all the evidence has been introduced, the arguments of counsel complete, and the applicable law charged. *State v. Pierce*, 289 S.C. 430, 346 S.E.2d 707 (1986); *State v. Joyner*, 289 S.C. 436, 346 S.E.2d 711 (1986); *State v. Gill*, 273 S.C. 190, 255 S.E.2d 455 (1979). Jurors should be admonished not to discuss the case with anyone, including each other, prior to the submission of the case to them. *State v. Parker*, 255 S.C. 359, 179 S.E.2d 31 (1971). The purpose behind the requirement for juror silence on the case prior to submission to the jury was stated succinctly in *State v. McGuire*, 272 S.C. 547, 552, 253 S.E.2d 103, 105 (1979). The *McGuire* Court reasoned: "A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation."

The PCR court determined that trial counsel was weak and not forthright in his testimony of certain matters. However, the PCR judge affirmatively found that trial counsel employed sound strategy in "not objecting and calling undue attention to the matters" complained of by the petitioner.

[5] This Court finds that an error of law was involved and that petitioner's claim of ineffective assistance of trial counsel is established by the record. First, we hold that trial counsel's failure to discern the prejudicial effect of the judge's comments and interpose the appropriate objections downgrades his representation to a level below an objective standard of reasonableness. Second, we conclude that, but for trial counsel's error, there is a reasonable probability the trial result would have been different. *Martinez v. State, supra.*

In our view, the PCR court's finding that the petitioner failed to meet his burden of proof is refuted by the record, which reflects that trial counsel's error was sufficient to undermine confidence in the outcome of the case. "A PCR judge's findings will not be upheld if such findings are not supported by probative evidence." *Horton v. State*, — S.C. — at —, 411 S.E.2d 223 at 225 (1991) *High v. State*, 300 S.C. 88, 386 S.E.2d 463 (1989).

Accordingly, the judgment of the PCR court is reversed and this case is remanded for a new trial.

REVERSED AND REMANDED.

HARWELL, CHANDLER and TOAL, JJ., concur.

GREGORY, C.J., dissenting in separate opinion.

GREGORY, Chief Justice, dissenting:

I respectfully dissent. As the majority points out, petitioner has the burden of proving not only deficient representation

1. We note that this record is devoid of any indication that trial counsel, out of the hearing of the jury, interposed an objection or made any motion pertaining to the alleged prejudicial remarks by the trial judge. Rules 4, 20, SCR Crim P.

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 III

JOHN H. BLUME, ESQ.
SHERI LYNN JOHNSON, ESQ.
Cornell Law School
Myron Taylor Hall
Ithaca NY 14853-4901
(607) 255-9653

ATTORNEYS FOR APPLICANT

APPENDIX AA

making a false statement of a material fact in a matter within the jurisdiction of a department or agency of the United States. Disciplinary Counsel has filed a petition seeking to have respondent placed on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR, and seeking the appointment of an attorney pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent has filed a return in opposition to the petition.

IT IS ORDERED that the petition is granted and respondent is suspended from the practice of law in this state until further order of this Court.

IT IS FURTHER ORDERED that John C. Thomas, Esquire, is appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Thomas shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients, including, but not limited to, notifying respondent's clients of their right to engage other counsel. Mr. Thomas may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that John C. Thomas, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that John C. Thomas, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Thomas' office.

/s/ Ernest A. Finney, Jr., C.J.
FOR THE COURT



335 S.C. 586

Irving FOYE, Petitioner,

v.

STATE of South Carolina, Respondent.

No. 24974.

Supreme Court of South Carolina.

Submitted June 23, 1999.

Decided July 26, 1999.

Defendant convicted of trafficking in cocaine applied for post-conviction relief. The Circuit Court, Charleston County, Daniel E. Martin, Sr., J., denied application. Granting certiorari, the Supreme Court, Burnett, J., held that defendant failed to prove that he was prejudiced by deficient performance of counsel.

Affirmed.

1. **Criminal Law** ⇐641.13(7)

Defendant's counsel was ineffective in failing to preserve for review issue of whether trial judge should have questioned jurors about whether they saw defendant in chains when he was brought into courtroom. U.S.C.A. Const.Amend. 6.

2. **Criminal Law** ⇐998(16)

The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application.

3. **Criminal Law** ⇐641.13(1)

In ineffective assistance of counsel claim, there is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.

4. **Criminal Law** ⇐998(8)

As to allegations of ineffective assistance of counsel, an applicant seeking post-conviction relief on those grounds must show his

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Center for Capital Litigation
P.O. Box 11311

counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability the result at trial would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.

5. Criminal Law ⇐1159.4(1)

Where matters of credibility are involved, appellate court gives great deference to a judge's findings, because appellate court lacks the opportunity to directly observe the witnesses.

6. Criminal Law ⇐998(17)

Defendant seeking post-conviction relief on grounds of ineffective assistance of counsel failed to prove that he was prejudiced by counsel's failure to preserve for review issue of whether trial judge should have questioned jurors about whether they saw defendant in chains when he was brought into courtroom, absent showing that any of seated jurors saw defendant in chains. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐641.13(6)

Defendant's trial counsel was deficient in failing to reevaluate defendant's decision not to testify after defendant's father implicated him in crime. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐1158(1)

If there is any probative evidence to support the findings of the judge on application for post-conviction relief, those findings must be upheld.

9. Criminal Law ⇐998(17)

Defendant seeking post-conviction relief on grounds of ineffective assistance of counsel failed to prove that he was prejudiced by counsel's failure to reevaluate defendant's decision not to testify after defendant's father implicated him in crime, where defendant's prior convictions probably would have been admissible to impeach defendant's testimony and cast severe doubts on his credibility. U.S.C.A. Const.Amend. 6.

587

Assistant Appellate Defender M. Anne Pearce, of South Carolina Office of Appellate Defense, of Columbia, for petitioner. 1 588

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Teresa A. Knox, and Assistant Attorney General Matthew M. McGuire, all of Columbia, for respondent.

ON WRIT OF CERTIORARI

BURNETT, Justice:

Petitioner was convicted of trafficking in cocaine and was sentenced to imprisonment for thirty years and payment of a $200,000 fine. His conviction and sentence were affirmed on direct appeal by the Court of Appeals. *State v. Foye*, Op. No. 95–UP–323 (S.C.Ct.App. filed December 6, 1995). Petitioner's application for post-conviction relief (PCR) was denied and this Court granted certiorari. We affirm.

ISSUES

I. Was petitioner's counsel ineffective in failing to present evidence of prejudice when petitioner appeared in chains before members of the venire?

II. Was petitioner's counsel ineffective in failing to reevaluate petitioner's decision not to testify after his co-defendant implicated him in the crime?

DISCUSSION

I.

[1] Petitioner claims trial counsel was ineffective in failing to request on the record that the trial judge question the seated members of the jury about whether they saw petitioner in chains when he was brought into the courtroom. We disagree.

Prior to jury selection, members of the venire observed petitioner in chains. Defense counsel moved for a mistrial and a continuance to another term of court. The trial judge denied the motions, finding no evidence of prejudice. On direct appeal, the Court of Appeals affirmed, finding no evidence that the members of the venire who

saw petitioner in chains were selected to serve as jurors in that case. *Id.* The Court of Appeals refused to address petitioner's further argument that the trial judge should have questioned the jurors to see if any of them had seen him because the court found petitioner's counsel failed to request this relief at trial. *Id.*

The PCR judge found this claim was addressed by the Court of Appeals on direct appeal. Thus, the claim was barred from collateral attack. *Drayton v. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993). This ruling is incorrect. Finding the issue unpreserved because petitioner's counsel failed to request the trial judge question the jurors, the Court of Appeals refused to address this issue. Thus, the issue was properly before the PCR court to determine if petitioner's counsel rendered ineffective assistance of counsel by failing to request this relief.

[2–5] The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application. *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). There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). As to allegations of ineffective assistance of counsel, the applicant must show his counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability the result at trial would have been different. *Strickland v. Washington, supra*; *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. *Johnson v. State, supra.* Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses. *Drayton v. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993). This Court must affirm the findings of the PCR judge if they are supported by any evidence in the record. *Cherry v. State, supra.*

At trial, counsel stated petitioner claimed two members of the venire saw him in chains. However, there was no claim that members of the seated jury saw petitioner in chains. Petitioner testified at the PCR hearing that one of the seated jurors saw him in chains.

Petitioner's counsel testified at the PCR hearing that he asked the trial judge at a bench conference to question the jurors to determine whether any of the seated jurors had seen petitioner in chains. The trial judge denied the request. However, because this request was not on the record, the Court of Appeals refused to address this issue. Thus, counsel was deficient because he failed to adequately preserve this issue for review.

[6] However, petitioner failed to prove he was prejudiced by counsel's deficient performance. Although counsel testified he believed petitioner was prejudiced by this incident, the PCR judge did not find this statement credible or sufficient to establish prejudice. *Butler v. State, supra* (the burden of proof is on the applicant); *Drayton v. Evatt, supra* (matters of credibility are within the discretion of the PCR judge). Further, the trial judge did not find petitioner's testimony that one member of his jury saw him in chains credible. Petitioner did not offer the testimony or affidavits of any of the seated jurors that they saw petitioner in chains and petitioner was prejudiced thereby. Without this evidence, petitioner's claim is not supported by any probative evidence and is based on pure speculation. *See Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995) (mere speculation and conjecture on the part of respondent is insufficient). Accordingly, petitioner failed to meet his burden of proving counsel rendered ineffective assistance.[1]

1. Petitioner suggests this Court should presume prejudice in this matter because due to the passage of time it is impossible to conduct an adequate post-trial inquiry. *See State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999) (recognizing under certain circumstances it may be appropriate to order a new trial absent a showing of actual prejudice in a case of juror misconduct).

II.

[7] Petitioner claims counsel was ineffective for failing to reevaluate petitioner's decision not to testify after petitioner's co-defendant provided damaging testimony.

[8] For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show his counsel failed to render reasonably effective assistance under prevailing professional norms and he was prejudiced by his counsel's ineffective performance. *Strickland v. Washington, supra.* To prove prejudice, the applicant must show but for counsel's errors, there is a reasonable probability the result at trial would have been different. *Johnson v. State, supra.* A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* If there is any probative evidence to support the findings of the PCR judge, those findings must be upheld. *Cherry v. State, supra.*

Petitioner was tried with his father.[2] After petitioner's father informed counsel he would testify petitioner did not know cocaine was in the gym bag, counsel advised petitioner not to testify because of his prior convictions for possession of marijuana with intent to distribute and possession of cocaine.

At trial, petitioner's father testified petitioner helped him drive from New York to Charleston. Petitioner's father claimed he did not tell petitioner he was transporting cocaine before or during the drive. However, petitioner's father testified, as they were walking from the parking lot to the hotel, his son asked him what was in the gym bag. Petitioner's father stated he told petitioner the bag contained cocaine. Petitioner expressed dismay at this information and wanted to help his father because he was afraid his father would be hurt. During this time, petitioner and petitioner's father passed the bag back and forth several times. Petitioner's father testified he insisted his son should not get involved and he took the bag away from him prior to entering the hotel. Petitioner waited in the lobby while his father delivered the cocaine. Several police officers testified they observed petitioner carrying the gym bag containing the cocaine.

The State argues counsel was employing a valid trial strategy in not putting petitioner on the stand even after his father's damaging testimony. *See 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); *Stokes v. State,* 308 S.C. 546, 419 S.E.2d 778 (1992). However, based on counsel's testimony at the PCR hearing, counsel did not consider the possibility of petitioner testifying after his father's testimony; therefore, counsel failed to use his discretion in employing an appropriate trial strategy in light of the unexpected testimony. Further, counsel admitted it may have been proper to put petitioner on the stand after his father's damaging testimony. Accordingly, counsel was deficient in failing to reevaluate petitioner's decision not to testify after his father implicated him.

[9] Petitioner claims if he had testified the jury would have had a chance to hear him adamantly deny involvement in the drug transaction. According to petitioner, his denial, in addition to the slim evidence against him, would have convinced the jury he was not guilty.

We disagree. Petitioner's prior convictions probably would have been admissible to impeach his testimony and cast severe doubt on his credibility.[3] Accordingly, the PCR

We disagree. The jury was instructed to determine petitioner's guilt based only on the evidence presented in the trial. A jury is presumed to follow instructions. *State v. Ard,* 332 S.C. 370, 505 S.E.2d 328 (1998). Therefore, without some showing the jurors disregarded these instructions, this Court declines to presume prejudice.

2. Petitioner and his father were both indicted for trafficking in cocaine and for conspiracy to traffic in cocaine. While the jury found his father guilty on both counts, it found petitioner not guilty on the conspiracy charge.

3. Petitioner's trial occurred before the South Carolina Rules of Evidence were adopted. Under the law prior to the SCRE, evidence of a prior conviction was admissible for impeachment purposes if the prior crime involved "moral turpitude." *State v. Millings,* 247 S.C. 52, 145 S.E.2d 422 (1965). Possession of marijuana with intent to distribute and possession of cocaine were considered crimes involving moral turpi-

judge correctly found the jury would not have found petitioner credible and his testimony would not have changed the outcome of the trial. *See Drayton v. Evatt, supra* (matters of credibility are within the discretion of the PCR judge); *Cherry v. State, supra* (the PCR judge's findings should be upheld if supported by any probative evidence).

593 Further, counsel sufficiently rehabilitated petitioner's father's testimony during cross-examination and re-established petitioner's defense that he was unaware he was transporting drugs. Thus, petitioner failed to prove he was prejudiced by counsel's deficient performance.

592

AFFIRMED.

FINNEY, C.J., TOAL, MOORE, and WALLER, JJ., concur.



The STATE, Respondent,

v.

William P. ROBINSON, Appellant.

No. 2988.

Court of Appeals of South Carolina.

Heard Feb. 9, 1999.

Decided May 3, 1999.

Defendant was convicted in the Circuit Court, Richland County, James W. Johnson, Jr., J., of second-degree computer crime, and he appealed. The Court of Appeals, Connor, J., held that: (1) five-year delay between arrest and trial did not violate defendant's constitutional right to speedy trial; (2) insufficient affidavit in support of search warrant was properly supplemented by sworn oral testimony; (3) custodial statement taken after execution of valid search warrant but prior to procurement of arrest warrant was admissible; and (4) police had probable cause to arrest defendant prior to execution of search warrant.

Affirmed.

1. Criminal Law ⇐577.10(3)

The determination of whether an accused has been denied his or her constitutional right to a speedy trial depends on the circumstances of each case. U.S.C.A. Const. Amend. 6; Const. Art. 1, § 14.

2. Criminal Law ⇐577.10(1)

The factors considered by court when determining whether defendant has been denied the right to a speedy trial include: 1) the length of the delay; 2) the reason the state asserts to justify the delay; 3) when and how the defendant asserted his or her right to a speedy trial; and 4) the prejudice to the defendant. U.S.C.A. Const.Amend. 6; Const. Art. 1, § 14.

3. Criminal Law ⇐577.15(3)

Five-year delay between arrest and trial of defendant for computer crime was sufficient to trigger review of remaining factors to be considered in determining whether defendant was denied his right to speedy trial. U.S.C.A. Const.Amend. 6; Const. Art. 1, § 14.

4. Criminal Law ⇐577.10(10), 577.12(1), 577.16(4)

Five-year delay between defendant's arrest and trial for computer crimes did not violate defendant's constitutional right to speedy trial, where defendant offered no evidence that delay resulted from neglect and wilfulness of the state, trial began ten months after defendant first asserted his right to speedy trial, and defendant cited no specific witness or document that was un-

tude. *See State v. Lilly*, 278 S.C. 499, 299 S.E.2d 329 (1983); *State v. Major*, 301 S.C. 181, 391 S.E.2d 235 (1990). However, evidence of these convictions was not *per se* admissible. Instead, the trial judge had discretion to determine whether the prejudicial effect of admitting the prior conviction outweighs the probative worth of such evidence on the issue of credibility. *See Merritt v. Grant*, 285 S.C. 150, 328 S.E.2d 346 (Ct.App.1985); *see also State v. Harvey*, 275 S.C. 225, 268 S.E.2d 587 (1980).

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1999 SC H.B. 4094 (SN)
1999 South Carolina House Bill No. 4094, South Carolina 113th Session of the SC General Assembly (FULL TEXT - STATE NET)

SOUTH CAROLINA BILL TEXT

SC H 4094

VERSION: Introduced May 13, 1999
Neal

A BILL

TO AMEND SECTION 16-3-20, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO PUNISHMENT FOR MURDER, SO AS TO PROVIDE THAT A PERSON MAY NOT BE EXECUTED IF THE PERSON WAS UNDER EIGHTEEN YEARS OLD WHEN THE CRIME WAS COMMITTED AND TO DELETE THE MITIGATING CIRCUMSTANCE OF BEING UNDER THE AGE OF EIGHTEEN WHEN THE CRIME WAS COMMITTED.

TEXT:

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 16-3-20(A) of the 1976 Code, as last amended by Act 83 of 1995, is further amended to read:

"(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine

months after she is no longer pregnant. <<+ **Under no circumstances may a person be executed if the person was under eighteen years of age when the crime was committed.** +>> When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection."

SECTION 2. Section 16-3-20(C)(b)(9) of the 1976 Code, as last amended by Act 83 of 1995, is further amended to read:

"(9) <<- The defendant was below the age of eighteen at the time of the crime. ->> <<+ (Reserved) +>>

SECTION 3. This act takes effect upon approval by the Governor.

1999 SC H.B. 4094 (SN)

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1999 SC H.B. 4094 (SN)
1999 South Carolina House Bill No. 4094 113th Session of the SC General Assembly (SUMMARY - STATE NET)

SOUTH CAROLINA BILL TRACKING

AUTHOR: Neal
TOPIC: LAW AND JUSTICE
SUBTOPIC: CRIMINAL LAW
TITLE: Murder Punishment

SUMMARY: Relates to the punishment for murder; provides that a person may not be executed if the person was under 18 years old when the crime was committed; deletes the mitigating circumstances of being under the age of 18 when the crime was committed.

STATUS:

05/13/99	INTRODUCED.
05/13/99	To HOUSE Committee on JUDICIARY.
08/09/99	113th Session of the General Assembly Adjourned - 06/24/1999 - Carried Over to 113th Session of the General Assembly.

TOPIC LIST:
HEALTH AND SOCIAL SERVICES
CHILDREN'S SERVICES AND RIGHTS
Children's Services and Rights- Misc
LAW AND JUSTICE
CRIMINAL LAW
Homicide
Criminal Sentencing and Penalties
JUVENILE LAW
Juvenile Law - Misc

1999 SC H.B. 4094 (SN)

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APPENDIX CC

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2001 AR S.B. 78 (SN)
2001 Arkansas Senate Bill No. 78 83rd Regular Session (SUMMARY - STATE NET)

ARKANSAS BILL TRACKING

AUTHOR: Everett
TOPIC: LAW AND JUSTICE
SUBTOPIC: JUVENILE LAW
TITLE: Juvenile Capitol Offenders

SUMMARY: **Amends various sections of the criminal code to provide that defendants less than eighteen years of age at the time of committing a capital offense shall not be subject to the death penalty.**

STATUS:
01/08/2001 INTRODUCED.
01/08/2001 To SENATE Committee on JUDICIARY.
01/10/2001 From SENATE Committee on JUDICIARY: Do pass.

TOPIC LIST:
LAW AND JUSTICE
CRIMINAL LAW
Criminal Sentencing and Penalties
JUVENILE LAW
Juvenile Law- Misc
2001 AR S.B. 78 (SN)

END OF DOCUMENT

APPENDIX DD

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2001 KY H.B. 109 (SN)
2001 Kentucky House Bill No. 109 2001 Regular Session (SUMMARY - STATE NET)

KENTUCKY BILL TRACKING

AUTHOR: Marzian et al.
TOPIC: MENTAL HEALTH
SUBTOPIC: CHILDREN'S SERVICES AND RIGHTS
TITLE: Youthful Offenders

SUMMARY: Relates to youthful offenders; **prohibits capital punishment for juveniles under 18 years of age at the time of the offense;** permits capital offense sentence of life imprisonment without benefit of parole for 25 years for a juvenile 16 years of age or older at the time of the offense.

STATUS:
01/04/2001 INTRODUCED.
01/05/2001 To HOUSE Committee on JUDICIARY.

TOPIC LIST:
HEALTH AND SOCIAL SERVICES
CHILDREN'S SERVICES AND RIGHTS
Children's Services and Rights- Misc
LAW AND JUSTICE
CORRECTIONS
Probation and Parole
Youth Incarceration
CRIMINAL LAW
Criminal Procedure and Investigations
Criminal Sentencing and Penalties
JUVENILE LAW
Juvenile Status Offenders
Juvenile Law - Misc

2001 KY H.B. 109 (SN)

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2001 MS H.B. 172 (SN)
2001 Mississippi House Bill No. 172 2001 Regular Session of Mississippi Legislature (SUMMARY - STATE NET)

MISSISSIPPI BILL TRACKING

AUTHOR: Fleming
TOPIC: LAW AND JUSTICE
SUBTOPIC: CRIMINAL LAW
TITLE: Minor Death Penalty

SUMMARY: **Eliminates the death penalty for individuals who are under the age of 18 years or who have an IQ below 70.**

STATUS:
12/22/2000 PREFILED.
01/02/2001 INTRODUCED.
01/02/2001 To HOUSE Committee on JUDICIARY EN BANC.

TOPIC LIST:
HEALTH AND SOCIAL SERVICES
SOCIAL SERVICES- OTHER
Developmentally Disabled- Services and Rights
CHILDREN'S SERVICES AND RIGHTS
Children's Services and Rights- Misc
LAW AND JUSTICE
CRIMINAL LAW
Criminal Procedure and Investigations
Criminal Sentencing and Penalties

2001 MS H.B. 172 (SN)

END OF DOCUMENT

cific transfers which Backman testified were drug related, giving the specific circumstances surrounding each transfer. Thus, Backman's testimony is not inconsistent with the sale of personal property. Furthermore, the jury was entitled to rely on the testimony of Backman as to the nature of the specific wire transfers and the involvement of both Stroh and Vollmer in the drug distribution and money laundering conspiracies. Backman testified that the wire transfers were money coming back for the methamphetamine that had been sent to North Dakota (Tr. at 266.) Backman further testified that he, Stroh, and Vollmer "teamed up and started getting drugs together and trying to sell them together." (Tr. at 239.) This testimony was sufficient to convict Stroh and Vollmer on the distribution and money laundering conspiracy charges.

The jury was also entitled to rely on the testimony of the government witnesses who testified that they had purchased various drugs from Stroh and Vollmer. Thus, this evidence amply supports the individual distribution charges.

In sum, although the government's evidence was circumstantial, it was sufficient for a reasonable jury to convict Stroh and Vollmer. *See United States v. Wilcox*, 50 F.3d 600, 602–03 (8th Cir.1995) (verdict may be based on circumstantial evidence alone; standard of appellate review remains the same). The jury's verdict was largely supported by a credibility assessment of the testimony of Backman, and we are without power to review such an assessment. The jury was informed that Backman had an immunity deal with the government (*see* Trial Tr. at 270), and chose to credit his testimony nonetheless and convicted Stroh and Vollmer.

III.

For the foregoing reasons, the judgment of the district court is affirmed.



Randall STEINKUEHLER, Petitioner–Appellee,

v.

Herb MESCHNER, Respondent–Appellant.

Nos. 98–2451, 98–2526.

United States Court of Appeals, Eighth Circuit.

Submitted March 8, 1999.

Filed May 6, 1999.

Petitioner convicted of first-degree murder in state court sought federal habeas corpus relief. The United States District Court for the Northern District of Iowa, Donald E. O'Brien, J., granted petition in part. Parties cross-appealed. The Court of Appeals, Strom, Senior District Judge, sitting by designation, held that: (1) trial counsel's performance was deficient when counsel failed to cross-examine sheriff about pressuring jailer supervisor to "forget" petitioner's condition following shooting and sheriff's purported practice of "forgetting" facts favoring defendants; (2) deficient performance prejudiced petitioner; and (3) trial counsel's decision not to seek instruction regarding confessions was permissible tactical decision falling within range of reasonable professional assistance.

Affirmed in part, reversed in part, and remanded.

1. Criminal Law ⇐1139

When there is no factual dispute, Court of Appeals reviews the district court's determination de novo.

2. Habeas Corpus ⇐205

Substantive review standards of the Antiterrorism and Effective Death Penalty

Act (AEDPA) did not apply on appeal of decision on habeas petition filed before the effective date of the Act. 28 U.S.C.A. § 2254.

3. Criminal Law ⇐641.13(1)

The Sixth Amendment grants defendants the right to have effective assistance of counsel. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐641.13(1)

Counsel's performance is deficient, under Sixth Amendment, if it falls below an objective standard of reasonableness. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐641.13(1)

Court's review of a counsel's performance, for purposes of ineffective assistance of counsel claim, is highly deferential. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐641.13(1)

Prejudice is established, for purposes of ineffective assistance of counsel claim, if there is a reasonable probability that, but for counsel's errors, the result would have been different. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐641.13(1)

Both deficient performance and resulting prejudice must be established to satisfy the *Strickland* standard for ineffective assistance of counsel claims. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐641.13(6)

Trial counsel's performance was deficient, for Sixth Amendment purposes, when counsel failed to cross-examine sheriff about whether sheriff pressured jailer supervisor to "forget" defendant's condition following shooting and sheriff's purported practice of "forgetting" facts favoring defendants, even though sheriff's testimony that defendant did not appear intoxicated following shooting conflicted with that of jailer supervisor and conflicting testimony was crucial to intoxication defense to first-degree murder. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐641.13(6)

Defendant was prejudiced by trial counsel's deficient performance in failing to cross-examine sheriff as to evidence that sheriff pressured jailer supervisor to "forget" defendant's condition following shooting and sheriff's purported practice of "forgetting" facts favoring defendants, inasmuch as defendant faced first-degree murder conviction unless he could convince jury that he was intoxicated when he shot victim and destroying sheriff's credibility would have placed into question the veracity of only witness who testified that defendant was not intoxicated. U.S.C.A. Const. Amend. 6.

10. Criminal Law ⇐641.13(2.1)

Trial counsel was justified in believing that statement defendant made after shooting girlfriend's ex-husband, that he was "a jealous son of a bitch," was not confession, and therefore decision not to seek instruction regarding confessions was permissible tactical decision falling within range of reasonable professional assistance; instruction's inclusion would have indicated to jury that statement was in fact a confession and, in light of evidence of other run-ins between defendant and victim, permitted inference that defendant meditated about killing well before shooting, which would have been inimical to intoxication defense. U.S.C.A. Const. Amend. 6.

11. Criminal Law ⇐516

Under Iowa law, "confession" is an acknowledgment in express terms by a party in a criminal case of guilt of the crime charged.

See publication Words and Phrases for other judicial constructions and definitions.

12. Criminal Law ⇐406(1), 516

Under Iowa law, a "confession," unlike an admission, refers to acknowledgment of all the essential elements of the crime charged, whereas an "admission" relates

only to a particular fact or circumstance covered thereby.

See publication Words and Phrases for other judicial constructions and definitions.

13. **Habeas Corpus** ⇐795(1, 3)

Appropriate relief, following determination that petitioner received ineffective assistance of counsel with respect to his intoxication defense, was order granting State of Iowa option of retrying petitioner for first-degree murder or sentencing him for second-degree murder, given that voluntary intoxication would not have provided defense to lesser-included offense of second-degree murder.

14. **Criminal Law** ⇐53
Homicide ⇐28

Under Iowa law, voluntary intoxication is not a defense to a crime, but it may negate the specific intent required for first-degree murder.

15. **Homicide** ⇐28

Under Iowa law, voluntary intoxication does not affect the offense of second-degree murder, inasmuch as second-degree murder does not require the specific intent potentially negated by intoxication.

Bridget Chambers, Des Moines, Iowa, argued (Thomas J. Miller and Thomas D. McGraine, on the brief), for Appellant.

Thomas R. Eller, Denison, Iowa, argued, for Appellee.

Before: RICHARD S. ARNOLD and HANSEN, Circuit Judges, and STROM,* Senior District Judge.

STROM, Senior District Judge.

Randall Steinkuehler (petitioner), an Iowa inmate, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Iowa after being convicted of first degree murder in an Iowa state court. Petitioner asserted eleven separate claims for relief. The District Court granted petitioner relief on two ineffective assistance of counsel claims and denied the remaining claims. *Randall N. Steinkuehler v. Meschner*, No. C94–4027 DEO (N.D.Iowa May 5, 1998) (judgment). Herb Meschner, warden of the Iowa State Penitentiary, appeals that part of the judgment granting relief, claiming the trial court erred in finding that petitioner received ineffective assistance of counsel. Petitioner cross-appeals the denial of his other claims. For reasons stated below, we affirm in part, reverse in part, and remand for entry of judgment in accordance with this opinion.

I. BACKGROUND

The district court thoroughly set forth the factual and procedural background of this case in its decision below. *See Id.* (order). Briefly, the background necessary to begin our discussion is as follows. At approximately 9:30 P.M. on December 9, 1987, after a long day of consuming large amounts of alcohol, petitioner shot and killed his girlfriend's ex-husband, DeWayne Mohr, at a bar in Denison, Iowa. Less than one-half hour later, petitioner went to the Crawford County Law Enforcement Center and turned himself in. At trial, petitioner did not deny killing the victim. Rather, he alleged his level of intoxication negated the specific intent required for first-degree murder. Witnesses who either had observed the petitioner prior to or after the shooting testified regarding petitioner's level of intoxication. The jury found petitioner guilty of first-degree murder.

Petitioner unsuccessfully appealed his conviction, *State v. Steinkuehler*, No. 88–1093 (Iowa Ct.App. Nov.11, 1989), and was

* The HONORABLE LYLE E. STROM, Senior United States District Judge for the District of Nebraska, sitting by designation.

later denied state postconviction relief. *Steinkuehler v. State*, 507 N.W.2d 716 (Iowa Ct.App.1993).

II. DISCUSSION

A. Failure to Present Evidence

The District Court granted petitioner's first claim for habeas relief. In that claim, petitioner asserts his trial counsel provided ineffective assistance by failing to question the jailer supervisor regarding pressure placed on her by the county sheriff to alter her testimony, and by then failing to impeach the sheriff.

When petitioner went to the Law Enforcement Center after the shooting, he told Sharon Shields (Shields), the jailer supervisor, the police were looking for him. Shields contacted the police and, while awaiting their arrival, observed the petitioner. Prior to trial, petitioner's attorney deposed Shields. At the deposition, Shields testified petitioner appeared dazed and incoherent when he arrived at the Law Enforcement Center. She detected a strong alcohol odor and concluded he must have been intoxicated. Shields had booked petitioner into jail on three prior occasions, yet he did not recognize her. Ultimately, she concluded, based on her training and experience, petitioner was in fact drunk and testified that a statement petitioner made to a fellow employee would be thrown out of court.

Immediately after the deposition, Thomas Gustafson (Gustafson), the county attorney, informed Shields that Don Stehr (Stehr), the county sheriff and Shields' boss, would hear about her testimony. Later that day, Gustafson wrote Shields a letter regarding her testimony and sent a copy of the letter to Stehr. The next day, Stehr confronted Shields about the letter. Stehr told Shields he was not happy about her testimony and indicated she should have said she "forgot" when asked about seeing petitioner. Stehr told her, "he forgets in court all the time." Tr. of Hr'g on Postconviction Relief at 34; J.A. at 116. Shields immediately informed petitioner's trial counsel about Gustafson's letter and Stehr's remarks.

At trial, several witnesses testified regarding petitioner's condition on the night of the killing. The witnesses who observed petitioner prior to the killing, namely, his drinking associates, other bar patrons, and bar employees, all testified petitioner was drunk. Those who observed petitioner after the killing gave varying statements. The police officers that questioned petitioner at the Law Enforcement Center gave inconclusive statements, indicating they smelled alcohol on him, but did not find any chemical testing necessary. Shields indicated she thought he was drunk, while Stehr testified he determined petitioner had been drinking, but was not drunk. Notwithstanding, petitioner's trial counsel did not question either Shields or Stehr about the pressure placed on Stehr to "forget" and the sheriff's practice of forgetting unfavorable evidence. The District Court determined trial counsel's inaction constituted ineffective assistance of counsel.

[1–8] There being no factual disputes, we review the District Court's determination de novo. *United States v. Craycraft*, 167 F.3d 451, 454 (8th Cir.1999); *McGurk v. Stenberg*, 163 F.3d 470, 473 (8th Cir. 1998).[1] The Sixth Amendment grants criminal defendants the right to have effective assistance of counsel. The Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), set forth the now familiar standard for establishing ineffective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient.

1. The substantive review standards of the Antiterrorism and Effective Death Penalty Act of 1996 do not apply to this appeal because Steinkuehler filed his habeas petition before the effective date of the Act. *See Roe v. Delo*, 160 F.3d 416, 418 n. 1 (8th Cir.1998) (citing *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997)).

> This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed 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. Counsel's performance was deficient if it "fell below an objective standard of reasonableness." *Id.* at 688. Our review of a counsel's performance is "highly deferential." *Id.* at 689. Prejudice is established if there is "a reasonable probability that," but for counsel's errors, "the result would have been different." *Id.* at 694. Both deficient performance and resulting prejudice must be established to satisfy the *Strickland* standard. *Id.* at 697.

We agree with the District Court's reasoning and determination that trial counsel's performance was deficient. By not denying shooting Mohr, petitioner's primary defense was his intoxication. Trial counsel did elicit strong evidence from the individuals who observed petitioner prior to the shooting. However, the last point in time any of these lay witnesses observed petitioner was one and one-half hours before the shooting. The law enforcement personnel, on the other hand, saw petitioner beginning approximately one-half hour after the shooting. A jury could reasonably conclude petitioner sobered up during the one and one-half hours before the shooting. Thus, the testimony of law enforcement personnel was especially critical.

The only law enforcement officers to offer an actual opinion as to petitioner's intoxication level were Shields and Stehr, and their testimony was in direct conflict. Thus, the relative credibility of Stehr and Shields was pivotal to petitioner's defense. As the District Court noted, at this point, "[t]rial counsel had in his hands material for a devastating cross-examination of Sheriff Stehr on critical issues in the case, Steinkuehler's level of intoxication and the Sheriffs policy of forgetting things that would help a defendant." Order at 36–7. Stehr's "routine forgetfulness" clearly impacted his credibility. It evidenced a willingness by the only law enforcement officer who testified petitioner was not drunk to do whatever was necessary to get a conviction.

Appellant argues trial counsel's decision not to develop any testimony in this area was a strategic choice within the reasonable professional judgment allowed under *Strickland*. At petitioner's postconviction hearing, trial counsel could not recall why he did not pursue this area, and only speculated as to what he may have been thinking. While we are aware our review of counsel's performance is highly deferential, "[i]t borders on the inconceivable that a trial attorney would fail to inform a jury of Sheriff Stehr's dishonesty and win at all costs attitude." Order at 37.

[9] We also agree with the District Court's determination that trial counsel's deficient performance prejudiced petitioner. Petitioner faced a first-degree murder conviction unless he could convince the jury he was intoxicated. The testimony of Stehr and Shields on that issue was contradictory. Destroying Stehr's credibility would have placed into question the veracity of the only opinion that petitioner was not intoxicated. Appellant asserts attacking Stehr's testimony would not have affected the jury because other law enforcement officers' testimony was actually more persuasive than Stehr's. App.Br. at 14. However, the testimony appellant refers to consists of inconsistent statements of petitioner's intoxication level, mere observations of petitioner's condition, and a refusal to speculate as to whether petitioner was intoxicated. Thus, as the District Court correctly concluded, petitioner's conviction of first-degree murder primarily rested on Stehr's testimony that petitioner was not drunk. Presenting evidence of the county attorney's letter and the sheriff's ensuing remarks would have certainly provided the

jury with a basis for reasonable doubt. We therefore conclude a reasonable probability exists that the result of petitioner's first-degree murder conviction would have been different if trial counsel would have presented evidence of the county attorney's letter and the sheriff's subsequent statements.[2] Petitioner was denied his Sixth Amendment right to effective assistance of counsel.

B. Confessions Instruction

[10] The District Court also found trial counsel was ineffective for failing to request a jury instruction regarding confessions. At trial, a law enforcement officer testified petitioner, shortly after turning himself in, voluntarily stated, "I am a jealous son of a bitch." J.A. 37. The pattern Iowa Criminal Jury Instructions include a confessions instruction.[3] Trial counsel did not request the instruction be given. Petitioner argues the instruction was necessary to guide the jury as to the statement's proper weight and credibility given petitioner's level of intoxication. The District Court agreed, finding the statement was an indirect confession and the only direct evidence of petitioner's motive. We again review the District Court's decision de novo, applying the *Strickland* standard.

At the postconviction hearing, trial counsel testified he did not request the cautionary instruction because he did not believe petitioner's statement was a confession. Using the instruction would have drawn attention to the statement and characterized it as a confession. Finally, trial counsel believed there were enough other instructions on intoxication for the jury to consider in evaluating the statement.

[11, 12] Whether trial counsel was legally correct or not, we find he was justified in believing the statement was not a confession. Petitioner did not expressly admit anything other than being a jealous person and clearly did not admit to all of the elements of the crime of first-degree murder. Under Iowa law, "[a] confession is an acknowledgment in express terms by a party in a criminal case of guilt of the crime charged." *State v. Schomaker*, 303 N.W.2d 129, 130 (Iowa 1981). A confession, unlike an admission, refers to acknowledgment of all the essential elements of the crime charged. *State v. Capper*, 539 N.W.2d 361, 364 (Iowa 1995); *State v. Saltzman*, 241 Iowa 1373, 44 N.W.2d 24, 26 (Iowa.1950). "Whereas, an 'admission' relates only to a particular fact or circumstance covered thereby." *State v. Davis*, 212 Iowa 131, 235 N.W. 759, 761 (Iowa 1931). Including the instruction would have indicated to the jury that petitioner's statement was in fact a confession. Furthermore, there was other evidence at trial that petitioner and the victim had several previous run-ins, including a discussion about petitioner's girlfriend only hours before the shooting. Characterizing petitioner's jealousy statement as a confession would have allowed the jury to reasonably infer that petitioner may have been meditating about the killing well before the time of the shooting. Such inference would be inimical to petitioner's intoxication defense. In light of these factors, we believe trial counsel's decision was a permissible tactical decision falling "within

2. The District Court also determined petitioner was prejudiced because the jury was not allowed to consider the overall fairness and reliability of the entire prosecution as well as Gustafson's credibility and vindictiveness. Having already concluded prejudice exists, we need not address this issue any further.

3. The cautionary instruction states:

> The defendant cannot be convicted by a confession alone. There must be other evidence the defendant committed the crime.
>
> In determining the weight and believability of the confession, you should consider:
>
> 1. Defendant's mental capacity and intelligence.
> 2. Defendant's mental and emotional state at the time it was made.
> 3. Whether it was knowingly and intelligently made.
> 4. Whether the defendant understood it.
> 5. Any other evidence relating to the confession.
>
> I.C.J.I. 200.16.

the wide range of reasonable professional assistance." *See Strickland*, 466 U.S. at 689. There being no deficiency, we do not need to consider if defendant was prejudiced. *Id.*

C. Other Claims

Finally, petitioner appeals the District Court's denial of his nine additional claims for habeas relief. Having carefully reviewed the record and the parties' briefs, we affirm dismissal of petitioner's remaining claims for the reasons stated by the District Court. *See* 8th Cir.R. 47B.

D. Relief

[13–15] The District Court's order granting petitioner habeas relief provided the State of Iowa with the option of retrying petitioner for murder or releasing him. The habeas relief granted herein relates solely to petitioner's intoxication defense. Under Iowa law, voluntary intoxication is not a defense to a crime, but it may negate the specific intent required for first degree murder. *See State v. Caldwell*, 385 N.W.2d 553 (Iowa 1986). However, voluntary intoxication does not affect the lesser included offense of second-degree murder because second-degree murder does not require the specific intent potentially negated by intoxication. *See State v. Hall*, 214 N.W.2d 205 (Iowa 1974). Thus, we find the appropriate relief in this case is to remand the matter to the District Court for entry of an order granting the State of Iowa the option of retrying petitioner for first-degree murder or sentencing him for second-degree murder.

CONCLUSION

For the above reasons, we reverse the District Court with respect to petitioner's second claim and affirm with respect to all other claims. This matter is remanded for entry of judgment in accordance with this opinion.



Richard James KELLOGG, Plaintiff–Appellant,

v.

Erik SKON, Warden, Defendant–Appellee.

No. 98–1932.

United States Court of Appeals, Eighth Circuit.

Submitted Dec. 17, 1998.

Decided May 10, 1999.

Following his state-court conviction for criminal sexual conduct, petitioner sought federal habeas corpus relief. The United States District Court for the District of Minnesota, Paul A. Magnuson, Chief Judge, denied relief. Petitioner appealed. The Court of Appeals, John R. Gibson, Circuit Judge, held that: (1) prosecutor's improper closing statement regarding presumption of innocence did not render trial fundamentally unfair; (2) prosecutor's improper closing argument references to petitioner as "monster," "sexual deviant," and "liar" did not make entire trial fundamentally unfair; (3) counsel's failure to object to prosecutor's belittling of presumption of innocence and name-calling did not deny petitioner effective assistance of counsel; (4) defense counsel acted reasonably in failing to object to prosecutor's implication that physical evidence of semen existed; and (5) it was reasonable for defense counsel not to object to prosecutor's argument that evidence supported witnesses' credibility as improper vouching.

Affirmed.

1. Habeas Corpus ⇐818

On appeal from denial of federal habeas corpus relief, Court of Appeals would

APPENDIX EE

whether a defendant has been denied due process. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Those factors are the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530, 92 S.Ct. at 2192. *Barker v. Wingo* involved a defendant who was not brought to trial for more than five years after his arrest. We agree with the Fifth Circuit that the right to avoid unreasonable delay in the appellate process is similar to the right to a speedy trial. *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir.1980). Accordingly, the trier of fact must balance the four factors to determine whether plaintiff in the case at bar has been denied due process.

Regarding the fourth factor—prejudice to the defendant—the Court in *Barker v. Wingo* identified three interests of a defendant in a speedy trial. *Barker v. Wingo*, 407 U.S. at 532, 92 S.Ct. at 2193. The Fifth Circuit in *Rheuark* modified those interests to the appeals process. They are: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal or retrial, might be impaired." *Rheuark*, 628 F.2d at 303 n. 8.

Thus if plaintiff can establish a delay in his appeal process resulting from the reporter's failure to provide him with a transcript, the trial court must balance the four factors of *Barker v. Wingo*, including the three interests that fall under the fourth factor—prejudice to the defendant. The language of the Court in *Barker v. Wingo* regarding the speedy trial right is equally applicable here.

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

407 U.S. at 533, 92 S.Ct. at 2193.

Consequently, if plaintiff has been deprived due process by the delay and can prove damages as a result thereof, he is entitled to recover under 42 U.S.C. § 1983 absent absolute or qualified immunity or other appropriate defenses. *See Rheuark*, 628 F.2d at 304–05.

The case is reversed and remanded to the trial court for further proceedings in connection with plaintiff's claim for damages.



Dennis Wayne SMITH, Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary of Florida Department of Offender Rehabilitation, et al., Respondents-Appellees.

No. 83–3690.

United States Court of Appeals, Eleventh Circuit.

Aug. 23, 1984.

Rehearing and Rehearing En Banc Denied Oct. 31, 1984.

Habeas petitioner appealed from an order of the United States District Court for the Middle District of Florida, Wm. Terrell Hodges, Chief Judge, denying his petition for writ of habeas corpus. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) habeas petitioner was entitled to evidentiary hearing on claim of ineffective assistance of counsel for failure to use prior conflicting statements to impeach

prosecution witnesses; (2) posttrial recantations of accomplice did not warrant habeas relief; (3) claim that accomplice confessed and agreed to testify for state only because of fear of death penalty was barred by procedural default; (4) admission of testimony concerning facts of second murder for which petitioner was not on trial did not deprive petitioner of fundamental fairness so as to warrant habeas relief; (5) alleged error in admitting testimony of accomplice's wife did not render trial fundamentally unfair so as to warrant habeas relief; (6) fact that psychiatrist retained by petitioner did not read petitioner *Miranda* warnings before conducting examination did not render testimony based on petitioner's statements inadmissible; (7) alleged disparity in sentencing between petitioner and accomplice did not warrant habeas relief; and (8) appellate counsel rendered constitutionally effective assistance.

Affirmed in part, vacated in part, and remanded.

1. Habeas Corpus ⇐59

Habeas petitioner was entitled to evidentiary hearing on claim of ineffective assistance of counsel for failure to use conflicting statements to impeach prosecution witnesses.

2. Criminal Law ⇐641.13(1)

To demonstrate ineffective assistance of counsel, a defendant must show both that attorney failed to render reasonably effective assistance and that there is a reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different.

3. Habeas Corpus ⇐25.1(8)

Posttrial recantations of prosecution witness did not warrant habeas corpus relief since such evidence, absent showing that it bore directly on constitutionality of conviction, went to merits of conviction, not its legality.

4. Habeas Corpus ⇐25.1(8)

Habeas petitioner's failure to properly raise under Florida procedure issue that accomplice confessed and agreed to testify for state only because of accomplice's fear of death penalty, in absence of showing of cause for failure to preserve issue and resulting prejudice, barred issue from review in federal courts on petition for habeas corpus.

5. Habeas Corpus ⇐45.2(4)

In order for an evidentiary ruling to be cognizable in habeas corpus, it must deprive state court defendant of fundamental fairness.

6. Habeas Corpus ⇐45.2(4)

A denial of fundamental fairness to a state court defendant sufficient to render evidentiary ruling cognizable in habeas corpus occurs when evidence is material in sense of a crucial, critical, highly significant factor.

7. Habeas Corpus ⇐45.2(4)

Although admissibility of testimony concerning second murder for which habeas petitioner had not been on trial presented a close and difficult question under Florida law, admission of such testimony did not result in a denial of fundamental fairness sufficient to render Florida court's evidentiary ruling cognizable in habeas corpus.

8. Habeas Corpus ⇐45.2(4)

Omission of accomplice's wife from witness list and presence of accomplice's wife during portion of trial that preceded her testimony in violation of sequestration rule, if violations of Florida state law, did not render trial fundamentally unfair so as to warrant federal habeas relief.

9. Criminal Law ⇐412.1(2)

Testimony of psychiatrist retained by defendant through his trial counsel to conduct examination regarding possible claim of insanity was not rendered inadmissible because psychiatrist did not read defendant *Miranda* warnings before conducting psychiatric examination.

10. Habeas Corpus ⇐45.2(4)

Alleged disparity in sentencing of defendant, who received death penalty for his

part in murder, and accomplice, who received sentence of 25 years in prison in accordance with plea bargain, did not violate Federal Constitution so as to warrant habeas relief.

11. Criminal Law ⇐641.13(7)

Appellate counsel rendered constitutionally effective assistance to defendant who had been sentenced to death for his part in murder, despite contentions that counsel should have challenged on appeal admissibility of photographs of victim's body during penalty phase of trial, counsel should have argued that Florida procedure providing for bifurcated sentencing hearing was unconstitutional, counsel should have challenged at penalty phase admissibility of testimony of psychiatrist retained by defendant, appellate counsel wrongly failed to challenge trial court's finding of heinous, atrocious, or cruel aggravating circumstances, appellate counsel should have challenged jury instructions, and appellate counsel should have requested transcription of entire voir dire proceedings.

12. Habeas Corpus ⇐59

District court properly refused to grant evidentiary hearing on habeas petitioner's contention that death penalty in Florida had been discriminatorily applied on basis of race of victim in view of fact that such issue had been conclusively resolved adversely to petitioner.

13. Habeas Corpus ⇐59

District court properly refused to grant evidentiary hearing to habeas petitioner on challenged use of nonrecord material by Florida Supreme Court in reviewing his death penalty case in view of fact that such issue had been conclusively resolved adversely to petitioner.

14. Habeas Corpus ⇐30(1)

Habeas petitioner's claim that sentence of death was unconstitutional because of state trial judge's faulty instructions to jury concerning aggravating and mitigating circumstances and because trial judge misapplied law concerning use of circumstances by relying on unconstitutional circumstance was barred by procedural default.

Sondra Goldenfarb, Patrick D. Doherty, Clearwater, Fla., for petitioner-appellant.

Theda James Davis, Asst. Atty. Gen., Tampa, Fla., for respondents-appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY and HILL, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JAMES C. HILL, Circuit Judge:

Dennis Wayne Smith appeals to this court from the order of the district court denying his petition for a writ of habeas corpus. We affirm the district court's judgment in part; however, concluding that Smith should have received a hearing on some of his claims of constitutional error, we vacate in part and remand.

Smith was tried and convicted in a Florida court on one count of first degree murder in late March, 1976. After a sentencing hearing, the trial judge sentenced Smith to death. Smith appealed to the Florida Supreme Court, which affirmed his conviction in *Smith v. State*, 365 So.2d 704 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). In 1981, Smith filed a motion to vacate his conviction and sentence pursuant to Florida Rule of Criminal Procedure 3.850. The trial court denied this motion without a hearing, and Smith appealed. The Florida Supreme Court affirmed the trial court's order in part, but remanded for an evidentiary hearing concerning an alleged violation of the rule in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *See Smith v. State*, 400 So.2d 956 (Fla.1982). After holding a hearing, the trial court again denied Smith's motion, and the Florida Supreme Court affirmed in *Smith v. State*, 421 So.2d 146 (Fla.1982). On February 9, 1983, Smith filed his petition for a writ of habeas corpus in the district court pursuant to 28 U.S.C. § 2254.

The factual background of this case is relevant to several of the issues raised by Smith. The primary evidence at trial against Smith was the testimony of Wesley Johnson, which the Florida Supreme Court summarized as follows:

> After taking part in the murder of John Mitchell Arnsdorff, Wesley Johnson turned himself into the police. Eventually he was charged with two other murders, as well. In the meantime he implicated Smith in the Arnsdorff murder and, accordingly, Smith was indicated for first degree murder. Smith pleaded not guilty and the cause was set for trial. Before its start, Johnson pleaded nolo contendere to the three murders and was to be given concurrent life sentences in return for testimony against Smith, the sentences to be imposed after the testimony.

Johnson testified to the following: He, Smith and a man named Wagner met at a bar and decided to rob a homosexual in order to obtain money for beer. The three then went to another bar where they met Arnsdorff. On the pretext of giving a party, they invited him to a shack Johnson was staying in. Arnsdorff and Johnson drove in Arnsdorff's car, Smith and Wagner in Smith's car. Johnson and Arnsdorff reached the shack first. Smith and Wagner had taken a wrong turn and were late, but Johnson kept Arnsdorff from leaving by showing him some silver casting equipment. When the former two arrived the men drank beer for a short while and then Johnson grabbed Arnsdorff while Wagner threatened him with an ice pick. While Arnsdorff was restrained Smith took Arnsdorff's wallet, in which there was $6.00, from his car and one of the three removed his wrist watch. They then forced Arnsdorff into the trunk of his own car. Their intention was to abandon him in a remote spot. Wagner and Johnson, in Arnsdorff's car, were following Smith in his car when they ran into a bridge abutment, flattening a tire. (Throughout the night the three had been drinking heavily.) After an unsuccessful attempt to fix it, the two cars proceeded until the wheel with the flat tire came loose. One of the three opened the trunk and Smith hit Arnsdorff with a tire tool. Wagner then began to stab him with the ice pick. Believing Arnsdorff to be dead they shut the trunk with him in it and went to a gas station. Smith told Wagner to get some gas, which he did. They returned to Arnsdorff's car and at Smith's direction, Johnson doused it with gas and set it afire. (Expert opinion that Arnsdorff died from incineration or asphyxiation from smoke caused by the fire had been introduced into evidence earlier.)

At this point in Johnson's narration the court excused the jury to allow the defense to renew a pre-trial motion that testimony by Johnson as to a second murder by him and Smith be suppressed. The court denied the motion, as it had previously done, on the ground that the second murder, though separate from the first, was part, just as Arnsdorff's, of a single transaction, the robbery, and, therefore, relevant to the Arnsdorff murder.

Johnson then testified that after burning the car he, Smith and Wagner immediately went to a swimming hole. An argument over division of the $6.00 and watch ensued between Smith and Wagner. Smith yelled to Johnson to grab Wagner, and while Johnson held him Smith stabbed him with the ice pick. At Smith's direction Johnson pulled Wagner into the swimming hole and held him under water to ensure his death. They transported his body elsewhere and buried it.

Smith took the stand in his own defense. He admitted that he was in the company of Wagner and Johnson on the night of the murder, but claimed that the robbery was their idea. Although he accompanied them to the second bar and left it with them and the victim, he testified that they drove him straight from the bar to his apartment, because he was too intoxicated by beer and drugs to do

anything but sleep. That was the last, according to Smith, he saw of them that night. No evidence was introduced by the defense to corroborate the alibi.

365 So.2d at 705–06 (footnote omitted). We will develop other facts as they become relevant to our opinion.

I. NEED FOR AN EVIDENTIARY HEARING

[1] Smith contends that the district court erred in refusing to grant him an evidentiary hearing concerning three of his claims for relief—that his counsel rendered ineffective assistance, that the state Rule 3.850 hearing concerning the alleged *Brady* violation was not full and fair, and that his execution in light of recantations by Wesley Johnson would violate due process.[1] Although the legal analysis of Smith's right to a hearing differs greatly for each claim, we discuss them together because each claim has a common factual basis—the numerous statements of Wesley Johnson. We conclude that, under *Thomas v. Zant*, 697 F.2d 977 (11th Cir.1983), the district court should have granted Smith an evidentiary hearing on his claim of ineffective assistance of counsel. Given the interrelationship of this issue with the *Brady* issue, the hearing that must be held will necessarily concern both issues. The district court did not err in refusing a hearing concerning Johnson's recantations.

As the quoted excerpt from the opinion of the Florida Supreme Court indicates, Wesley Johnson was the primary witness against Smith. The record[2] shows that in early September, 1975, Johnson presented himself to the Polk County Sheriff's Department and confessed to three murders. He claimed to have killed Caleb McDowell, John Mitchell Arnsdorff (whom Smith is convicted of murdering), and James Wagner. The transcript of Johnson's statement and the report of the Polk County Sheriff's Office, dated September 6, 1975, indicate that Johnson told the following story concerning the second and third victims.

Johnson met Wagner in a bar in Lakeland, Florida. Johnson and Wagner went to another bar, the Green Parrot, where they met Arnsdorff. The three journeyed first to Johnson's apartment and then to Arnsdorff's, where Johnson and Wagner robbed Arnsdorff of eleven dollars, tied him hand and foot, and put him into the trunk of his car. Johnson and Wagner promised Arnsdorff that they would drive him into the woods and leave him so that, "if he [had] enough energy," he could kick out the back seat of the car.

Johnson and Wagner drove away, but, after leaving Lakeland, they wrecked and the car became stuck in a ditch. Johnson stated that he then opened the trunk and hit Arnsdorff with a jack handle as Arnsdorff begged for mercy. Johnson stated that he stabbed Arnsdorff with the sharp end of the jack and with a knife, while forcing Wagner to watch. Johnson and Wagner then climbed into a second car and drove away. Johnson refused to explain why a second car was with them, although the police asked him to do so. The two drove to a gas station and bought some gas. They then returned to the wrecked vehicle, doused it with gasoline, and set it afire with Arnsdorff in the trunk. This was the extent of what Johnson related concerning Arnsdorff's murder; he did not mention Smith.[3]

1. Smith also asked for an evidentiary hearing on other issues. We will address those claims separately.

2. Our record is somewhat unclear concerning some events. For example, it is doubtful that we now have before us all the statements of Wesley Johnson and Patricia Johnson, his wife. *See Smith v. State*, 400 So.2d 956, 953 n. 1 (Fla.1981) (listing statements). Although we believe our construction of the events to be substantially accurate, on remand the district court may expand the record and correct any misconceptions in our opinion.

3. The September 6 statement is relevant to this case for one reason in addition to Johnson's omission of Smith. In describing his murder of McDowell, which occurred two years before the other murders, Johnson indicated that he also locked the victim in the trunk of a car and set the car on fire after dousing it with gasoline.

On September 8, an officer interviewed Wesley Johnson's wife, Patricia Johnson. In this interview, she stated that Wesley had told her that both he and Smith had murdered Arnsdorff. Although Smith submitted this statement to us after argument, it is not in our record. Our record indicates that Patricia Johnson had, however, made a previous statement that omitted any reference to Smith.

On September 10, Patricia Johnson notified the officers that Wesley "wanted to tell the whole story about the three murders." Polk County Sheriff's Report at 6. She asked to meet with Wesley. After talking with his wife, Johnson informed the police that he would prefer not to give a statement until his attorney could discuss a plea bargain. He indicated, however, that Smith had been with him on the night Arnsdorff was murdered and "did take part in the same." *Id.* Sometime subsequent to this, Johnson apparently came to the agreement he desired[4] with the prosecutor and gave a statement implicating Smith. He stated that Smith had been with Wagner and himself on the night of Arnsdorff's murder and that Smith had actually struck Arnsdorff with the tire jack. Johnson stated that Wagner stabbed Arnsdorff with an ice pick while Smith used the jack handle. Johnson then stated that he could not remember "exactly what happened right at the moment .... we all looked around [and] I stepped up and slammed the [trunk]." Johnson also testified that, after returning with the gas, "[we] got out of the car and Slick's [Smith] got the gas can. So I poured the gas all over it. And Slick gets back in the car, and what's his name throwed a match on it." In response to a clarifying question, Johnson indicated Wagner to be the person referred to as "what's-his-name." He also indicated in detail how he (Johnson) doused the car with gasoline.

As far as we can determine, Johnson made one other pretrial statement relevant to our decision. The trial transcript shows that Johnson sent a note to Smith while both were incarcerated before trial. The note read as follows:

> Hey, Slick, how are you doing? Okay? Well, the next time they say court, it's for real. Just keep cool. You can have Parks called because I made sure he heard me talking about how I done it by myself and it's like that. Just heard on the news that they, they are going to bring back the chair. Hope I miss it. Well, just stay cool. Jake.

Apparently, this note indicates that Johnson confessed to another inmate named Parks so that Smith could call Parks at trial to impeach Johnson.

At trial, Johnson testified that Smith murdered Arnsdorff. Smith's counsel impeached Johnson with only the note written concerning Parks. The state then called Patricia Johnson in rebuttal to testify that Wesley had made prior statements consistent with his story implicating Smith. Since the trial, Johnson has made numerous sworn recantations of his trial testimony, stating that he lied at trial when implicating Smith and that he committed the crime himself.

A. *Effective Assistance Claim.*

In his brief, Smith argues that his trial counsel was ineffective. He lists the following "errors and omissions" at the guilt/innocence phase of the trial:

1. Failure to seek a *Richardson* hearing and challenge the admissibility of the testimony of Patricia Johnson under the rule of sequestration;
2. Failure to use Patricia or Wesley Johnson's pretrial statements for impeachment;
3. Failure to interview Smith adequately; and
4. Failure to depose Wesley Johnson before trial.

Smith also contends that his attorney, during the penalty phase:

4. Johnson testified at Smith's trial that he agreed to plead no contest to the three murders and testify against Smith in exchange for concurrent life sentences. Johnson was sentenced after Smith's trial.

1. Failed to adduce appropriate mitigating evidence or properly use that evidence in closing argument;

2. Failed to seek jury instructions on reasonable doubt or object to other instructions;

3. Failed to understand the bifurcated proceeding; and

4. Failed to challenge the use of the heinous, atrocious, and cruel aggravating circumstance.

[2] In *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court set forth the test under which we review claims of ineffective assistance. *See also Jarrell v. Balkcom*, 735 F.2d 1242, 1261 (11th Cir.1984). The petitioner must show both that his attorney failed to render "reasonably effective assistance," *id.* at 2064, and that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 2068. With some exceptions not applicable here, *see id.* at 2067; *see also United States v. Cronic*, — U.S. —, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the inquiry is two-pronged. The petitioner must show both ineffective assistance and resulting prejudice.

In this case, only one of Smith's claims—that counsel should have more effectively impeached the Johnsons—merits discussion and possible relief. The claimed failure of his attorney to understand the bifurcated proceeding and act as an advocate is related to the failure to impeach issue. The other claims are either unsupported by the record or simply do not merit relief.[5]

Counsel's failure to depose Johnson does not warrant relief or a hearing; given the numerous inconsistent statements made by Johnson and his wife, counsel probably had no need to conduct such a deposition. Had a deposition produced testimony detrimental to Smith, it would have been available to the state as evidence to disprove recent fabrication. (The state Rule 3.850 court held that Smith's counsel had available all the statements we have set forth above.) We are unable, without an evidentiary hearing, to reach a conclusion concerning ineffectiveness in light of counsel's failure to cross-examine Wesley or Patricia Johnson by using their pretrial statements, however.[6] The district court concluded that the attorney failed to use the statements for a valid strategic reason: he preferred to emphasize Johnson's plea bargain for impeachment purposes. Without a hearing,[7] we cannot hold this to be a valid reason for counsel's failure to use the Johnsons' statements not implicating Smith. Use of these statements would have been totally consistent with counsel's assumed strategy of showing that Johnson implicated Smith only to save himself from the electric chair.

We also hold that counsel's failure to use the statements may well have resulted in prejudice under the test in *Strickland v. Washington*. The entire case of the state, with the exception of plaster casts of a tire track and a shoe print,[8] was based on the testimony of Wesley Johnson as buttressed by Patricia Johnson's testimony during the state's rebuttal case. When first questioned, however, neither witness implicated Smith: the September 6 statements[9] of both witnesses omit any reference to

5. For a discussion of the claims regarding erroneous jury instructions and the application of the heinous, atrocious and cruel aggravating factor, *see infra* section VII (discussing claims in context of ineffective assistance of appellate counsel). Our conclusion concerning these issues does not change in light of the different test for appraising the effectiveness of trial counsel.

6. The entire transcript of the cross examination is attached to this opinion as Appendix A.

7. A hearing will also be helpful to clarify the record. *See supra* note 2.

8. The tire track matched Smith's car's tires; the shoe print matched a pair of shoes Smith owned. Smith explained that he had loaned his car, with the shoes in the back seat, to Johnson.

9. Other, more minor, inconsistencies appear among Johnson's statements. For example, Johnson's trial testimony cast Smith more as the ringleader than did his statement made after September 10.

Smith. Only after Patricia Johnson conferred with Wesley on September 10 did Wesley implicate Smith—stating that Smith was involved, but that a plea bargain discussion must occur before he would provide any further information.

Two conclusions may be drawn from these facts. The first is that Wesley and Patricia Johnson "framed" Smith, as Wesley's recantations would indicate. This conclusion is supported by the timing and order of the statements, and, to some extent, by Johnson's admission on September 6 that he locked his first victim in the car trunk and set the car on fire. Smith's attorney might well have argued that Johnson—who had a history of similar murders—implicated Smith to avoid "the chair," as Johnson stated in his note. The second, contradictory conclusion is that Wesley simply omitted any reference to Smith for some unknown reason—and later told the truth. This interpretation is supported by Johnson's suspicious reference to a second car in his September 6 statement without elaborating concerning its source or its driver. Nevertheless, the choice between the two interpretations would have been one the jury could have made either way had they heard the facts. The jury's choice could well have affected the outcome of the trial.

The failure of counsel to use the statements to impeach the Johnsons may not only have affected the outcome of the guilt/innocence phase, it may have changed the outcome of the penalty trial. As we have previously noted, jurors may well vote against the imposition of the death penalty due to the existence of "whimsical doubt." In rejecting the contention that the Constitution requires different juries at the penalty and guilt phases of capital trial, we stated:

> The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained *any* doubt whatsoever. There may be no *reasonable* doubt—doubt based upon reason—and yet some *genuine* doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt—this absence of absolute certainty—can be real.
>
> The capital defendant whose guilt seems abundantly demonstrated may be neither obstructing justice nor engaged in an exercise in futility when his counsel mounts a vigorous defense on the merits. It may be proffered in the slight hope of unanticipated success; it might seek to persuade one or more to prevent unanimity for conviction; it is more likely to produce only whimsical doubt. Even the latter serves the defendant, for the juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremedial penalty of death.

Smith v. Balkcom, 660 F.2d 573, 580–81 (5th Cir. Unit B 1981), *modified*, 677 F.2d 20, *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982). In this case, use of Wesley and Patricia Johnson's prior inconsistent statements might have created a whimsical doubt that would discourage the court and advisory jury from recommending the death penalty.

Of course, counsel may have elected to choose another strategy at the penalty portion of Smith's trial. If he did so, however, the record does not reveal the content of the strategy. For example, in counsel's closing statement at the penalty phase,[10] he evidenced no reasonable strategy. Counsel stated (in full):

> MR. HADDOCK: May it please the Court? Ladies and gentlemen, this is the last time we will be before you. The most trying circumstances, the fact that will be sent back to you will be cumulative of what you have already decided, that the defendant is guilty. Now, with little help except from you—and you are

10. We note that counsel was somewhat confused by the bifurcated proceeding in any event. He repeatedly requested that the judge abandon the bifurcated procedure and use the procedure declared unconstitutional in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

not here to help me, you are here to do the right thing—I have to ask that you take into consideration all of the things that have been said, all of the things that have been admitted into evidence. In particular, consideration to the statements of Dr. Kaplan pertaining to Mr. Smith.

Weigh those, because they weigh heavily upon everybody in this room. Add them up. If they indicate to you that this man, who has made a statement that you can take or leave—because you have taken and left some of his statements—that he would spend the rest of his life in a penitentiary. Whether this man should die or be given the right to live until, God willing, someday this state will provide a place for him.

If the state desires to do so, on remand it is free to introduce evidence before the district court showing that trial counsel's failure to utilize the Johnsons' statements at either the guilt/innocence or penalty phases of the trial was prompted by reasonable trial strategy.

B. *The* Brady *Issue.*

Smith contended before the state Rule 3.850 court that he did not receive material evidence from the state before trial pursuant to his request under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The state court held a hearing and concluded that the requested material was available to Smith's counsel. Smith now contends that this finding of fact by the state court is incorrect and not entitled to a presumption of correctness under 28 U.S.C. § 2254(d) because his trial counsel never testified at the hearing. He notes that the testimony at the hearing indicated that the prosecutor, although he maintained an "open file" policy, could not recall whether the various statements were in the file at any particular time. Smith himself testified that he could not recall seeing or hearing about the statements, except for the statement made after September 10 by Wesley Johnson.

We do not hold that these circumstances support a finding that the hearing was not full and fair;[11] indeed, we see no need to pass on this question. When the district court conducts its hearing on the effectiveness of Smith's counsel, the inquiry will by necessity involve the availability of the statements. For example, the state might produce Smith's counsel and introduce his testimony that he did not use the statements because he did not have them. If he did not have them because he did not check the prosecutor's file, this would constitute ineffective assistance given the content of the statements. But, if the statements were not available, counsel could not use them.

If the district court should conclude after an evidentiary hearing that the statements were not available to trial counsel, Smith will be confronted with a variation of Catch-22 created in part by 28 U.S.C. § 2254(d). The state could presumably argue that state court's finding that the statements were available is a historical fact entitled to a presumption of correctness, but that counsel rendered effective assistance under the circumstances because the statements were, in fact, unavailable. Such a situation no doubt results from the difficulties inherent in the administration of justice by means of the writ of habeas corpus. Nevertheless, if this situation arises, the district court should conclude that, under 28 U.S.C. § 2254(d)(3), "the material facts were not adequately developed at the state court hearing," *see Thomas v. Zant*, 697 F.2d 977, 980 (11th Cir.1983), and issue the writ under *Brady v. Maryland*.[12] We have no doubt that

11. For example, Smith does not explain why he could not have deposed his attorney, even if he was unable to subpoena him. *Cf. Birt v. Montgomery*, 725 F.2d 587, 590 n. 5 (11th Cir.1984) (en banc) (noting possibility that petitioner could depose witness without passing on sufficiency of state hearing).

12. Smith correctly notes that the state court's finding was supported by somewhat weak evidence. In addition, the state court did not hold an evidentiary hearing on Smith's effective assistance of counsel contention, although he requested a hearing.

statements were "material either to guilt or to punishment" under *Brady*. 373 U.S. at 87, 83 S.Ct. at 1196.

C. *Recantations of Wesley Johnson.*

Finally, Smith contends that the district court should also receive evidence concerning the post-trial recantations of Wesley Johnson. A panel of this court recently addressed a similar claim in *Drake v. Francis*, 727 F.2d 990 (11th Cir.1984). This court vacated the opinion in *Drake* for en banc consideration, and we recently received briefs and heard oral argument on several issues raised in *Drake*. We see no need to hold this case pending the decision in *Drake*, however. We perceive that the panel in *Drake* accurately stated the law in this circuit concerning claims of newly discovered evidence in habeas corpus proceedings.

As long ago as 1958, the former Fifth Circuit Court of Appeals summarized the law in this area: "Newly discovered evidence in the form of a confession by another does not render the conviction void and subject to collateral attack by habeas corpus because it goes to the merits of the conviction, not its legality." *Shaver v. Ellis*, 255 F.2d 509, 511 (5th Cir.1958), *cert. denied*, 355 U.S. 864, 78 S.Ct. 98, 2 L.Ed.2d 70 (1957). To be distinguished are situations in which the new evidence bears directly on the constitutionality of the conviction. For example, in *Schneider v. Estelle*, 552 F.2d 593 (5th Cir.1977), the petitioner claimed new evidence would show that the state had suborned perjury in obtaining a conviction against the petitioner. The court remanded for an evidentiary hearing, holding that the writ should issue if the petitioner proved the allegations of his complaint. *Id.* at 596; *see also Smith v. Florida*, 410 F.2d 1349 (5th Cir.1969).

[3] In this case, we seriously doubt that Smith has alleged subornation of perjury by the state. To prove such a claim, Smith would have to show that the prosecutor or the police officers knew that the testimony of one of the Johnsons was false. *Schneider*, 552 F.2d at 595; *Smith*, 410 F.2d at 1350–51. Smith has made no proffer of any evidence supporting such a contention. Absent such evidence, this claim does not warrant habeas corpus relief.

II. COERCION OF TESTIMONY

Smith next contends that Johnson confessed and agreed to testify for the state only because of Johnson's fear of the death penalty. Smith notes that one of the terms of Johnson's plea bargain required him to testify before he received his sentence. Smith argues that he should have received an evidentiary hearing on this issue in the district court.

We have little difficulty accepting the validity of the argument that Johnson entered into his plea bargain agreement with the state and testified against Smith because of the possible imposition of the death penalty. Nevertheless, the district court properly held that this claim affords Smith no basis for relief.

[4] We have substantial doubt that this claim is one that warrants relief. *Cf. United States v. Ballard*, 586 F.2d 1060 (5th Cir.1978); *Chaney v. Wainwright*, 561 F.2d 1129 (5th Cir.1977), 443 U.S. 904, 99 S.Ct. 3095, 61 L.Ed.2d 871 (1979). It is clear that Smith's attorney cross-examined Johnson and revealed the facts underlying Johnson's testimony to the jury, which decided whether or not to believe Johnson. We need not consider this issue on its merits, however, because Smith failed properly to raise it under Florida procedure. The Florida courts have refused to address the issue, *see Smith v. State*, 400 So.2d 956, 959 (Fla.1981); and, absent a showing of cause for failure properly to preserve the issue and resulting prejudice, the issue is barred from review in the federal courts, *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1976). Smith has shown neither cause nor prejudice.

III. ADMISSION OF EVIDENCE OF SECOND MURDER

At Smith's trial, the judge allowed Wesley Johnson to testify concerning the facts of a second murder for which Smith was

not on trial. (The circumstances and content of this testimony are set forth in the portion of the Florida Supreme Court's opinion quoted in the introductory portion of this opinion.) The Florida court apparently admitted this testimony on the theory that it constituted part of the *res gestae*. *See Smith v. State*, 365 So.2d 704, 706 n. 2 (Fla.1978). Smith contends that the evidence was irrelevant, inflammatory, prejudicial, and inadmissible as a matter of constitutional law.

[5–7] In reviewing the disposition of this claim by the district court, we note that "[i]n order for an evidentiary ruling to be cognizable in habeas corpus, it must deprive the state court defendant of fundamental fairness." *Jameson v. Wainwright*, 719 F.2d 1125, 1126 (11th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 2355, 80 L.Ed.2d 827 (1984); *see also Hills v. Henderson*, 529 F.2d 397 (1976). A denial of fundamental fairness occurs when the evidence is "material in the sense of a crucial, critical, highly significant factor." *Id.* at 1127. Under this test, the admission of the evidence did not violate the Constitution, although its admissibility under state law presents a close and difficult question. *See* 365 So.2d at 708 (three Justices dissenting).

IV. TESTIMONY OF PATRICIA JOHNSON

[8] At Smith's trial, the state introduced the testimony of Patricia Johnson, Wesley Johnson's wife. (Wesley Johnson was the prosecutor's essential witness. *See supra* § I.) The prosecutor called Patricia Johnson to testify concerning prior consistent statements made by her husband in response to Smith's impeachment. The witness list submitted to Smith before trial by the prosecutor did not include Patricia Johnson's name, as Florida law requires. In addition, the record shows that Patricia Johnson was present during a portion of the trial that preceded her testimony and was thus in violation of the sequestration rule. Smith argues that the omission of Patricia Johnson's name from the witness list and the sequestration rule violation compels the issuance of the writ. Smith, however, cites no authority to the effect that these violations are of constitutional dimension. *See, e.g., Bronstein v. Wainwright*, 646 F.2d 1048 (5th Cir.1981) (state law violations do not usually warrant habeas relief). Assuming that the claim is simply one rooted in the concept of "fundamental fairness," *see Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), we conclude that these violations (if they were violations) [13] did not render Smith's trial fundamentally unfair.

V. TESTIMONY OF DR. NISWONGER

[9] Dr. Joseph K. Niswonger, a psychiatrist, examined Smith before trial. Niswonger testified that, during the examination, Smith claimed amnesia concerning the events of the murder. The state argued to the jury that this testimony contradicted Smith's alibi that he did not commit the murder, but was at home "sleeping off a drunk." Smith now contends that, under the rule of *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), Niswonger's testimony was inadmissible because Niswonger did not read Smith *Miranda* warnings before conducting the psychiatric examination. *See also Battie v. Estelle*, 655 F.2d 692 (5th Cir.1981). The state contends that this claim is barred from consideration by *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1976), and that the claim also fails on the merits. The state's argument concerning the merits of this claim is correct; we therefore chose not to address the *Wainwright* issue, which presents a question of law not yet squarely addressed by this court.

The record in this case shows that the trial court did not appoint Niswonger to examine Smith, as was the case in *Estelle*

13. The prosecutor explained the omission of Patricia Johnson's name from the list and her presence in the courtroom by contending that he had not forseen that he would call her as a witness.

APPENDIX FF

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25 Fla. L. Weekly S309
(Cite as: 760 So.2d 903)

Supreme Court of Florida.

Fred Lewis WAY, Appellant,
v.
STATE of Florida, Appellee.

No. SC78640.

April 20, 2000.
Rehearing Denied June 15, 2000.

After petitioner's sentence of death was vacated on motion for postconviction relief, 568 So.2d 1263, petitioner was again sentenced to death. He again sought postconviction relief. The Circuit Court, Hillsborough County denied relief. Petitioner appealed. The Supreme Court, 630 So.2d 177, remanded for evidentiary hearing. The Circuit Court, Susan C. Bucklew, Bob Anderson Mitcham, and J. Rogers Padgett, JJ., denied relief. Petitioner appealed. The Supreme Court held that: (1) petitioner was not prejudiced by State's failure to disclose photographs; (2) in resentencing proceeding, petitioner could not present evidence questioning his guilt of arson; (3) evidence supported aggravating circumstances; and (4) sentence of death was not disproportionate.

Affirmed.

Wells, J., filed concurring opinion.

Pariente, J., filed concurring opinion in which Anstead, J., concurred.

Lewis, J., concurred in result only.

West Headnotes

[1] Criminal Law k700(4)
110k700(4)
Prosecutor's obligation under Brady extends to the disclosure of evidence that could be used for impeachment, as well as exculpatory evidence.

[2] Criminal Law k700(7)
110k700(7)
In order to comply with Brady, individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.

[3] Criminal Law k700(2.1)
110k700(2.1)
[3] Criminal Law k700(4)
110k700(4)
Under Brady, evidence is considered exculpatory merely if it is favorable to the accused, either because it is exculpatory, or because it is impeaching.

[4] Criminal Law k1158(1)
110k1158(1)
Trial court's finding after evaluating conflicting evidence that Brady material had been disclosed is a factual finding; as a factual finding, the reviewing court should uphold the finding as long as it is supported by competent, substantial evidence in the record.

[5] Criminal Law k700(3)
110k700(3)
Trial court's finding that all photographs were disclosed was inconsistent with Brady, where state affirmatively represented that all photographs of crime scene had been produced but some had not actually been in file.

[6] Criminal Law k700(2.1)
110k700(2.1)
Ultimate test in determining if a Brady violation occurred is whether confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different.

[7] Criminal Law k700(2.1)
110k700(2.1)
Showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more; defendant must establish that the defense was prejudiced by the State's suppression of evidence, in other words, that the evidence was material.

[8] Criminal Law k700(2.1)
110k700(2.1)
For purposes of Brady, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have ultimately resulted in the defendant's acquittal.

[9] Criminal Law k700(2.1)
110k700(2.1)
The cumulative effect of the suppressed evidence must be considered when determining materiality for Brady purposes.

[10] Criminal Law k1134(3)
110k1134(3)
[10] Criminal Law k1158(1)
110k1158(1)
Although reviewing courts must give deference to the trial court's findings of historical fact with respect to claim of Brady violation, the ultimate question of whether evidence was material resulting in a due process violation is a mixed question of law and fact subject to independent appellate review. U.S.C.A. Const.Amend. 14.

[11] Criminal Law k700(2.1)
110k700(2.1)
For purposes of Brady, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal; instead, the proper inquiry 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.

[12] Criminal Law k1166(10.10)
110k1166(10.10)
Defendant was not prejudiced by prosecution's failure to produce two photographs of garage, which were taken after fire in which victims' bodies were burned; to accept defendant's alternative defense theory, juror would have had to accept that victims severely bludgeoned each other and that thereafter, coincidentally and accidentally, an electrical spark from an open circuit breaker started a fire.

[13] Criminal Law k1042
110k1042
Postconviction petitioner failed to preserve for appeal his claim that cumulative impact of suppressed evidence should have been

considered in conjunction with previous claims raised on direct appeal, where petitioner did not assert that claim before postconviction court.

[14] Criminal Law k1192
110k1192
On remand, postconviction court properly limited testimony of three witnesses as beyond scope of remand for evidentiary hearing on Brady claim; testimony was unrelated to issue of whether photographs had been withheld from defense.

[15] Sentencing and Punishment k2250
350Hk2250
A resentencing is a completely new proceeding, and the resentencing judge is not obligated to find the same aggravating and mitigating circumstances that were established in the original sentencing proceeding.

[16] Sentencing and Punishment k2292
350Hk2292
Although the State is not allowed to relitigate guilt during resentencing proceedings, it may introduce evidence concerning the facts and circumstances of the crime in order to prove the aggravating circumstances beyond a reasonable doubt.

[17] Sentencing and Punishment k2292
350Hk2292
During resentencing proceedings, defendant has a right to present evidence that is relevant to the nature and circumstances of the crime.

[18] Sentencing and Punishment k2292
350Hk2292
In resentencing proceeding, defendant can introduce evidence that is relevant to any of the statutory aggravating circumstances the State seeks to establish or to any statutory or nonstatutory mitigation.

[19] Sentencing and Punishment k2292
350Hk2292
In resentencing proceeding following convictions of capital murder and arson, defendant was not entitled to present evidence regarding possible causes of fire and victims' injuries; admission of such evidence would have been a relitigation of question of guilt rather than an explanation of circumstances of crime.

[20] Criminal Law k662.3
110k662.3
Confrontation clause applies to sentencing proceedings. U.S.C.A. Const.Amend. 6.

[21] Sentencing and Punishment k2292
350Hk2292
In resentencing proceeding following convictions of capital murder and arson, defendant was not entitled to cross-examine detective regarding whether arson investigation had been adequately conducted; that issue had already been decided adversely to defendant when he was convicted.

[22] Sentencing and Punishment k1681
350Hk1681
Trial court could find death penalty aggravating circumstance that murder was committed during commission of arson, even if victims died from blunt trauma wounds that were delivered before defendant started fire.

[23] Sentencing and Punishment k1705
350Hk1705
Conviction for the contemporaneous murder of one victim established the applicability of the death penalty aggravating circumstance with respect to other victim that defendant had

previously been convicted of a felony involving the use of violence.

[24] Sentencing and Punishment k1684
350Hk1684
Evidence supported death penalty aggravating circumstance that murder was heinous, atrocious, and cruel; victim died from blunt trauma to head or from total body burns, victim screamed during fire and struggled to move while engulfed in flames, and defendant obstructed efforts to extinguish fire despite fact that victim was screaming and engulfed in flames.

[25] Sentencing and Punishment k1684
350Hk1684
Evidence must show that the victim was conscious and aware of her impending death to support death penalty aggravating circumstance that murder was heinous, atrocious, and cruel.

[26] Sentencing and Punishment k1788(10)
350Hk1788(10)
Any error in trial court's finding that murder was cold, calculated, and premeditated was harmless; trial court stated that it did not consider that aggravating circumstance in imposing sentence of death.

[27] Sentencing and Punishment k1683
350Hk1683
Sentence of death was not disproportionate for defendant convicted of first-degree murder for striking his daughter in the head with a hammer and then setting daughter on fire; defendant had contemporaneously killed his wife and set her on fire.

***906** Gregory C. Smith, Capital Collateral Counsel — Northern Region, Heidi E. Brewer, Assistant CCRC and David F. Chester, CCRC Staff Attorney — Northern Region, Tallahassee, Florida; and James Marion Moorman, Public Defender, and Steven L. Bolotin, Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida, for Appellant.

Robert A. Butterworth, Attorney General, and Candance M. Sabella and Robert A. Krauss, Assistant Attorneys General, Tampa, Florida, for Appellee.

PER CURIAM.

Fred Lewis Way appeals a sentence imposing the death penalty following a resentencing proceeding and the trial court's denial of post-conviction relief following an evidentiary hearing. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const.

The facts of this case are set forth in our previous opinions. See Way v. Dugger, 568 So.2d 1263 (Fla.1990) (Way II); Way v. State, 496 So.2d 126 (Fla.1986) (Way I). On July 11, 1983, a fire occurred in the garage of the home occupied by the defendant, Fred Lewis Way, and his family. Both his fifteen-year-old daughter, Adrienne Way, and his wife, Carol Way, were found dead in the garage.

> The state presented evidence that Way, who was having marital difficulties, argued with his wife in the garage of their Tampa home, ultimately striking her in the head with a hammer. He called Adrienne into the garage and also struck her in the head with a hammer. He then set both

> mother and daughter, and the garage, on fire.

Way II, 568 So.2d at 1264.

At trial, the medical examiner testified that Carol had suffered twelve traumas to the skull that had been caused by a blunt instrument, such as a hammer. Adrienne had suffered two similar blows to the head, the second of which was severe enough to crack her skull. Expert witnesses for the State testified at trial that the fire was intentionally set and gasoline had been used as the primary accelerant. See id. The cause of death for both victims was blunt trauma and 100% body burns, either of which could have caused their deaths. See Way I, 496 So.2d at 127.

At trial, Way's surviving daughter Tiffany testified that her mother and father had been in the garage together when Way called Adrienne into the garage. Moments later, Tiffany heard Adrienne screaming in the garage. When Tiffany looked out her bedroom window, she saw a fire in the garage. However, her father did not respond when Tiffany asked whether she should call the fire department. **[FN1]**

> FN1. In Way v. Dugger, 568 So.2d 1263 (Fla.1990) (Way II), we rejected Way's claim that the testimony of the surviving daughter, Tiffany, was unreliable because it was induced by hypnosis and that trial counsel was ineffective in failing to move to exclude it. We first noted that subsequent to the trial in Way, we held in Bundy v. State, 471 So.2d 9 (Fla.1985), that hypnotically induced testimony is now per se inadmissible in the courts of Florida but that a hypnotized witness can "testify to all events other than the new matter discovered at the hypnotic session." Id. at 19. We determined that because Bundy had not been decided at the time of Way's trial, counsel was not ineffective for failing to exclude Tiffany's testimony. See Way II, 568 So.2d at 1265. In addition, we held that "the record does not demonstrate that Tiffany Way's testimony at trial was induced or refreshed by hypnosis." Id.

*907 Witnesses to the fire also testified that Way did not respond to questions concerning whether anyone was in the burning garage. After hearing screams from inside the garage, Way answered that his daughter was in the garage. A witness also saw a body **[FN2]** engulfed in flames attempting to rise up on all fours as if to crawl out of the burning garage and then finally collapsing. See Way II, 568 So.2d at 1265. The jury, rejecting Way's defense that the mother and daughter were killed while engaged in mutual combat, found Way guilty of second-degree murder in the killing of Carol Way, but guilty of first-degree murder for the killing of Adrienne as well as first-degree arson. In accordance with the jury's seven to five recommendation, the trial court imposed the death penalty for the murder of Adrienne Way. The trial court also imposed a sentence of ninety-nine years' imprisonment for the second-degree murder conviction and a thirty-year sentence for the first-degree arson conviction. This Court affirmed the convictions and sentences on direct appeal. See Way I, 496 So.2d at 129.

> FN2. Adrienne's body was found in the location described by the witness.

The trial court denied Way's first motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850, **[FN3]** which this Court affirmed on appeal. See Way II, 568 So.2d at 1266-67. However, we granted a writ of habeas corpus, vacated the death sentence and remanded for resentencing as required by Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed.2d 347 (1987), because the error that

occurred when the jury was not instructed that it could consider nonstatutory mitigation was not harmless beyond a reasonable doubt. **[FN4]** See Way II, 568 So.2d at 1266-67.

FN3. A death warrant was signed in 1988 and the trial court granted a stay of execution in order to hold an evidentiary hearing on the motion for postconviction relief. See Way II, 568 So.2d at 1264 n. 1.

FN4. In Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed.2d 973 (1978) (plurality), the United States Supreme Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604, 98 S. Ct. 2954 (footnote omitted); see also Skipper v. South Carolina, 476 U.S. 1, 4, 106 S. Ct. 1669, 90 L. Ed.2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S. Ct. 869, 71 L. Ed.2d 1 (1982). In reaching this conclusion in Lockett, the Court reasoned that "[g]iven that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases." 438 U.S. at 605, 98 S. Ct. 2954. In its later decision in Hitchcock v. Dugger, 481 U.S. 393, 399, 107 S. Ct. 1821, 95 L. Ed.2d 347 (1987), the United States Supreme Court vacated the death penalty of a Florida defendant where the State did not establish the harmlessness of the error occurring when the defendant's advisory jury was instructed not to consider nonstatutory mitigation and the trial judge did not consider nonstatutory mitigation.

Prior to the resentencing proceeding, Way filed an emergency 3.850 motion in the trial court alleging that photographs withheld from the defense showed that the fire had been started by an "accidental propane gas explosion" instead of having been intentionally set by Way using gasoline. Way v. State, 630 So.2d 177, 178 (Fla.1993) (Way III). The trial court summarily denied relief on the 3.850 motion and proceeded with the resentencing.

The jury again recommended the imposition of the death penalty by a vote *908 of seven to five. The trial court imposed the death penalty after finding that the applicable statutory aggravating circumstances **[FN5]** outweighed the statutory mitigating **[FN6]** and nonstatutory mitigating **[FN7]** circumstances. On appeal of the resentencing proceedings and the summary denial of the postconviction motion, we remanded for an evidentiary hearing to determine

> whether there was an improper withholding of the photographs and whether, even if there was, it would have affected the outcome of Way's trial. We are unable to conclusively determine from the record that this "new" evidence could not support an alternative theory of the deaths of his wife and daughter and provide a basis on which a jury could find him innocent.

Id. at 178-79. We withheld ruling on the issues raised in Way's direct appeal of the resentencing proceedings. See id. at 179. After holding an evidentiary hearing, the trial court denied relief on the Brady **[FN8]** claim and this appeal follows.

FN5. (1) Way was previously convicted of a felony involving the use of threat or violence — the second-degree murder conviction for the murder of his wife Carol; (2) the murder was committed while Way was engaged in the commission of arson; and (3) the murder was heinous, atrocious, and cruel (HAC). The trial

court also stated that the record supported a finding that the murder was cold, calculated and premeditated (CCP), but specifically did not rely upon that finding because the State did not allege during the penalty phase proceeding that the CCP aggravator was applicable.

FN6. (1) Way had no significant history of prior criminal activity; (2) Way's age at the time of the crime — 38.

FN7. (1) Way's childhood-his father died when Way was eleven years old and Way's family was poor and he worked at an early age to help his family; (2) Way's service in the Air Force and Air Force Reserves; (3) Way's successful employment with the Federal Aviation Administration; (4) Way's friends and relatives testified that he enjoyed a reputation for peacefulness and hard work; (5) Way suffered from a hearing impairment and possibly a mental impairment; (6)Way behaved well in prison, having received no disciplinary reports during the past eight years of incarceration.

FN8. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963).

In the present appeal, Way raises three issues on appeal from the denial of postconviction relief **[FN9]** and eight issues remain outstanding from his appeal of the imposition of the death penalty in the resentencing proceedings. **[FN10]** We first address the trial court's denial of Way's Brady claim.

FN9. Way's claims are: (1) the trial court erred in denying Way's Brady claim; (2) the trial court improperly limited the testimony presented at the evidentiary hearing; and (3) the cumulative impact of the Brady claim, newly discovered evidence, ineffective assistance of counsel, and the State's improper presentation of misleading evidence render the outcome of Way's trial materially unreliable.

FN10. Issue (1), regarding the Brady claim, resulted in this Court reversing for an evidentiary hearing. The outstanding claims include: (2) improper limitation of the presentation of mitigation evidence and cross-examination of the State's witnesses; (3) the Court should recede from its cases precluding the consideration of lingering doubt as a mitigating factor; (4) the trial court erred in finding the aggravating circumstance that the murder occurred during the commission of an arson; (5) the trial court erred in finding the aggravating circumstance that Way was previously convicted of a violent felony based on his contemporaneous conviction for the murder of Carol Way; (6) the trial court erred in finding the HAC aggravating circumstance; (7) the court erred in finding the CCP aggravating circumstance; (8) the recommendation of death by a bare majority of jurors is not reliable; and (9) the death sentence is disproportionate.

BRADY CLAIM

The evidence presented at the evidentiary hearing centered on two photographs that Way asserted had been suppressed by the State in violation of Brady. One photograph showed the condition of the circuit breaker box following the fire. A number of circuit breakers had been tripped and black lines radiated out of the panel. The second photograph of the garage after the ***909** fire showed a weight bench with a broken leg extension bar.

The photographs had been taken by Henry Regalado, an arson investigator who had conducted an arson investigation the day following the fire for a private company. The defense claimed that the photograph of the circuit breaker box would have supported a defense that the fire was accidentally started and the photograph of the weight bench would have provided an explanation of Adrienne's head wounds.

In order to support the Brady claim, the defense presented the testimony of Eleanor Posey, an expert in electrical engineering and forensic fire examination, who testified that in her opinion the photograph of the electrical panel when viewed in conjunction with the other evidence at the scene refuted the State's theory that the fire had been intentionally set by Way. Instead, according to Posey, a spark from an open circuit breaker ignited flammable vapors present from chemicals used to refinish furniture. This explosion would have been sufficient to hurl a person to the ground.

As to the significance of the photograph of the weight bench, the defense also presented the expert testimony of Dr. Feegel, a medical pathologist, who testified that in his opinion, one of the wounds on the heads of Adrienne and Carol could have occurred when their heads hit a round object, such as the weight extension bar, during an explosion. However, in Dr. Feegel's opinion, it was unlikely that the remaining wound on Adrienne's head or the remaining eleven wounds on Carol's head were caused by mutual combat between the victims.

In response to the defense testimony, the State presented expert testimony explaining that based on all of the physical evidence at the scene, the fire had been intentionally set and gasoline had been used as an accelerant. The State's experts testified that the burn patterns in the garage were inconsistent with an explosion, but consistent with the fire starting when a pile of combustibles had been soaked with gasoline and set using a trail of gasoline. The most intense burns surrounded the bodies, and little combustible materials were close to the bodies. This indicated to the State's experts that the bodies had been doused with gasoline. After the fire, gasoline had accumulated in pools, and tests conducted demonstrated that the gasoline would not have flowed to these areas had it not been intentionally poured.

The trial court denied the Brady claim, finding that the photographs had been disclosed to Way because the arson investigator referenced them in his report and brought the photographs to his deposition prior to trial. The trial court further found that the photographs were not exculpatory and "the suggested alternative theory of the defense is incredible." Specifically, the trial court found that:

> The victim of the capital murder suffered two (2) severe, one probably even lethal, blows to her skull. According to the alternative theory these wounds occurred when she was knocked down against a weight-lifting bench by the force of an explosion which occurred when unknown flammable vapors were ignited by some unknown malfunction of the circuit breaker box. Incredibly, according to the alternative theory, this occurred a moment after the victim had inflicted about a dozen severe wounds, identical to her own and again probably even lethal, to the skull of her mother. Then, according to the alternative theory, the force of the explosion caused gasoline to spill on the victim, her mother, a TV set and a box of books and then ignite.
>
> . . . The opinion of fire expert Eleanor Posey defies logic,

> is inconsistent with the physical evidence at the fire scene and is refuted by the testimony of on-scene fire investigators and an electrical engineer. The testimony of Petitioner's expert in forensic pathology, Dr. ***910** Feegel, merely reiterated expert testimony presented by defense expert Dr. William Gibson during trial. Viewed in the light most favorable to Petitioner, the defense theory that an accidental fire occurred simultaneous with the victim's mutual combat is implausible. No rational juror could have found a reasonable doubt based upon the testimony adduced by Petitioner at the evidentiary hearing.

(Emphasis supplied.) Thus, the trial court concluded that the Brady claim was without merit because there was no reasonable probability of a different outcome had the photographs been used by the defense at trial.

[1][2] In Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused . . . 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." The prosecutor's obligation under Brady extends to the disclosure of evidence that could be used for impeachment, as well as exculpatory evidence. See United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed.2d 481 (1985). "In order to comply with Brady, . . . 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in [the] case, including the police.' " Strickler v. Greene, 527 U.S. 263, 119 S. Ct. 1936, 1948, 144 L. Ed.2d 286 (1999) (quoting Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed.2d 490 (1995)). Whether the prosecutor succeeds or fails in meeting this obligation to learn of any favorable evidence known to others acting on the State's behalf in the case, "the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." Kyles, 514 U.S. at 438, 115 S. Ct. 1555.

In accordance with Brady, Bagley and Kyles, the United States Supreme Court in Strickler enunciated the three significant elements of a Brady claim as follows:

> There are three components of a true Brady violation: [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

Strickler, 119 S. Ct. at 1948. Accordingly, we review each of these elements.

A. Were the Photographs Favorable to Way?

[3] As to the first prong, the trial court made a statement in its order denying relief because it was "not convinced that the photos were exculpatory," while acknowledging that the photographs could have been used in support of an alternative defense theory. Under Brady, evidence is considered

exculpatory merely if it is "favorable to the accused, either because it is exculpatory, or because it is impeaching." Strickler, 119 S. Ct. at 1948.

During the guilt phase of the trial, William Myers, an expert witness called by the State, testified that the fire had not been caused by an electrical shortage. Concerning the circuit breaker, Myers testified that:

> Q. Did you make a check in that garage area for any electrical shortages?
> A. Yes, sir, I did.
> Q. How did you do that?
> A. [I] went to the electrical breaker panel that was located on the north wall and checked to see if there had been any indications of localized heat or if any of the breakers had been tripped indicating that there had been a short.
> Q. What conclusions did you make?
> A. There was no electrical fire in the garage.

Although the expert never affirmatively testified as to whether he had found the ***911** breakers tripped, his testimony could lead the jury to conclude that he had examined the circuit breakers and found that they had not been tripped. The photograph of the electrical panel would have shown that the breakers were tripped after the fire. At the very least, it appears that this photograph could have been used to impeach the State's witness as to the condition of the breakers after the fire.

In addition, this photograph could have been used to support the alternative defense theory that the fire had been started accidentally by a spark from an open circuit breaker igniting furniture refinishing chemicals. Likewise, the photograph of the weight bench could have also been used to support this alternative theory that Adrienne's head wounds had not been caused by Way. Thus, we conclude that the photographs were exculpatory evidence under Brady and Bagley.

B. Were the Photographs Suppressed?

Way's resentencing counsel testified at the evidentiary hearing that the photographs were first found by the defense when preparing for the resentencing proceedings. Resentencing counsel testified that he asked Michael Benito, who was the trial prosecutor in this case, if that was "all the evidence." In response, Benito showed resentencing counsel a box full of photographs that had been in Benito's desk rather than with the rest of the file. Resentencing counsel further testified that Benito stated the box was full of photographs that "essentially we never used, we never showed to anybody. If you want them take a look at them." The photographs at issue were in that box.

Benito testified he did not recall whether this conversation occurred or when these specific photographs had been disclosed to the defense. However, Benito testified that at all times he had maintained an "open file" policy.

The trial court found that "trial counsel did not have possession of the disputed photos at trial." The trial court further found that the photographs were part of the file of an expert witness, Henry Regalado, who testified at trial on behalf of the State and who also gave a deposition prior to trial. In finding that the photographs had been "disclosed," even

though trial counsel did not have possession of the photographs, the trial court relied on the expert witness's testimony that he had brought the photographs to the deposition and his report that stated that "photographs were also taken by Mr. Regalado, some of which are included in this report, with the remainder being on file" at Regalado's office. There was no testimony at the evidentiary hearing as to whether the defense knew of the presence of the photographs at the deposition. However, the trial court found, "This report was provided to trial counsel and was used by him during his deposition of Mr. Regalado. Mr. Regalado had the photos with him at the deposition, available for viewing and/or copying."

[4] A trial court's finding after evaluating conflicting evidence that Brady material had been disclosed is a factual finding. See United States v. Willis, 759 F.2d 1486 (11th Cir.1985); Squires v. Dugger, 794 F. Supp. 1568 (M.D.Fla.1992). As a factual finding, the reviewing court should uphold the finding as long as it is supported by competent, substantial evidence in the record. See Stephens v. State, 748 So.2d 1028 (Fla.1999).

In previous cases, this Court has broadly stated that evidence was not "suppressed" where it was equally available to the State and the defense. See Roberts v. State, 568 So.2d 1255, 1260 (Fla.1990); James v. State, 453 So.2d 786, 790 (Fla.1984). However, in those cases, the defendant was aware of the exculpatory information. See Roberts, 568 So.2d at 1260 (defendant aware of evidence that would show he was under the influence of drugs or alcohol during the crime); James, 453 So.2d at 790 (defendant was aware of existence of photographs contained in confidential juvenile records). This case is also ***912** unlike Provenzano v. State, 616 So.2d 428 (Fla.1993), where the defendant claimed that the State had suppressed the notes taken by the State's expert witness. The Court found that these notes had not been suppressed because the expert used the notes while testifying at trial, and the defendant could have obtained them at that time. See id. Thus, the defendant in Provenzano should have been actually aware of the expert's notes.

[5] However, in this case, there is no evidence that the expert witness referred to the disputed photographs during his deposition or his trial testimony. Indeed, none of Regalado's deposition or trial testimony discussed the electrical panel. Further, and most significantly, at a pretrial hearing occurring after Regalado's deposition, the prosecutor affirmatively assured the defense that all photographs of the crime scene had already been produced. **[FN11]** In light of these representations, the State may have unintentionally caused the defense lawyer to assume that all of the photographs of the crime scene had been produced, including those in the expert witness's report. Cf. Bagley, 473 U.S. at 683, 105 S. Ct. 3375 (finding that prosecutor's response to discovery request may have "misleadingly induced" defense counsel to believe that impeachment evidence did not exist). Therefore, as a matter of law, we find that a finding of disclosure would be inconsistent with Brady where, as here, the State affirmatively represented that all the photographs of the crime scene had been produced.

FN11. After Regalado's deposition on October 18, 1983, the following exchange occurred during a pretrial hearing on December 9, 1983:

> *Rankin [Defense Counsel]*: Also, the Motion for Production of photographing, Mr. Benito has assured me — he can make the same representation here on the record — that he has produced for me all those photographs which are available which relate in any manner to this investigation.
>
> . . . .
>
> *Benito [Assistant State Attorney]*: That is correct. That motion should have been rendered moot.

[6] As to the issue of whether trial counsel should have been aware of the photographs because all photographs were referenced generally in the report, in Young v. State, 739 So.2d 553 (Fla.1999), this Court observed that under the rules of discovery

> there is an obligation upon the defendant to exercise due diligence pretrial to obtain information. However, we have also recognized . . . that the focus in postconviction Brady-Bagley analysis is ultimately the nature and weight of undisclosed information. The ultimate test in backward-looking postconviction analysis is whether information which the State possessed and did not reveal to the defendant and which information was thereby unavailable to the defendant for trial, is of such a nature and weight that confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different.

Id. at 559 (emphasis supplied). Thus, while the discovery rules impose an obligation upon defendants to obtain exculpatory materials through the exercise of due diligence, the "ultimate test" in determining if a Brady violation occurred is whether "confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different." Id.

C. Prejudice

[7] As explained by the United States Supreme Court in Kyles, a "showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more." Kyles, 514 U.S. at 437, 115 S. Ct. 1555; see Strickler, 119 S. Ct. at 1948; Bagley, 473 U.S. at 675, 105 S. Ct. 3375. In addition, the defendant must establish ***913** that the defense was prejudiced by the State's suppression of evidence, in other words, that the evidence was material. See Strickler, 119 S. Ct. at 1948-49. The United States Supreme Court articulated the specific test for determining the materiality of evidence in order to meet the prejudice prong of Brady:

> [E]vidence is material 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. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Bagley, 473 U.S. at 682, 105 S. Ct. 3375 (plurality opinion) (emphasis supplied); see Strickler, 119 S. Ct. at 1952.

[8][9] A showing of materiality "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have ultimately resulted in the defendant's acquittal." Kyles, 514 U.S. at 434, 115 S. Ct. 1555. As the United States Supreme Court recently explained:

> [T]he 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. 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."

Strickler, 119 S. Ct. at 1952 (quoting Kyles, 514 U.S. at 435, 115 S. Ct. 1555) (emphasis supplied) (citations omitted). **[FN12]** The cumulative effect of the suppressed evidence must be considered when determining materiality. See Kyles, 514 U.S. at 436 & n. 10, 115 S. Ct. 1555. "It is the net effect of the evidence that must be assessed." Jones v. State, 709 So.2d 512, 521 (Fla.1998); see Kyles, 514 U.S. at 436 & n. 10, 115 S. Ct. 1555.

> FN12. The Supreme Court majority opinion in Kyles v. Whitley, 514 U.S. 419, 435 n. 8, 115 S. Ct. 1555, 131 L. Ed.2d 490 (1995), noted: "This rule is clear, and none of the Brady cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone."

[10] Although reviewing courts must give deference to the trial court's findings of historical fact, the ultimate question of whether evidence was material resulting in a due process violation is a mixed question of law and fact subject to independent appellate review. See Hays v. Alabama, 85 F.3d 1492, 1498 (11th Cir.1996), cert. denied, 520 U.S. 1123, 117 S. Ct. 1262, 137 L. Ed.2d 341 (1997); Kennedy v. Herring, 54 F.3d 678 (11th Cir.1995); see also Stephens v. State, 748 So.2d 1028 (Fla.1999) (concluding that appellate courts should defer to the findings of historical fact with regard to a claim of ineffectiveness of trial counsel but that the ultimate question of ineffectiveness is a mixed question of law and fact subject to independent appellate review). In its order denying relief, the trial court concluded that:

> [T]he overwhelming circumstantial evidence admitted at trial supports the conclusion that no reasonable probability exists that possession of the photographs by Petitioner prior to trial would have resulted in a different outcome. These photographs and the expert opinions drawn therefrom are not of such a nature that they would probably produce an acquittal on retrial. The opinion of fire expert Eleanor Posey defies logic, is inconsistent with the physical evidence at the fire scene and is refuted by the testimony of on-scene fire investigators and an electrical engineer. The testimony of Petitioner's expert in forensic pathology, Dr. Feegel, merely reiterated expert testimony presented by defense expert Dr.

> William Gibson during trial. Viewed in the light most favorable to Petitioner, the defense theory that an accidental fire occurred simultaneous[ly] with the victim's mutual combat is implausible. No rational juror could have found a reasonable doubt based upon the testimony adduced ***914** by Petitioner at the evidentiary hearing.

(Emphasis supplied.)

[11] Way asserts that the trial court applied the wrong legal standard when it stated that the photographs were not material because "they are not of such a nature that they would probably produce an acquittal on retrial." Way is correct that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Kyles, 514 U.S. at 434, 115 S. Ct. 1555. Instead, the proper inquiry 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.

[12] Although the trial court in this case may have used an incorrect standard when it tied the materiality inquiry to whether the photographs would result in an acquittal on retrial, it is clear from the entire order that the trial court was in fact assessing whether confidence in the verdict was undermined under the Kyles standard and was not utilizing a sufficiency of the evidence test. Significantly, the trial court's order assesses the credibility of the defense expert witnesses and the impact their testimony would have had if presented during trial in light of the evidence presented at the evidentiary hearing, the trial, and the resentencing proceeding.

In evaluating the impact this evidence had on the reliability of the trial, the trial court found that the testimony of defense expert Posey as to the source of the fire was contrary to the physical evidence at the scene and refuted by the testimony of the State's expert witnesses. The trial court concluded that the alternative defense theory was so implausible that "[n]o rational juror could have found a reasonable doubt based upon the testimony adduced by Petitioner at the evidentiary hearing." The trial court's finding that Way's alternative theory is rebutted by the State's expert witnesses and contrary to the physical evidence at the scene of the crime is supported by competent, substantial evidence based on the evidence presented at the evidentiary hearing and at trial.

The real problem with the alternative defense theory is that it is not only substantially contradicted by the physical evidence, but it also fails to explain the majority of the victims' head wounds. Carol suffered multiple blunt traumas to her head and Adrienne suffered two severe head wounds. In fact, one of the lacerations suffered by Adrienne was so severe that it cracked her skull and went into the brain tissue. According to Posey, the force of the explosion would have been sufficient to hurl a person to the ground. However, as Posey acknowledged, the explosion could only account for one head injury per victim, leaving eleven significant wounds on Carol and one significant wound on Adrienne unexplained. In defense expert Dr. Feegel's opinion, it is unlikely that the remaining injuries were caused by mutual combat. The State's expert

pathologist, Dr. Diggs, had testified at trial that the similarity between the wounds on the two victims' heads made it much more likely that the victims had been injured by a third party rather than through mutual combat. **[FN13]** Further, according to Dr. Diggs, the severity of the wounds would make it difficult for the victims to continue battering each other. Each individual wound would have caused severe dizziness, and the wound that cracked Adrienne's skull would have rendered her unconscious immediately. Also unexplained by the defense theory is that the blood splatter evidence entered at trial ***915** showed that both women received many of the wounds while in a low-lying position.

> FN13. Although in his reply brief Way asserts that he never adopted a mutual combat theory at the evidentiary hearing to explain the remaining head wounds, no other explanation for these severe injuries has been offered.

Before accepting this alternative defense theory, a juror would have had to accept that after being called out to the garage, Adrienne and her mother severely bludgeoned each other, and that thereafter, coincidentally and accidentally an electrical spark from an open circuit breaker started a fire. We agree with the trial court that this is contrary to the physical evidence at trial and defies logic when considered in totality with all the evidence presented at trial, the resentencing and the evidentiary hearing.

Thus, we agree with the conclusion of the trial court that even if these photographs had been disclosed by the State, Way has not demonstrated that he was prejudiced thereby pursuant to the Brady, Kyles, and Strickler standard. Under these cases, Way must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," Strickler, 119 S. Ct. at 1952 (quoting Kyles, 514 U.S. at 435, 115 S. Ct. 1555), had the defense been able to use the photographs at trial. We affirm the denial of postconviction relief by the trial court because the photographic evidence does not put this case in such a different light as to undermine confidence in the verdict. **[FN14]**

> FN14. Because we reject the underlying Brady claim on the grounds that Way failed to establish prejudice, we do not address the merits of his corresponding ineffective assistance of counsel claim. Even if trial counsel's performance was deficient because he should have discovered the photographs, the ineffective assistance of counsel claim is without merit because Way would not be able to establish the prejudice prong of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). See Downs v. State, 740 So.2d 506, 513 n. 10 (Fla.1999); Mills v. State, 684 So.2d 801 (Fla.1996).

[13] Way further asserts that the cumulative effect of this evidence should be considered in conjunction with the previous claims raised on direct appeal and during his first motion for postconviction relief. However, Way's written closing arguments following the evidentiary hearing, which purported to inform the trial court of the correct legal standard to apply to the Brady claim, did not assert that the materiality of the photographs should be considered in conjunction with any other previous claims. Thus, we find that the claim that the cumulative impact should have been considered when determining materiality has not been preserved for review because it was not raised in the trial court. However, even if we were to engage in a cumulative analysis, we do not find that our conclusion as to

prejudice would change. Cf. Lightbourne v. State, 742 So.2d 238, 249 (Fla.1999).

[14] We also reject Way's related claim that the trial court erred in limiting the testimony of Way's son, Fred Way, Jr., and excluding the testimony of Betty Slanton and Sean Rooker. The trial court allowed Fred Way, Jr., to testify that the weight bench in the garage had been in working order before the fire and that his mother stored furniture refinishing chemicals in the garage. The defense also proffered testimony that Fred Way, Jr., would testify that he recanted his trial testimony that he had seen his father throw a hammer over the backyard fence after the fire. **[FN15]** The trial court sustained the State's objection to this testimony as beyond the scope of the remand for the evidentiary hearing on the Brady claim.

> FN15. Although Way's briefs also state that Fred Way, Jr., would have testified that he and his sister had been subject to police coercion at the time of the trial, Way made no proffer to this effect in the trial court. Accordingly, his claims that the trial court erred in excluding this testimony are not preserved for appellate review. See, e.g., Finney v. State, 660 So.2d 674, 684 (Fla.1995).

In addition, the trial court sustained the State's objection to the testimony of Sean Rooker. An eyewitness to the fire, Rooker initially told police that he had observed ***916** Adrienne and Carol having an argument prior to the trial. Rooker later told police that this statement was a lie. At the evidentiary hearing, collateral counsel proffered the testimony of Rooker that he had never told the police that he lied when he said that he had heard Adrienne and Carol arguing prior to the fire. The trial court sustained the State's objection to this testimony because it was unrelated to the issue of whether the photographs had been withheld from the defense.

In addition, the trial court sustained the State's objection to the testimony of Betty Slanton, who collateral counsel claimed was a newly discovered witness who would testify that at the time of the fire Way was visibly upset. The trial court ruled that this evidence was also irrelevant to the Brady claim, because this testimony would have been used by the defense to rebut the State's evidence that Way was unnaturally calm and unemotional at the scene of the fire regardless of whether the defense had access to the photographs.

We find that the trial court did not abuse its discretion in concluding that the testimony of these witnesses was beyond the scope of the remand to determine whether a Brady violation occurred. See Mendyk v. State, 707 So.2d 320 (Fla.1997). Further, Way never attempted to amend his postconviction motion to include additional claims that the testimony of these three witnesses constituted newly discovered evidence and he does not make that claim on appeal. For these reasons, we affirm the trial court's denial of relief on Way's postconviction motion.

APPEAL FROM RESENTENCING

We next turn to the issues Way raised on appeal from his resentencing proceeding. For the reasons expressed below, we affirm the trial court's imposition of the death penalty in this case.

A. Admissibility of Evidence Questioning Way's Guilt of Arson

During the resentencing proceedings, Way proffered the testimony of Dr. Feegel, who would have testified that the victims' injuries could have occurred during a propane gas explosion, and were inconsistent with gasoline being poured on their bodies. **[FN16]** In addition, Way proffered the testimony of Craig Tanner, an arson investigator, who would have testified that the circuit breaker malfunctioned causing an electrical spark to light fumes from a nearby propane gas tank. The trial court excluded this testimony on the grounds that it was only relevant to Way's guilt of the crimes underlying his convictions for murder and arson and was not relevant to any resentencing issues. The trial court also limited Way's cross-examination of the State's witness Detective Croll regarding what was done during the arson investigation.

> FN16. We note that during the evidentiary hearing on the Brady claim, the defense presented expert testimony that an explosion resulted when an electrical spark ignited flammable vapors from refinishing chemicals. No expert testified concerning the theory that a propane gas tank caused the fire.

As the State argues, this Court has previously rejected the argument that evidence that would serve only to create a lingering doubt of the defendant's guilt is admissible as a nonstatutory mitigating circumstance. See, e.g., Preston v. State, 607 So.2d 404, 411 (Fla.1992); King v. State, 514 So.2d 354, 358 (Fla.1987). Although the Eighth Amendment of the United States Constitution requires that the jury or court imposing the death sentence not be precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense," Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S. Ct. 869, 71 L. Ed.2d 1 (1982), we have previously rejected the argument that evidence relevant only to establish a lingering doubt of the defendant's guilt is a mitigating circumstance that the Eighth Amendment requires the fact-finder to consider. See King v. Dugger, 555 So.2d 355, 358 (Fla.1990); White ***917** v. Dugger, 523 So.2d 140, 140 (Fla.1988); see also Franklin v. Lynaugh, 487 U.S. 164, 108 S. Ct. 2320, 101 L. Ed.2d 155 (1988) (finding that Eighth Amendment does not require that sentencing jury be instructed that it can consider lingering doubt of guilt as a mitigating factor).

[15] However, Way argues that this evidence was admissible, not as a nonstatutory mitigating circumstance, but in order to rebut the evidence introduced by the State concerning the applicability of aggravating circumstances. As Way asserts, a resentencing is a completely new proceeding, and the resentencing judge is not obligated to find the same aggravating and mitigating circumstances that were established in the original sentencing proceeding. See Preston v. State, 607 So.2d 404 (Fla.1992); Teffeteller v. State, 495 So.2d 744, 745 (Fla.1986). This Court has explained that

> it is within the sound discretion of the trial court during resentencing proceedings to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence. We cannot expect jurors impaneled for capital sentencing proceedings to make

> wise and reasonable decisions in a vacuum.

Teffeteller, 495 So.2d at 745.

[16][17][18] While the State is not allowed to relitigate guilt during resentencing proceedings, it may introduce evidence concerning the facts and circumstances of the crime in order to prove the aggravating circumstances beyond a reasonable doubt. See Valle v. State, 581 So.2d 40, 45 (Fla.1991). Similarly, a defendant has a right to present evidence that is relevant to the nature and circumstances of the crime. See Downs v. State, 572 So.2d 895, 899 (Fla.1990). An example of a relevant circumstance of the crime is that the defendant played a relatively minor role in the murder compared to the other participants. See id. Of course, the defendant can also introduce evidence that is relevant to any of the statutory aggravating circumstances the State seeks to establish or to any statutory or nonstatutory mitigation. Fundamental fairness and due process require this.

[19] However, we have rejected claims that the trial court abused its discretion in precluding the admission of evidence that was only relevant to rebut the defendant's guilt of the underlying crime. See Waterhouse v. State, 596 So.2d 1008, 1015 (Fla.1992); King, 514 So.2d at 358. While the defendant in Waterhouse was allowed to present evidence to rebut the State's evidence in support of the aggravating circumstance that a sexual battery occurred during the commission of the capital murder, the defendant had not been previously convicted of sexual battery. See Waterhouse, 596 So.2d at 1015. Although Way relies upon Waterhouse, in that case we found the trial court "appropriately precluded Waterhouse from presenting evidence questioning his guilt." 596 So.2d at 1015. In this case, Way had previously been convicted of both arson and first-degree murder. Thus, the trial court did not abuse its discretion in excluding testimony that was only relevant to question the validity of the underlying arson conviction. If Way had been able to put on the testimony of the expert witness to explain the alternate theory of the crime, as set forth in his Brady claim, he would have been relitigating the question of guilt rather than explaining the circumstances of the crime.

[20] Second, as for Way's related claim that the trial court erred in limiting his cross-examination of Detective Croll, it appears that the trial court did not abuse its discretion. Way is correct in his assertion that the confrontation clause applies to sentencing proceedings. See, e.g., Engle v. State, 438 So.2d 803, 814 (Fla.1983). However, the cases relied upon by Way to establish that it is reversible error to limit cross-examination on a critical fact supporting guilt are distinguishable because ***918** they involved testimony admitted during the guilt phase. See, e.g., Zerquera v. State, 549 So.2d 189, 192 (Fla.1989).

[21] In this case, during resentencing the testifying arson investigator gave relatively short testimony describing the facts that both victims were burned in a fire in the garage, and that an arson investigation was conducted in which the investigators determined that the fire was intentionally set using gasoline as an accelerant. The trial court ruled that Way could cross-examine the detective or call other detectives in rebuttal to establish that the investigators had not in fact determined that the fire had been intentionally set. Thus, the trial court afforded Way considerable leeway.

However, the trial court ruled that Way could not question Detective Croll concerning whether the investigation had been adequately conducted because the trial court found that the issue of the adequacy of the investigation was collateral and had already been decided adversely to Way when he was convicted of arson. This type of testimony would not have assisted the resentencing jury in evaluating the nature and circumstances of the crime. Because the State in this case took care to limit the testimony about the circumstances of the crime, we find no abuse of discretion in the trial court's restriction of cross-examination in this case. We find that the limitation of the detective's cross-examination did not result in a violation of the confrontation clause or otherwise violate Way's due process rights.

B. Applicability of Aggravating Circumstances

Way challenges the trial court's findings that: (1) the murder in this case occurred during the commission of an arson; (2) Way was previously convicted of a violent felony, based only on the contemporaneous murder of his wife; (3) the murder was cold, calculated, and premeditated (CCP); and (4) the murder was heinous, atrocious, and cruel (HAC). As we have previously stated,

> [I]t is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt — that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.

Willacy v. State, 696 So.2d 693, 695 (Fla.1997) (footnote omitted). We find that competent substantial evidence in the record supports the trial court's findings as to these aggravating circumstances.

[22] First, Way challenges the trial court's finding that the murder in this case occurred during the commission of an arson. As discussed above, the trial court did not improperly limit Way from introducing evidence to rebut this aggravating circumstance. On essentially the same evidence, we upheld the trial court's finding of the applicability of this aggravating circumstance during the direct appeal:

> Appellant next argues that the trial court erroneously found that the capital murder was committed while he was engaged in the crime of arson. In support, appellant avers to the fact that it could not be determined whether the victims died from the blunt trauma wounds or the fire, and that the blows were delivered prior to the fire. We agree with the state that the other committed felony, arson, need not be the cause of death to support this aggravating circumstance. Rather, it is sufficient that the capital murder occur during the same criminal episode as the enumerated felony, which was certainly the case in this instance. Accord Adams v. State, 412 So.2d 850, 854-55 (Fla.), cert. denied, 459 U.S. 882,

> 103 S. Ct. 182, 74 L. Ed.2d 148 (1982) (cause of death was strangulation which occurred during the criminal episode of kidnapping and attempted rape); Scott v. State, 411 So.2d 866, 867 (Fla.1982) *919 (cause of death was head injuries which occurred during the criminal episode of robbery and/or burglary).

Way I, 496 So.2d at 128. We likewise find that the record during the resentencing proceeding supports the trial court's finding that this aggravating circumstance applies.

[23] Second, Way's conviction for the contemporaneous murder of Carol Way established the applicability of the aggravating circumstance that Way had previously been convicted of a felony involving the use of violence. See, e.g., Pooler v. State, 704 So.2d 1375, 1379 (Fla.1997); Mahn v. State, 714 So.2d 391, 399-400 (Fla.1998).

[24] Third, we find that the record supports the imposition of the aggravating circumstance that the murder was HAC. The trial court found that:

> The medical examiner, Dr. Charles Diggs, testified that Adrienne Way died from blunt trauma to the head and/or 100% total body burns. He further testified that she was alive at the time of the fire and that she could have moved in response to the fire after having suffered the blows to her head. A witness, Randall Hierlmeier, testified that when he came upon the scene, the Defendant was standing outside the burning garage, squirting a hose in the direction of a car parked in the garage. He testified that Defendant was making no attempts to enter the garage and was unresponsive to questions regarding who, if anyone, was in the garage. The witness heard screams coming from the garage and testified he saw someone engulfed in flames in the garage struggling to move. The brutal beating and burning of Adrienne Way, the daughter of the Defendant, sets this crime apart from the norm of capital felonies.

[25] Way argues that the evidence does not establish that this crime was HAC because the State failed to prove that Way intended to torture the victim or that the crime was meant to be especially painful. However, this Court has upheld the HAC aggravator in similar cases where the defendant bludgeoned and then burned a victim who was alive. See Willacy, 696 So.2d at 696 (victim beaten, strangled, and burned); Henry v. State, 613 So.2d 429, 433-34 (Fla.1992) (defendant incapacitated victims and then set them on fire); see also Lawrence v. State, 698 So.2d 1219, 1222 (Fla.1997) ("We have consistently upheld HAC in beating deaths."); Wilson v. State, 493 So.2d 1019, 1023 (Fla.1986) (victim bludgeoned with a hammer and then shot). We agree with Way that the evidence must show that the victim was conscious and aware of her impending death to support this aggravating circumstance. See Zakrzewski v. State, 717 So.2d 488, 493 (Fla.1998), cert. denied, 525 U.S. 1126, 119 S. Ct. 911, 142 L. Ed.2d 909 (1999); Jackson v. State, 451 So.2d 458, 463 (Fla.1984); Simmons v. State, 419 So.2d 316, 318-19 (Fla.1982). For example,

in Simmons the defendant bludgeoned the victim with a sharp tool and then attempted to conceal the murder by burning the body. See Simmons, 419 So.2d at 317. This Court found in Simmons that the evidence did not support the finding of HAC because the victim was not aware he was going to be hit with the tool, which caused an instantaneous death. See id. at 319-18.

However, unlike in Simmons, the evidence in this case supports a conclusion that Adrienne was aware of her impending death because she screamed her sister's nickname shortly after entering the garage. Further, she was alive during the fire because a witness heard her screaming and saw her struggling to move while engulfed in flames. Although Way argues that there was no evidence he intended to set his daughter on fire, the evidence shows that he obstructed efforts to extinguish the fire despite the fact that his daughter was screaming and engulfed in flames.

While the Court's resolution of this issue during Way's original direct appeal is not dispositive because the finding of a mitigating ***920** or aggravating circumstance is not an "ultimate fact" that is binding during the resentencing proceeding, see Preston, 607 So.2d at 407-09, we previously rejected Way's very similar argument upon essentially the same evidence. **[FN17]** We again find that competent, substantial evidence supports the trial court's finding that the HAC aggravating circumstance applies.

FN17. We previously found that:

> [Way's] argument principally revolves around the medical examiner's inability to determine the exact cause of death. Therefore, according to appellant, it must be assumed that the victims were totally incapacitated at the time of the fire and that his crime was not "unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla.1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed.2d 295 (1974). We disagree with appellant's view of the evidence and therefore find his argument to be without merit. The medical examiner's report clearly shows that the victim was still alive at the time of the fire. She was observed by eyewitnesses to be on fire in the garage and struggling to move. Certain witnesses heard screams coming from the garage. It was not unreasonable for the trial court, based on all of the circumstances, to infer that the victim suffered immense mental agony from the time she was first struck until her death during the ensuing fire.

Way I, 496 So.2d at 128-29.

[26] Fourth, we reject Way's claim that the record does not support the trial court's finding that the murder in this case was CCP. On very similar evidence during the original direct appeal, we found that the evidence supported the imposition of this aggravating circumstance. See Way I, 496 So.2d at 129. Further, during the resentencing, although the sentencing order stated that the record supported a finding that the murder was CCP, the order also stated that the trial court had not relied upon this aggravating circumstance because the State had not asserted its applicability during the resentencing proceedings. Because the jury had not been instructed on this aggravating circumstance and the trial court stated it did not consider this aggravating circumstance, even if the record does not support the imposition of this

aggravating circumstance, we conclude that any error in the trial court's finding this aggravating circumstance applicable is harmless beyond a reasonable doubt. See Sochor v. State, 619 So.2d 285, 293 (Fla.1993) (affirming death sentence despite the trial court's error in finding the aggravating circumstance of CCP applicable because "if there is no likelihood of a different sentence, the error must be deemed harmless"); cf. Sims v. State, 681 So.2d 1112, 1118 (Fla.1996) (concluding that the trial court did not err in finding applicable an aggravating circumstance that had not been alleged by the State and for which the jury had received no instruction).

D. Proportionality

[27] Finally, we consider Way's claim that the imposition of the death penalty is disproportionate. In aggravation, the trial court considered that: (1) Way was previously convicted of a felony involving the use or threat of violence (Carol Way's murder); (2) the capital felony was committed while Way was engaged in the commission of arson; and (3) the murder was HAC. The trial court also found the murder was CCP, but did not rely upon that finding. The trial court considered the following statutory mitigating circumstances: (1) Way had no significant history of prior criminal activity; (2) Way's age at the time of the crime (thirty-eight). The court also considered the following nonstatutory mitigation: (1) difficult childhood — father died at an early age, family was poor; (2) four years of service in the Air Force and twelve years of service in the air force reserves; (3) successful employment history; (4) reputation for peacefulness and hard work; (5) a hearing impairment and possibly a mental impairment; (6) good behavior in prison; (7) all other mitigating circumstances asserted by the defendant.

***921** This Court recently rejected an argument that a death sentence of a defendant who killed his wife and two children was disproportionate because the murder arose from a domestic dispute. See Zakrzewski v. State, 717 So.2d 488, 493 (Fla.1998).

> [T]his Court has never approved a "domestic dispute" exception to imposition of the death penalty. See [Santos v. State, 629 So.2d 838 (Fla.1994)] (finding death sentence disproportionate because four mitigating circumstances of extreme emotional disturbance, substantial inability to conform conduct to requirements of law, no prior history of criminal conduct, and abusive childhood outweighed single aggravating circumstance of prior violent felonies based upon crimes that occurred during the murders). In some murders that result from domestic disputes, we have determined that CCP was erroneously found because the heated passions involved were antithetical to "cold" deliberation. Santos v. State, 591 So.2d 160, 162 (Fla.1991); Douglas v. State, 575 So.2d 165, 167 (Fla.1991). However, we have only reversed the death penalty if the striking of the CCP aggravator results in the death sentence being disproportionate.

Zakrzewski, 717 So.2d at 493 (quoting Spencer v. State, 691 So.2d 1062, 1065

(Fla.1996)) (alterations in original); see also Porter v. State, 564 So.2d 1060, 1064-65 (Fla.1990) (finding death sentence to be proportionate where defendant committed "a cold-blooded, premeditated double murder" of his "live-in lover" and her new boyfriend); Brown v. State, 565 So.2d 304, 309 (Fla.1990) (finding death sentence to be proportionate where defendant murdered his girlfriend's child), abrogated on other grounds, Jackson v. State, 648 So.2d 85, 88 (Fla.1994).

This case is similar to Zakrzewski, where the defendant killed his wife through blunt and sharp trauma, and then killed his two children with a machete. In that case, the trial court found applicable the aggravating circumstances of (1) HAC, (2) the convictions for the contemporaneous murders, and (3) CCP for the murders of the children, but this circumstance was not applicable for the murder of the wife. See Zakrzewski, 717 So.2d at 491. Similar to Way, Zakrzewski: (1) had no significant criminal history prior to the murders; (2) served in the military; (3) was a hard worker and well thought of by others; and (4) had an emotional response to the deaths. See id.

However, in Zakrzewski, the additional statutory mitigator of extreme mental or emotional disturbance was applicable. See id. at 493-94. As this Court pointed out in Spencer, in many of the domestic dispute cases where the death penalty was found to be disproportionate, substantial mental mitigation is present. 691 So.2d at 1065 (citing Santos, 591 So.2d at 162, and Lemon v. State, 456 So.2d 885, 887-88 (Fla.1984)); see also Ross v. State, 474 So.2d 1170, 1174 (Fla.1985) (finding death penalty disproportionate though HAC applied where defendant murdered wife in angry domestic dispute, was under extreme emotional distress, was intoxicated, and had no prior history of violence). In contrast to these cases, there was not significant mental mitigation presented in this case, although the trial court found Way "possibly had a mental impairment." We conclude that the death penalty is a proportionate penalty in this case.

CONCLUSION

We find that the remainder of Way's claims have been previously decided adversely to him. **[FN18]** For the reasons expressed above, we affirm the imposition of ***922** the death penalty and the denial of postconviction relief.

FN18. This Court has previously rejected claims that the death penalty recommended by a bare majority of jurors is constitutionally infirm. See, e.g., Hunter v. State, 660 So.2d 244, 252-53 (Fla.1995); Alvord v. State, 322 So.2d 533 (Fla.1975), receded from on other grounds, Caso v. State, 524 So.2d 422 (Fla.1988).

It is so ordered.

HARDING, C.J., and SHAW and ANSTEAD, JJ., concur.

WELLS, J., concurs with an opinion.

PARIENTE, J., concurs with an opinion, in which ANSTEAD, J., concurs.

LEWIS, J., concurs in result only.

QUINCE, J., recused.

WELLS, J., concurring.

I concur in the affirmance of the trial court's orders. I concur in result only as to the majority's Brady **[FN19]** claim analysis. I find that the Brady claim analysis is unnecessarily complicated and that it omits the second part of the analysis, which has four components, not three. This requires a showing of due diligence by the defendant. A four-part analysis is consistent with this Court's precedent in Robinson v. State, 707 So.2d 688, 693 (Fla.1998), and Hegwood v. State, 575 So.2d 170 (Fla.1991), and the analysis of the Eleventh Circuit in Wright v. Hopper, 169 F.3d 695, 701 (11th Cir.1999), and Sims v. Singletary, 155 F.3d 1297, 1310 (11th Cir.1998). Wright and Sims are post-Kyles v. Whitley decisions.

FN19. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963).

Further, I am concerned that the majority's Brady analysis in stating what are factual questions to which deference is owed to the trial court and what are questions of mixed law and fact subject to de novo review reaches too far, and claims de novo review of issues which are actually questions of inferences drawn from facts. An example of this is the discussion on page 16 in respect to the "finding of disclosures." I believe reviewing courts must avoid complex analysis which constructs a basis upon which to label something a mixed question of law and fact in order to afford a premise upon which to then exercise appellate court judgment in place of the judgment which has been made by the trial court. It is vital that we respect the time-honored discretion of trial courts and not remake decisions which, because of the trial court's superior vantage point, should be within the purview of the trial court and are presumed correct.

PARIENTE, J., concurring.

I concur in the denial of the Brady claim and the affirmance of the death sentence. I write separately to address Way's point on appeal that this Court should recede from its prior decisions that preclude the consideration of "lingering" or "residual" doubt as a nonstatutory mitigator — especially because this was a resentencing proceeding in which the jury did not decide the issue of guilt.

Many of the concerns over the death penalty have focused on the possibility of executing an innocent person — a spectre that runs contrary to the interests of justice. Although the United States Supreme Court has rejected the argument that the Eighth Amendment requires that a capital sentencing jury be instructed that it can consider lingering doubt evidence in mitigation, see Franklin v. Lynaugh, 487 U.S. 164, 173-74, 108 S. Ct. 2320, 101 L. Ed.2d 155 (1988), in view of the finality of the death penalty, there are some important reasons why our responsibility to independently review death sentences might extend to an evaluation of the evidence supporting guilt.

As then-Justice Barkett noted in her specially concurring opinion in Melendez v. State, 498 So.2d 1258, 1262 (Fla.1986),

> While a jury verdict of guilt based on competent substantial evidence is sufficient for upholding convictions and prison sentences, I do not believe it is always enough for upholding a death

> sentence. There are cases, albeit not many, when a review of the evidence in the record leaves one with the fear that ***923** an execution would perhaps be terminating the life of an innocent person.

Earlier, Justice Thurgood Marshall made similar observations:

> There is certainly nothing irrational — indeed, there is nothing novel — about the idea of mitigating a death sentence because of lingering doubts as to guilt. It has often been noted that one of the most fearful aspects of the death penalty is its finality. There is simply no possibility of correcting a mistake. The horror of sending an innocent defendant to death is thus qualitatively different from the horror of falsely imprisoning that defendant. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice. As such it has been raised as a valid basis for mitigation by a variety of authorities.

Heiney v. Florida, 469 U.S. 920, 921-22, 105 S. Ct. 303, 83 L. Ed.2d 237 (1984) (dissenting from denial of certiorari) (emphasis supplied).

Addressing concerns such as these, the drafters of the Model Penal Code included the consideration of lingering doubts of guilt in their model death penalty statute as not just a mitigating factor, but as a factor that excludes the possibility of a death sentence as a matter of law:

> **Death Sentence Excluded.** When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree [i.e., a non-capital offense] if it is satisfied that:
> . . . .
> (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

Model Penal Code § 210.6(1) (1962).

The fact that a jury or judge may not decide to impose the death penalty because of concerns over the defendant's guilt is a reality acknowledged by the Eleventh Circuit Court of Appeals in Smith v. Wainwright, 741 F.2d 1248 (11th Cir.1984). **[FN20]** In the course of deciding whether trial counsel was ineffective for failing to impeach the State's key witnesses with prior inconsistent statements, the Eleventh Circuit observed that the failure of counsel to use the statements not only may have affected the outcome of the guilt phase of the trial, but may have also changed the outcome of the penalty phase of the trial. See id. at 1255. The Eleventh Circuit reasoned that the outcome of the penalty phase may have been affected because "jurors may well vote against the imposition of the death penalty due to the existence of 'whimsical doubt.' " Id.

> FN20. In fact, authors of a law review article examining the factors influencing juries to recommend the imposition of a life versus a

death sentence in Florida concluded that the "existence of some degree of doubt about the guilt of the accused was the most often recurring explanatory factor" in those cases studied where the jury recommended a life sentence. See William S. Geimer & Jonathan Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases, 15 Am. J.Crim. L. 1, 28 (1988).

Because a lingering doubt of the defendant's guilt appears to be an actual factor that sentencing phase juries and judges consider when making the sentencing recommendation, I conclude that the introduction of this type of evidence is especially important during resentencing proceedings. In resentencing proceedings, the jurors do not have the benefit of hearing evidence presented in the guilt phase that might have cast a doubt on the defendant's guilt.

A good example of why it is important to allow the presentation of lingering doubt evidence during resentencing proceedings is set forth in Justice Barkett's dissenting opinion in King v. State, 514 So.2d 354 (Fla.1987). In King's case, the Eleventh Circuit had previously found that defense ***924** counsel was constitutionally ineffective because

> [the defendant] was convicted on circumstantial evidence which however strong leaves room for doubt that a skilled attorney might raise to a sufficient level that, though not enough to defeat conviction, might convince a jury and a court that the ultimate penalty should not be exacted, lest a mistake may have been made.

See id. at 361 (quoting King v. Strickland, 748 F.2d 1462, 1464 (11th Cir.1984)) (emphasis supplied). Justice Barkett observed that the defendant should not lose the benefit of this lingering doubt argument during the resentencing proceeding. See id. Accordingly, Justice Barkett concluded that the defendant should have been allowed to present evidence during the resentencing proceeding that would place a lingering doubt of the defendant's guilt in the jurors' minds. See id.

The protection of allowing the consideration of lingering doubt evidence is even more important where the death penalty may be imposed by a vote of seven to five, a bare majority of the jurors, as occurred in this case. In fact, Florida is in a small minority of jurisdictions with a statute that allows the imposition of the death penalty even though the jurors' vote is less than unanimous. **[FN21]**

FN21. In many jurisdictions that have the death penalty, a vote of more than a bare majority of the jurors is required before the death penalty may be imposed. See Geimer & Amsterdam, supra, at 13 n. 49. In fact, as of 1988, twenty-five out of the thirty states requiring a jury verdict to support the death penalty explicitly required a unanimous jury verdict. Id. At the present time, Virginia, New York, Illinois and California are among the states that require a unanimous jury verdict. See Cal.Penal Code § 190.4(b) (West.1999); 720 Ill. Comp. Stat. Ann. 5/9-1(g) (West.Supp.1999); N.Y.Crim. Proc. Law § 400.27(11)(a) (McKinney Supp.1999); Va.Code Ann. § 19.2-264.4(D)(1) (Michie Supp.1999). Similarly, the Texas statute provides that a death sentence may not be imposed unless the jurors unanimously find that there are not "sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed," while a life sentence requires the agreement of ten jurors. Tex.Crim. P.Code Ann.

§ 37.071 (West Supp.2000); see Prystash v. State, 3 S.W.3d 522, 537 (Tex.Crim.App.1999), petition for cert. filed (U.S. Dec. 14, 1999) (No. 99-8503).

In summary, I believe that the nature and strength of the evidence of guilt should be considered in deciding whether to impose the death sentence and in whether to uphold a death sentence. I urge the Legislature consider including evidence of residual doubt as a statutory mitigating factor that could be considered by juries in making a sentencing recommendation, the trial court in imposing the death sentence, and this Court in determining whether the death penalty should be affirmed. Alternatively, I urge the Legislature consider requiring a unanimous jury verdict, or at the minimum a vote of ten-to-two, for a jury recommendation of death.

My view of this issue, however, does not alter my conclusion regarding the propriety of the imposition of the death penalty in the present case. Indeed, after careful review of the record, I believe that the evidence of guilt rises to the level of certainty that supports the imposition of the death penalty.

ANSTEAD, J., concurs.

END OF DOCUMENT

APPENDIX GG

kins, 303 S.C. 214, 399 S.E.2d 760 (1990); *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979).

In conclusion, we reverse appellant's convictions because of the trial judge's erroneous ruling on the *Batson* issue and remand the case for a new trial.

REVERSED and REMANDED.

HARWELL, CHANDLER, FINNEY and TOAL, JJ., concur.



306 S.C. 252

Bobby HORTON, Petitioner,

v.

STATE of South Carolina, Respondent.

No. 23511.

Supreme Court of South Carolina.

Submitted Sept. 25, 1991.

Decided Nov. 12, 1991.

Rehearing Denied Dec. 16, 1991.

Postconviction proceeding was brought. The Circuit Court, Jasper County, Thomas L. Hughston, Jr., J., denied relief. Petitioner appealed. The Supreme Court, Finney, J., held that petitioner received ineffective assistance of counsel when trial counsel erroneously informed him that he could be cross-examined on prior convictions resulting in petitioner not testifying.

Reversed and remanded.

1. **Criminal Law** ⇐641.13(1)

To meet two-prong test establishing ineffective assistance of counsel, defendant must prove that counsel's representation fell below objective standard of reasonableness and that, but for counsel's error, there is reasonable probability that result would have been different. U.S.C.A. Const. Amend. 6.

2. **Witnesses** ⇐345(4)

Prior conviction may be used to impeach credibility of witness only if conviction involves crime of moral turpitude.

3. **Criminal Law** ⇐641.13(6)

Defendant received ineffective assistance of counsel when trial counsel erroneously informed him that he could be cross-examined on prior convictions for simple possession of marijuana and assault and battery with intent to kill; simple possession of marijuana was not a crime of moral turpitude which could be used to impeach defendant's credibility, defendant was convicted of the other offense 15 years before the trial and counsel failed to get ruling from trial judge on whether crime was too remote to be used to impeach defendant, and defendant's decision not to testify was based on that erroneous advice and but for that error, there was reasonable probability that result would have been different. U.S.C.A. Const.Amend. 6.

4. **Criminal Law** ⇐1158(1)

Postconviction review judge's findings will not be upheld if findings are not supported by probative evidence.

Asst. Appellate Defender M. Anne Pearce, of the South Carolina Office of Appellate Defense, Columbia, for petitioner.

Atty. Gen. T. Travis Medlock, Chief Deputy Atty. Gen. Donald J. Zelenka and Asst. Atty. Gen., Miller W. Shealy, Jr., Columbia, for respondent.

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FINNEY, Justice:

This Court granted certiorari to review the circuit court's denial of post-conviction relief (PCR) to Petitioner Bobby Horton. After considering the record and reviewing the applicable law, we reverse and remand for a new trial.

The sole issue before this Court is whether petitioner is entitled to PCR on the basis of ineffective assistance of trial counsel.

On September 4, 1986, Michael Peaster (Agent Peaster), an undercover agent with

the South Carolina Law Enforcement Division purchased 1.877 grams of cocaine from a man introduced to him as Bobby Horton by Kerry Garner, a confidential informant. The transaction occurred at approximately 10:20 P.M. outside the Spring Hills Club. The petitioner was arrested on February 7, 1987, and later indicted for distribution of cocaine.

The petitioner did not testify at his trial. He was convicted of distribution of cocaine and sentenced to imprisonment for fifteen years and a $10,000 fine; suspended upon service of ten years, payment of the fine, and probation for five years. Petitioner's direct appeal was dismissed, *State v. Horton*, Memo.Op. No. 89-MO-088 (S.C.Sup.Ct. filed February 21, 1989).

Petitioner filed an application for PCR alleging, *inter alia*, ineffective assistance of counsel on the grounds that 1) trial counsel gave petitioner erroneous advice on which petitioner based his decision not to testify; and 2) trial counsel failed to object to impermissible testimony. After a hearing, the PCR court issued its order finding that the matters raised a) had been refuted by the record; b) did not indicate any deficiency on the part of trial counsel; or c) were not sufficient to show prejudice to the petitioner. The PCR court dismissed the application with prejudice and remanded the petitioner to the custody of the state.

Petitioner filed a petition for writ of certiorari, and this Court granted certiorari to review only Question 1.

Petitioner maintains his decision not to testify was based on trial counsel's advice that he would be subject to cross examination on two prior criminal convictions. Petitioner's record shows a conviction in 1972 for assault and battery with intent to kill and a 1980 conviction for simple possession of marijuana. Petitioner contends trial counsel's advice was in error since neither conviction was admissible for the purpose of impeachment.

Petitioner's trial counsel testified at the PCR hearing that his advice was based upon counsel's desire to prevent petitioner's two prior convictions from being introduced to impeach the petitioner's credibili-

[1] In order to meet the two-pronged test establishing ineffective assistance of counsel, a defendant must prove 1) that counsel's representation fell below an objective standard of reasonableness; and 2) that, but for counsel's error, there is a reasonable probability the result would have been different. *Martinez v. State*, 304 S.C. 39, 403 S.E.2d 113, 114 (1991); *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).

[2, 3] We address first petitioner's conviction for simple possession of marijuana, which does not constitute a crime of moral turpitude. A prior conviction may be used to impeach the credibility of a witness only if such conviction involves a crime of moral turpitude. *State v. Drakeford*, 290 S.C. 338, 350 S.E.2d 391 (1986). Hence, counsel's advice was the result of an erroneous legal syllogism.

Second, the offense of assault and battery with intent to kill for which petitioner was convicted in 1972 is classified as a crime of moral turpitude. However, the lapse of fifteen years between petitioner's 1972 conviction and his 1987 trial for distribution of cocaine raises the issue of remoteness in time. The decision of whether a prior conviction is too remote in time for admissibility to impeach a defendant is a matter within the sound discretion of the trial judge. *State v. Livingston*, 282 S.C. 1, 317 S.E.2d 129 (1984); *State v. Johnson*, 271 S.C. 485, 248 S.E.2d 313 (1978). There is no showing in the record that trial counsel sought a ruling on admissibility from the trial judge. Obviously, counsel's advice in this instance was premised upon an unsubstantiated legal assumption, and he was under a duty to move the court for a ruling either confirming or invalidating his assumption.

The PCR court determined that trial counsel's advice to petitioner not to testify was based on a tactical decision. We find that errors of law were involved, rendered more egregious by lack of ambiguity in the law. Hence, we conclude that counsel's representation fell below an objective stan-

the test for ineffective assistance of counsel.

The next consideration is whether petitioner was prejudiced by such ineffectiveness. Petitioner was arrested six months after the transaction occurred during an undercover operation. The agent was in the presence of the seller, previously unknown to him, for approximately four minutes outside at night. The state's evidence against the petitioner consisted solely of Agent Peaster's testimony. Petitioner contends that among the matters he wanted to testify about was his belief that he was framed by the confidential informant because of animosity on the part of the informant. Petitioner acknowledged the ultimate decision not to testify was his alone, but stated that he relied on counsel's advice in making the decision. Petitioner testified at the PCR hearing, "... but I had retained this counsel. I had paid him quite a bit of money. So, I don't know as much about the law as he does, so obviously I followed his advice.... But, I listened to his advice by him being my attorney."

We conclude that petitioner has met the second prong of the ineffective assistance test by a showing of prejudice by his reliance upon counsel's erroneous advice; and that, but for counsel's error, there is a reasonable probability the result would have been different.

[4] The PCR court's finding that petitioner's allegations of ineffective assistance of counsel are without merit is not supported by the record. A PCR judge's findings will not be upheld if such findings are not supported by probative evidence. *High v. State*, 300 S.C. 88, 386 S.E.2d 463 (1989); *Stone v. State*, 294 S.C. 286, 363 S.E.2d 903 (1988).

Accordingly, the order of the PCR court is reversed and this case is remanded for a new trial.

REVERSED and REMANDED.

GREGORY, HARWELL, CHANDLER and TOAL, JJ., concur.



Nevelle HENDERSON, Appellant,

v.

F & D ELECTRICAL CONTRACTORS and United States Fidelity and Guaranty Company, Respondents.

No. 1723.

Court of Appeals of South Carolina.

Heard Oct. 16, 1991.

Decided Nov. 12, 1991.

Rehearing Denied Dec. 5, 1991.

Following settlement of employee's workers' compensation claim, employer sought to recover its carrier lien from proceeds of third-party lawsuit pursuant to agreement between employer and employee. Industrial Commission found that employee was bound to pay under the agreement, and employee appealed. The Lexington County Circuit Court, Hubert E. Long, J., affirmed, and employee appealed. The Court of Appeals, Shaw, J., held that there is no requirement that Commission must approve agreement prior to conclusion of trial and settlement of third-party lawsuit.

Affirmed.

1. Administrative Law and Procedure ⇐791

Workers' Compensation ⇐1939.4(4)

On appeal from decision of Industrial Commission, standard of review is substantial evidence rule prescribed by Administrative Procedures Act, and thus scope of review is limited to making determination of whether or not there was substantial evidence to support factual findings of Commission. Code 1976, § 1-23-10 et seq.

2. Workers' Compensation ⇐2252

Industrial Commission was not required to approve carrier lien agreement between employer and employee prior to

APPENDIX HH

theory by which the Fourteenth Amendment protects the fundamental liberties of individual citizens, it is noteworthy that there is a large area of agreement, both here and in other cases, that certain basic rights are fundamental—not to be denied the individual by either the state or federal governments under the Constitution. See, e. g., Cantwell v. State of Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213; NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488; Gideon v. Wainwright, supra; New York Times Co. v. Sullivan, supra; Turner v. State of Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed. 2d 424.



380 U.S. 415

Jesse Elliott DOUGLAS, Petitioner,

v.

STATE OF ALABAMA.

No. 313.

Argued March 9 and 10, 1965.

Decided April 5, 1965.

Prosecution for assault with intent to commit murder. The Circuit Court, Dallas County, Alabama, entered a judgment of conviction and the defendant appealed. The Court of Appeals, 42 Ala. App. 314, 163 So.2d 477, affirmed, and the Alabama Supreme Court denied certiorari, 276 Ala. 703, 163 So.2d 496. The Supreme Court granted certiorari and in an opinion by Mr. Justice Brennan, held that State defendant's inability to cross-examine witness, who had been convicted for the same crime and refused while acting in his own interests to answer any questions in reliance on privilege against self-incrimination as to witness' alleged confession which implicated defendant and which was read to jury by prosecutor under guise of cross-examination after witness had claimed privilege, constituted a denial of defendant's right of cross-examination secured by Confrontation Clause of the Sixth Amendment.

Reversed and remanded.

1. Criminal Law ⇐662(1)

Confrontation Clause of the Sixth Amendment is applicable to the States. U.S.C.A.Const. Amend. 6.

2. Criminal Law ⇐662(1)

A primary interest secured by Confrontation Clause of the Sixth Amendment is right of cross-examination. U.S. C.A.Const. Amend. 6.

3. Criminal Law ⇐662(1)

An adequate opportunity for cross-examination may satisfy Confrontation Clause of the Sixth Amendment even in absence of a physical confrontation. U.S. C.A.Const. Amend. 6.

4. Criminal Law ⇐662(1, 3)

Primary object of Confrontation Clause of the Sixth Amendment is to prevent depositions or ex parte affidavits from being used against prisoner in lieu of personal examination and cross-examination of witness in which accused has opportunity, not only of testing recollection and sifting conscience of witness, but of compelling witness to stand face to face with jury which may judge by his demeanor whether his testimony is worthy of belief. U.S.C.A.Const. Amend. 6.

5. Criminal Law ⇐662(4)

State defendant's inability to cross-examine witness who had been convicted for the same crime and who refused, while acting in his own interests, to answer any questions in reliance on privilege against self-incrimination as to witness' alleged confession which implicated defendant and which was read to jury by prosecutor under guise of cross-examination after witness had claimed privilege, constituted a denial of defendant's right of cross-examination secured by Confrontation Clause of the Sixth Amendment. U.S.C.A.Const. Amend. 6.

6. Criminal Law ⇐662(4)

State defendant's opportunity to cross-examine law enforcement officers, who had testified that document read by prosecutor to jury under guise of cross-examination of witness who had invoked privilege against self-incrimination was the confession of witness, was not adequate to redress denial of defendant's right of cross-examination as secured by Confrontation Clause. U.S.C.A.Const. Amend. 6.

7. Courts ⇐394(1)

The adequacy of state procedural bars to the assertion of federal questions is itself a federal question.

8. Courts ⇐396(7)

An objection which is ample and timely to bring alleged federal error to attention of state trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve claim for review in Supreme Court.

9. Courts ⇐396(7)

Defense counsel who objected in state prosecution to reading of witness' confession to jury at several points, at any of which corrective action could have been taken, made sufficient objection to reading of alleged confession to preserve claimed error for review by Supreme Court, and to extent state rule required objection to each question in prolonged series it was inadequate to bar review of federal question presented.

Charles Cleveland, Birmingham, Ala., for petitioner.

Paul T. Gish, Jr., Montgomery, Ala., for respondent.

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Mr. Justice BRENNAN delivered the opinion of the Court.

The petitioner and one Loyd were tried separately in Alabama's Circuit Court on charges of assault with intent to murder. Loyd was tried first and was found guilty. The State then called Loyd as a witness at petitioner's trial. Because Loyd planned to appeal his conviction, his lawyer, who also represented petitioner, advised Loyd to rely on the privilege against self-incrimination and not to answer any questions. When Loyd was sworn, the lawyer objected, on self-incrimination grounds, "to this witness appearing on the stand," but the objection was overruled. Loyd gave his name and address but, invoking the privilege, refused to answer any questions concerning the alleged crime. The trial judge ruled that Loyd could not rely on the privilege because of his conviction, and ordered him to answer, but Loyd persisted in his refusal.[1] The judge thereupon granted the State Solicitor's motion "to declare [Loyd] a hostile witness and give me the privilege of cross-examination." The Solicitor then produced a document said to be a confession signed by Loyd. Under the guise of cross-examination to refresh Loyd's recollection, the Solicitor purported to read from the document, pausing after every few sentences to ask Loyd, in the presence of the jury, "Did you make that statement?" Each time, Loyd asserted the privilege and refused to answer, but the Solicitor continued this form of questioning until the entire document

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had been read.[2] The Solicitor then called three law enforcement officers who identified the document as embodying a confession made and signed by Loyd. Although marked as an exhibit for identi-

1. Loyd had not been sentenced at the time of petitioner's trial. The trial judge initially threatened to hold Loyd in contempt for persisting in his refusal to answer after the judge had ruled that Loyd could not rely on the privilege since "the jury has already determined your guilt." However, the judge did not proceed with the contempt citation but interrupted petitioner's trial to sentence Loyd to 20 years' imprisonment.

2. There were 21 questions occupying seven pages in the printed record.

fication, the document was not offered in evidence.

This procedure, petitioner argues, violated his rights under the Confrontation Clause of the Sixth Amendment as applied to the States. The statements from the document as read by the Solicitor recited in considerable detail the circumstances leading to and surrounding the alleged crime; of crucial importance, they named the petitioner as the person who fired the shotgun blast which wounded the victim.[3] The jury found petitioner guilty.

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The Court of Appeals of Alabama affirmed, 42 Ala.App. 314, 163 So.2d 477. Although stating that Loyd's alleged confession was inadmissible in evidence against petitioner under state law because "[t]here must be confrontation face to face to allow viva voce cross-examination before the jury," and noting that "it might be claimed that the repeated and cumulative use of the confession might have been an indirect mode of getting the inadmissible confession in evidence," the Court of Appeals affirmed petitioner's conviction on the ground that petitioner's counsel had "stopped objecting" and that in that circumstance, "the failure to object was waiver." 42 Ala. App., at 329, 332, 163 So.2d, at 493, 495. The Supreme Court of Alabama denied review, 276 Ala. 703, 163 So.2d 496. We granted certiorari, 379 U.S. 815, 85 S.Ct. 77, 13 L.Ed.2d 28. We reverse.

I.

[1–4] We decide today that the Confrontation Clause of the Sixth Amendment is applicable to the States. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065. Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation. As the Court said in Mattox v. United States,

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits * * * being used against

3. Two of the Solicitor's questions were as follows:

"Did you make the further statement, 'We intended to shoot these trucks before they got to Centreville, but when we turned and went back north and passed the trucks again I was unable to bring myself to the point of shooting the trucks. After we passed the trucks this time we turned around and went south again toward Centreville, Alabama. These trucks were both stopped at a truck stop in Centreville where we passed them again and we proceeded on south on No. 5 about twenty miles. We sat alongside of the highway waiting for the trucks to come on and several trucks passed us, so we thought we ought to move before someone recognized us. We went back north again and saw a station wagon that looked suspicious so we turned off No. 5 onto 16. We drove over this route about six or eight miles and pulled in behind a church. We sat there for about five minutes and then heard what sounded like two trucks together going south on No. 5. We thought this was the two trucks and we went back to No. 5. When we got to No. 5 I told Douglas that I would drive and he said that was fine because I knew the car better than he. I drove on until we caught these trucks about five or eight miles above the junction of No. 5 and No. 80 and we passed them proceeding on to the junction where we turned around and headed back north to meet these trucks. Jesse Douglas was in the back seat with the automatic shotgun that belongs to B. F. Jackson and had it loaded with buckshot. He rolled down the window and when we passed these trucks he shot the lead truck as we passed them heading back north as they were coming south. We then went on to Highway 14, turned left and went into Greensboro, Alabama. We turned left in Greensboro on No. 69, drove south about five miles and realized we were going the wrong direction to go to Tuscaloosa, Alabama. We turned around and went back up to No. 69 to Tuscaloosa.' Did you make that statement?"

"Were you asked the question, 'How many shots were fired at the truck?' And your answer, 'Only one.' Did you say that?"

the prisoner

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in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." 156 U.S. 237, 242–243, 15 S.Ct. 337, 339, 39 L.Ed. 409.

See also 5 Wigmore, Evidence §§ 1365, 1397 (3d ed. 1940); State v. Hester, 137 S.C. 145, 189, 134 S.E. 885, 900 (1926).

[5, 6] In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause. Loyd's alleged statement that the petitioner fired the shotgun constituted the only direct evidence that he had done so; coupled with the description of the circumstances surrounding the shooting, this formed a crucial link in the proof both of petitioner's act and of the requisite intent to murder. Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true. Slochower v. Board of Higher Education, 350 U.S. 551, 557–558, 76 S.Ct. 637, 640–641, 100 L.Ed. 692; United States v. Maloney, 262 F.2d 535, 537 (C.A.2d Cir. 1959). Since the Solicitor was not a witness, the inference from his reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be cross-examined on a statement imputed to but not admitted by him. Nor was the opportunity to cross-examine the law enforcement

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officers adequate to redress this denial of the essential right secured by the Confrontation Clause. Indeed, their testimony enhanced the danger that the jury would treat the Solicitor's questioning of Loyd and Loyd's refusal to answer as proving the truth of Loyd's alleged confession. But since their evidence tended to show only that Loyd made the confession, cross-examination of them as to its genuineness could not substitute for cross-examination of Loyd to test the truth of the statement itself. Motes v. United States, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150; cf. Kirby v. United States, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890.

Hence, effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer. We need not decide whether Loyd properly invoked the privilege in light of his conviction. It is sufficient for the purposes of deciding petitioner's claim under the Confrontation Clause that no suggestion is made that Loyd's refusal to answer was procured by the petitioner, see Motes v. United States, supra, 178 U.S. at 471, 20 S.Ct. at 998; on this record it appears that Loyd was acting entirely in his own interests in doing so. This case cannot be characterized as one where the prejudice in the denial of the right of cross-examination constituted a mere minor lapse. The alleged statements clearly bore on a fundamental part of the State's case against petitioner. The circumstances are therefore such that "inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." Namet v. United States, 373 U.S. 179, 187, 83 S.Ct. 1151, 1155, 10 L.Ed.2d 278, See also Fletcher v. United States, 118 U.S. App.D.C. 137, 332 F.2d 724 (1964).

II.

[7–9] We cannot agree with the Alabama Court of Appeals that petitioner's counsel waived the right to confrontation

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through failure to make sufficient objection to the reading of Loyd's alleged confession. The court stated: "There must be a ruling sought and acted on before the trial judge can be put in error. Here there was no ruling asked or invoked as to the questions embracing the alleged confession." 42 Ala.App., at 332, 163 So.2d, at 495. Yet, as the colloquy set out in the margin shows, petitioner's counsel did object three times to the reading of the confession before the jury.[4] After the second time, the Solicitor

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assured him that he already had an objection in—plainly implying that further objection to the reading of the document was unnecessary. The ground for objection to later questions would have been the same, that the confession was being read to the jury. In light of this record it is difficult to understand the Court of Appeals' conclusion; nevertheless, accepting the finding as an authoritative interpretation of Alabama law, we follow our consistent holdings that the adequacy of state procedural bars to the assertion of federal questions is itself a federal question. See Wright v. Georgia, 373 U.S. 284, 289–291, 83 S.Ct. 1240, 1243–1245, 10 L.Ed. 2d 349. In determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here. Davis v. Wechsler, 263 U.S. 22, 24, 44 S.Ct. 13, 14, 68 L.Ed. 143; Love v. Griffith, 266 U.S. 32, 33–34, 45 S. Ct. 12, 69 L.Ed. 157. No legitimate state interest would have been served

4. The following occurred:

"Q. Is that your signature (showing witness signature on confession)?

"A. I'm not sure.

"Q. I will ask you if on January 20, 1962—

"Mr. Esco: (Interrupting) If your Honor please, I object to the reading of any document or purported confession,—

"Mr. McLeod: (Interrupting) This is cross-examination.

"The Court: Hostile witness. Overrule.

"Mr. Esco: We except, if you please.

"Q. I will ask you if on the night of January 20, 1962, in Selma, Alabama, in the Dallas County jail if you didn't make the following statement: (reading) 'I, Olen Ray Loyd, make the—'

"Mr. Esco: (Interrupting) I object to this being read in the presence of the jury.

"Mr. McLeod: You've already got an objection in there.

"Mr. Esco: I object to this being read in the presence of the jury.

"The Court: Overrule.

"Mr. Esco: We except."

After the questions were read, defense counsel renewed his objections:

"Mr. Esco: I'd first like to object to the reading of this purported confession on the grounds that it is hearsay evidence, that it was made outside the hearing of this defendant, it was not subject to cross-examination, and we move to exclude it from the evidence.

"The Court: The Court will deny your motion.

"Mr. Esco: We except, if you please. And at this time, your Honor, we make a motion for a mistrial on the grounds that this jury has been so prejudiced from these proceedings, and from the attempts of the prosecution to use illegal evidence, that no fair and just verdict whatsoever could come from a jury that has been so prejudiced.

"The Court: Motion is denied.

"Mr. Esco: We except, if you please.

* * * * *

"Mr. Esco: We would like to make a motion for a new trial on the grounds that the proceedings have been very irregular here today and we feel that it has been prejudicial to this defendant.

"The Court: * * * Your objection is overruled.

"Mr. Esco: It is a motion, your Honor.

"The Court: Your motion is overruled.

"Mr. Esco: We except, if you please."

APPENDIX I I

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(Cite as: 152 Ariz. 116, 730 P.2d 825)

Supreme Court of Arizona, In Banc.

STATE of Arizona, Appellee,
v.
James Clifford FISHER, Appellant.

No. CR 86-0073-PC.

Dec. 31, 1986.

Petition was filed for postconviction relief from judgment of first-degree murder. The Superior Court, Maricopa County, Cause No. CR-122316, Philip Marquardt, J., denied petition. Petitioner appealed. The Supreme Court, Cameron, J., held that: (1) attorney's representation at trial, which relied on strategy that petitioner's wife was guilty, was not ineffective assistance, and (2) attorney's failure, at hearing on motion for new trial, to present witnesses to support unsworn confession of petitioner's wife was deficient performance and prejudiced petitioner.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Criminal Law k641.13(6)
110k641.13(6)
Petitioner's attorney, who elicited testimony of wife's violent character, defendant's state of inebriation, and location of furniture and bloodstains at murder scene in attempt to portray wife as guilty party, did not render ineffective assistance, where attorney tried to confront wife with her plea agreement in hope of persuading jury that refusal to testify was motivated by fear of losing benefits of agreement, and where attorney argued defense of wife's guilt to jury. A.R.S. § 13-1105; U.S.C.A. Const.Amend. 6.

[2] Criminal Law k641.13(7)
110k641.13(7)
Attorney's failure to investigate and present necessary evidence at hearing on motion for new trial to support unsworn confession of guilt by petitioner's wife was deficient performance for purpose of determining whether attorney rendered ineffective assistance, where attorney did not secure presence of witness to whom wife had confessed guilt. A.R.S. § 13-1105; U.S.C.A. Const.Amend. 6.

[3] Criminal Law k641.13(7)
110k641.13(7)
Attorney's deficient performance that consisted of failure, at hearing on motion for new murder trial, to call witnesses to whom petitioner's wife had confessed guilt, prejudiced petitioner, and, therefore, was ineffective assistance. A.R.S. § 13-1105; U.S.C.A. Const.Amend. 6.

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Robert K. Corbin, Atty. Gen. by William J. Schafer III and Gary A. Fadell, Phoenix, for appellee.

J. Douglas McVay, Phoenix, for appellant.

CAMERON, Justice.

I. Jurisdiction

Defendant, James C. Fisher, was convicted of first-degree murder of a seventy-three-year-old woman, Marguerite Bailey, A.R.S. § 13-1105, and was sentenced to death. Defendant's conviction and sentence were affirmed on appeal. State v. Fisher, 141 Ariz. 227, 686 P.2d 750, cert. denied, 469 U.S. 1066, 105 S. Ct. 548, 83 L. Ed.2d 436 (1984). Defendant sought post-conviction relief. He petitions this court for review of the denial of his request for post-conviction relief. See 17 A.R.S. Rules of Crim.Proc., Rule 32. We have jurisdiction pursuant to Ariz. Const. art. VI, § 5(3), A.R.S. § 13-4031 and 17 A.R.S. Rules of Crim.Proc., Rule 32.9.

II. Issues

We must answer the following issues:

1) Was counsel's performance at trial ineffective?
2) Was counsel's performance at the motion for new trial ineffective?

III. Facts and Procedural Background

At the time of the homicide, defendant and his wife, Ann, lived in and managed a Phoenix apartment complex owned by the victim, Marguerite Bailey. Bailey's body ****826 *117** was discovered in an alley early Sunday morning, 13 September 1981. Pursuing their investigation, the police entered the defendant's abandoned apartment where they discovered evidence of the murder.

Both defendant and Ann were arrested on 17 September 1981, at defendant's mother's home in Davenport, Iowa. As the result of police interrogation, Ann made a statement inculpating defendant

in Bailey's murder. Once the police confronted defendant with Ann's statement, he confessed to the murder, reiterating Ann's earlier statements.

At trial, defendant's main defense was that his wife, Ann, was the guilty party and that he had confessed to protect her. He took the stand on his own behalf and so testified. A subsidiary defense was that he was so drunk that he blacked out the afternoon of the murder and did not know what happened.

Ann, in the meantime, entered into a plea agreement covering her potential liability for this homicide/robbery. The agreement permitted her to plead guilty to hindering prosecution, a class 5 felony, if certain conditions were met. 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 * * *.' " State v. Fisher, 141 Ariz. at 244, 686 P.2d at 767 (1984).

Efforts at defendant's trial to obtain the testimony of Ann were unsuccessful as she followed her counsel's advice to claim her fifth amendment privilege and refused to testify about the murder. The defense unsuccessfully attempted to introduce letters written by Ann to defendant while he was in jail which declared his innocence. Subsequent to Ann's appearance, the trial judge reversed his earlier ruling and admitted Ann's plea agreement into evidence. Once the agreement was admitted into evidence, Ann was not recalled as a witness. The jury found defendant guilty.

After defendant's trial but before sentencing, Ann pled guilty to hindering prosecution and received a sentence of 2.5 years. Shortly thereafter, she contacted defendant's attorney, Thornton W. Price III, and confessed that she, rather than defendant, had killed Bailey. Arguing that a transcript of Ann's confession and her sworn affidavit were newly discovered evidence, Price moved for a new trial.

At the hearing on the motion for new trial, Price did not have Ann testify nor did he introduce any additional written materials from Ann at that time. Neither did he call Betty Fisher, defendant's former wife, although her testimony would have indicated that Ann's confession was consistent with prior statements. The trial court denied the motion for new trial, holding that the evidence was not newly discovered and was not credible.

At sentencing, the trial judge found two aggravating circumstances: 1) that defendant killed Bailey in expectation of receipt of something of pecuniary value, A.R.S. § 13-703(F)(5); and 2) that Bailey was killed in an especially heinous and depraved manner, A.R.S. § 13-703(F)(6). The court found no mitigating circumstances sufficiently substantial to call for leniency and imposed the death penalty.

On appeal, this court affirmed the conviction and sentence, State v. Fisher, 141 Ariz. at 253, 686 P.2d at 776, and denied a motion for reconsideration.

Six months later, Fisher filed a propria persona petition for post-conviction relief pursuant to Rule 32 in Maricopa County Superior Court claiming, among other things, ineffective assistance of counsel. At the Rule 32 hearing, defendant and his former trial counsel, Price, testified in person.

IV. Ineffective Assistance of Counsel at Trial

[1] In support of his claim of ineffective assistance of counsel at trial, defendant testified that he had wanted to take a polygraph test, even though he knew it was inadmissible, but Price had refused. Additionally, defendant claimed that a handwriting analysis should have been done on the map found in his apartment **827 *118 showing the location where the victim's car was found; also, the map should have been dusted and sprayed for prints. Defendant recalled asking Price to obtain a crime-scene reconstruction expert to show that the hammer blows to Bailey's head were struck by a right-handed person, such as Ann. Defendant is left-handed.

Defendant also testified that his lawyer was aware of his earlier mental problems, his possible temporal lobe epilepsy, and alcohol problems, yet did not utilize this evidence at the sentencing phase of the case. Defendant accused Price of failing to follow up on evidence of Ann's mental problems and propensities for violence.

Price, a certified criminal law specialist, testified at length as to his strategy in the case; he and defendant had discussed that strategy extensively. Price had no recollection of the polygraph issue, but would not have recommended it in any event. Concerning the handwriting and fingerprints on the map, Price felt that an analysis would not have proven anything and, that since the state had not offered any fingerprint evidence, he preferred not to stir up possible trouble.

Price saved the right-handed vs. left-handed theory for his closing argument, thinking he could argue persuasively from the location of the furniture and blood stains at the murder scene and from the placement of the blows to Bailey's head. Furthermore, to his knowledge, the state had not pursued this theory. Price believed that asking the court for funds for a crime-scene reconstruction would have required an explanation of the theory, thereby losing the element of surprise. Plus, experts might have proven the theory wrong. Price admitted that he had not thought of the theory until after the start of the trial, although perhaps he could have obtained a continuance. Additionally, Price admitted that he was not aware that he could have obtained funds ex parte to hire a crime-scene reconstruction expert or to have a polygraph test done.

Price acknowledged that he and defendant had discussed extensively Fisher's mental problems, including the alcoholism and temporal lobe epilepsy. Price was fully aware of defendant's hospitalizations and medical care. He obtained the records and provided them to two local psychiatrists. The information was made available to the jury through psychiatric testimony and defendant's own testimony. There never was any firm medical diagnosis of temporal lobe epilepsy that could have been presented.

To determine whether trial counsel was ineffective, a two-pronged test is applied: 1) was counsel's performance deficient? State v. Nash, 143 Ariz. 392, 397, 694 P.2d 222, 227, cert. denied, 471 U.S. 1143, 105 S. Ct. 2689, 86 L. Ed.2d 706 (1985); and 2) was defendant prejudiced by his attorney's deficient performance? State v. Lee, 142 Ariz. 210, 213-14, 689 P.2d 153, 156-57 (1984). This test complies with the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984).

The first prong requires the defendant to specify the acts or omissions of counsel that allegedly constitute ineffective assistance. The evidence must overcome a presumption that the challenged action was sound trial strategy under the circumstances. Id. at 689, 104 S. Ct. at 2066, 80 L. Ed.2d at 694-95. After examining all the circumstances existing at the time of counsel's actions, we will find deficient representation only where counsel's performance falls below objective standards of reasonable representation measured by prevailing professional norms. Nash, 143 Ariz. at 397, 694 P.2d at 227, citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065-66, 80 L. Ed.2d at 693.

We disagree with defendant's contention that counsel's performance at trial was deficient. The defense strategy, developed by Price and defendant together, of portraying Ann as the guilty party was difficult given Ann's posture in the case and defendant's earlier confession. Nevertheless, Price acted reasonably in presenting the defense: eliciting testimony on Ann's violent character, defendant's state of inebriation, ***119 ****828** and the location of furniture and blood stains at the murder scene. Price tried to confront Ann with her plea agreement, hoping to persuade the jury that her refusal to testify was motivated by fear of losing the agreement's benefits. Furthermore, in his closing argument, Price argued the defense of Ann's guilt to the jury. Price's performance at trial as measured by prevailing professional norms did not fall below objective standards of reasonable representation. We hold that counsel's representation at trial was not ineffective.

V. Ineffective Assistance of Counsel at the Motion for New Trial

A review of the facts and circumstances surrounding counsel's representation of defendant in the motion for new trial reveals, however, specific incidents where counsel failed to properly investigate or utilize vital evidence and testimony.

At the Rule 32 hearing, a transcript prepared from a tape recording of an unsworn interview of Betty Fisher was admitted into evidence. Defendant and Betty were married for fifteen years, but lived together, off and on, for several years after divorcing in 1975. The interview was conducted in Iowa by defendant's current lawyer together with an attorney from the Arizona Attorney General's Office. The interview occurred after the defendant's appeal had been decided by this court.

The interview with Betty painted a picture of Ann as a woman who had a history of violence, who ran around with other men, and who used drugs. After being arrested, defendant had told Betty that he confessed to protect Ann and that Ann had told James that "she had took and hit her [Bailey] in the head with a hammer, and killed her." Betty also related some phone conversations and letters she had received from Ann. In all, Betty received some 20 to 30 telephone calls from Ann. Ann told

Betty several stories about the killing, none of them implicating defendant as the killer. According to Betty, one story was that defendant was innocent because he was passed out when a "Roger" came in and murdered Bailey. According to Ann, Roger supposedly lived in the apartments and "had it in" for the landlady. By other accounts, Ann and Roger both were involved. After defendant's conviction and Ann's sentencing, Ann confessed to Betty that she had killed Bailey and gave a detailed description of the murder. Ann reiterated this confession to Betty on several occasions.

Betty also related some conversations with Price about her coming to Phoenix to testify at trial, but that she did not have the money. Price recalled these telephone conversations with Betty. He remembered that they had talked about defendant's alcoholism and Betty's conversations with Ann. Price never sent Betty the money or a ticket as he thought her testimony at trial would be cumulative and unnecessary.

At the hearing on the motion for new trial, Price presented only the unsworn confession of Ann. Ann did not appear as a witness; consequently, the trial judge's questions as to her willingness to testify at a new trial went unanswered. Nor did Betty appear as a witness to testify that Ann's confession was consistent with statements Ann had made to her. Counsel failed to present any proof supporting his argument that Ann's confession was not recanted, and therefore unreliable, testimony.

The sixth amendment guarantees the right to a fair trial by protecting an adversarial process where the accused has counsel acting in the role of an advocate. Anders v. California, 386 U.S. 738, 741-42, 87 S. Ct. 1396, 1398-99, 18 L. Ed.2d 493, 496-97 (1967). As an advocate, "[c]ounsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed.2d at 694. "Because that testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, . . . 'counsel has a duty to make reasonable investigations or to make a reasonable decision **829 *120 that makes particular investigations unnecessary.' " Kimmelman v. Morrison, 477 U.S. ----, ----, 106 S. Ct. 2574, 2588, 91 L. Ed.2d 305, 325 (1986) (quoting Strickland, 466 U.S. at 689, 104 S. Ct. at 2066, 80 L. Ed.2d at 695).

[2] We believe counsel failed in his required duty to use the skill, thoroughness and preparation reasonably necessary by failing to investigate and present necessary evidence at the hearing on the motion for new trial. Failure to do so was unreasonable given the nature of the evidence admitted at trial.

For the second prong of the ineffective counsel test, prejudice to the defendant requires only a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Lee, 142 Ariz. at 214, 689 P.2d at 157, quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed.2d at 698. "[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695, 104 S. Ct. at 2069, 80 L. Ed.2d at 698. We have defined a "reasonable probability" as "less than 'more likely than not' but more than a mere possibility." Lee, 142 Ariz. at 214, 689 P.2d at 157. According to Strickland, a "showing that the decision reached would reasonably likely have been

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CALHOUN)	CA No. 98-CP-09-101
HERMAN HUGHES, JR.,)	
)	
Applicant,)	
)	
v.)	
)	AFFIDAVIT
MICHAEL MOORE,Commissioner) of Department of Corrections,)	
)	
Respondent.)	
)	

HAROLD MORGAN, M.D., who appeared personally before me and after being duly sworn, deposes and says:

1. I am a psychiatrist in Columbia, South Carolina.

2. I graduated from Emory University and I received my medical degree from the Medical College of Georgia in 1962. My residency training in psychiatry took place at the William S. Hall Psychiatric Institute, and I also trained for one year in Forensic Psychiatry at Harvard University. I am licensed to practice medicine in South Carolina and Georgia, and am Board Certified in General Psychiatry by the American Board of Psychiatry and Neurology, and Forensic Psychiatry by the American Board of Forensic Psychiatry.

3. As part of my practice in forensic psychiatry, I was asked to evaluate Herman Hughes, the Applicant in this action, and to testify at his capital trial in Calhoun County. I was retained very shortly before the trial commenced. I testified that Mr. Hughes was probably mentally retarded, had attention deficit disorder, and had a mixed personality disorder with paranoid, passive, and dependent features.

4. As I am not a psychologist, I was not asked to administer any intellectual testing, assess the validity of psychological testing performed by others, or determine any *particular* areas in which Mr. Hughes' cognitive and intellectual functioning were impaired. I relied on the IQ testing performed by the Hall Institute, as well as IQ testing done in conjunction with Psychoeducational Evaluations by the Calhoun County School System. In my opinion, a psychologist would have been helpful in this case, especially given the unusual number of errors on Mr. Hughes' Bender tests, which were administered during a Psychoeducational Evaluation. The Bender tests often serve as a screening indicator for brain dysfunction, and the high number of errors suggests the need for further testing. Additionally, I have been informed by Mr. Hughes' post-conviction counsel that Herman's mother had syphilis during her pregnancy with Herman. I was not aware of this fact at the time of my evaluation. Had I known of this, I would have recommended that the issue be explored in more detail through additional psychological and neuropsychological testing.

5. Although the Hall Institute administered an IQ test to Mr. Hughes, it does not appear that anyone attempted to assess Mr. Hughes' adaptive functioning. While I am not an expert in mental retardation, the mere fact that someone's IQ tests slightly above 70 does not mean that the person is not mentally retarded. Furthermore, an assessment of adaptive functioning is especially important to the determination of whether an individual is mentally retarded.

6. Additionally, in both my clinical and my forensic practice, I focus primarily on treating adults, not children or adolescents. At the time of the crimes for which Mr. Hughes was convicted, he was only sixteen years old; *i.e.*, he was still an adolescent. Moreover, his intellectual limitations would certainly affect his emotional, psychological, and social maturation, making him less mature than an unimpaired adolescent of the same age. Given

this fact, I believe it would have been helpful if the psychologist referred to above had expertise in child and adolescent psychology and psychological testing and child development, or alternatively, some other individual with expertise in child psychology and development be consulted with in this case in order that the issue of Herman's adolescence be fully developed.

7. I have reviewed my testimony from Mr. Hughes' trial. While, as noted above, I am not an expert in child and adolescent development and psychiatry, if asked by counsel I could have discussed in more detail the significance of the fact that Herman was only sixteen years old at the time of the offense and the developmental, moral and maturational phases of children and teenagers.

8. Finally, I was not asked in this case to assess Mr. Hughes' potential adaptability to prison.

FURTHER AFFIANT SAYETH NAUGHT.

Harold Morgan, M.D.

Sworn to and subscribed before me
this 6th day of October, 1999.

Notary Public

My Commission Expires: 11-5-2007

APPENDIX KK

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CALHOUN)	CA No. 98-CP-09-101
HERMAN HUGHES, JR.,)	
)	
Applicant,)	
)	
v.)	
)	AFFIDAVIT
MICHAEL MOORE, Commissioner)	
of Department of Corrections,)	
)	
Respondent.)	
)	

JOHN H. DEWITT, M.D., who appeared personally before me and after being duly sworn, deposes and says:

1. I am a psychiatrist in Columbia, South Carolina. I have been licensed to practice medicine since 1985, and have been board certified in General Psychiatry since 1990 and in Forensic Psychiatry since 1996. I am a member of the American Psychiatric Association, the South Carolina Psychiatric Association, and the American Academy of Psychiatry and the Law.

2. I received my M.D. in 1984 from the University of South Carolina School of Medicine. In 1987, I completed a three-year residency in General Psychiatry at Vanderbilt University. In 1988, I completed a one-year Fellowship in Forensic Psychiatry at the Hall Institute in Columbia, South Carolina. Since 1988, I have been in private practice in General and Forensic Psychiatry.

3. As part of my practice in forensic psychiatry, I was asked by Attorney Phillip Newsom to evaluate Herman Hughes, the Applicant in this action, and to testify at his capital trial in Calhoun County. I did so, and testified that Mr. Hughes had intellectual limitations (borderline

intellectual functioning), probable attention deficit disorder, and passive and dependent personality features.

4. As I am not a psychologist, I was not asked to administer any psychological testing, assess the validity and significance of psychological testing performed by others, or determine any *particular* areas in which Mr. Hughes' cognitive and intellectual functioning were impaired. In my opinion, a psychologist should have been retained in this case, given the questions surrounding interpretation of psychological tests like the WAIS-R and particularly given the unusual number of errors on Mr. Hughes' Bender tests. The Bender tests often serve as a screening indicator for brain dysfunction, and once a subject has passed a certain age, a high number of errors suggests the need for further testing. However, I do not recall whether I actually recommended to trial counsel that he retain a psychologist or have additional testing conducted; in fact, I did not even know whether counsel had already retained a psychologist.

5. Additionally, I was not informed by counsel or otherwise that Mr. Hughes' mother had syphilis while she was pregnant with him.[1] Congenital syphilis, which is acquired *in utero*, can cause significant cognitive and other impairments. Therefore, further assessment of the possibility that Mr. Hughes had congenital syphilis, in addition to more thorough psychological and neuropsychological testing, was certainly warranted in this case. Unfortunately, I was retained only shortly before trial, had limited time to review records, and, as noted above, was not, in fact, aware that trial counsel had not retained a psychologist.

6. Additionally, in both my clinical and my forensic practice, I focus primarily on treating adults, not children or adolescents. In fact, I am not Board Certified in Child and Adolescent

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[1]I have been told that the records of the Hall Institute contain a brief reference to a positive syphilis test, but I was shown the Hall records only shortly before I took the stand and had little more than a chance to skim them.

Psychiatry. At the time of the crimes for which Mr. Hughes was convicted, he was only sixteen years old; *i.e.*, he was still an adolescent. Moreover, his intellectual limitations would certainly affect his emotional, psychological, and social maturation, making him less mature than an unimpaired adolescent of the same age. Given this fact, I believe it would have been important for trial counsel to either retain an expert or otherwise elicit evidence about the effect Mr. Hughes' youth had on his judgment at the time of the offense and his potential for rehabilitation, as well as more general evidence about child development and the effects of intellectual impairments and abuse or neglect upon normal development. However, all of these tasks were beyond the scope of what I was asked to do in this case. I do not believe I recommended at that time that trial counsel retain such an expert.

7. Finally, I was not asked in this case to assess Mr. Hughes' potential adaptability to prison.

FURTHER AFFIANT SAYETH NAUGHT.

John DeWitt, M.D.

John DeWitt, M.D.

Sworn to and subscribed before me
this 21st day of December, 1999.

Ann H Corrigan
Notary Public

My Commission Expires: 4/4/00

APPENDIX LL

Other Disorders of Infancy, Childhood, or Adolescence. This grouping is for disorders that are not covered in the sections listed above. **Separation Anxiety Disorder** is characterized by developmentally inappropriate and excessive anxiety concerning separation from home or from those to whom the child is attached. **Selective Mutism** is characterized by a consistent failure to speak in specific social situations despite speaking in other situations. **Reactive Attachment Disorder of Infancy or Early Childhood** is characterized by markedly disturbed and developmentally inappropriate social relatedness that occurs in most contexts and is associated with grossly pathogenic care. **Stereotypic Movement Disorder** is characterized by repetitive, seemingly driven, and nonfunctional motor behavior that markedly interferes with normal activities and at times may result in bodily injury. **Disorder of Infancy, Childhood, or Adolescence Not Otherwise Specified** is a residual category for coding disorders with onset in infancy, childhood, or adolescence that do not meet criteria for any specific disorder in the Classification.

Children or adolescents may present with problems requiring clinical attention that are not defined as mental disorders (e.g., Relational Problems, Problems Related to Abuse or Neglect, Bereavement, Borderline Intellectual Functioning, Academic Problem, Child or Adolescent Antisocial Behavior, Identity Problem). These are listed at the end of the manual in the section "Other Conditions That May Be a Focus of Clinical Attention" (see p. 675).

DSM-III-R included two anxiety disorders specific to children and adolescents, Overanxious Disorder of Childhood and Avoidant Disorder of Childhood, that have been subsumed under Generalized Anxiety Disorder and Social Phobia, respectively, because of similarities in essential features.

Mental Retardation

Diagnostic Features

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children—Revised, Stanford-Binet, Kaufman Assessment Battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65–75). Thus, it is possible to diagnose Mental Retardation in individuals with

IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. The choice of testing instruments and interpretation of results should take into account factors that may limit test performance (e.g., the individual's sociocultural background, native language, and associated communicative, motor, and sensory handicaps). When there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading.

Impairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with Mental Retardation. *Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation. Problems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute.

It is useful to gather evidence for deficits in adaptive functioning from one or more reliable independent sources (e.g., teacher evaluation and educational, developmental, and medical history). Several scales have also been designed to measure adaptive functioning or behavior (e.g., the Vineland Adaptive Behavior Scales and the American Association on Mental Retardation Adaptive Behavior Scale). These scales generally provide a clinical cutoff score that is a composite of performance in a number of adaptive skill domains. It should be noted that scores for certain individual domains are not included in some of these instruments and that individual domain scores may vary considerably in reliability. As in the assessment of intellectual functioning, consideration should be given to the suitability of the instrument to the person's sociocultural background, education, associated handicaps, motivation, and cooperation. For instance, the presence of significant handicaps invalidates many adaptive scale norms. In addition, behaviors that would normally be considered maladaptive (e.g., dependency, passivity) may be evidence of good adaptation in the context of a particular individual's life (e.g., in some institutional settings).

Degrees of Severity of Mental Retardation

Four degrees of severity can be specified, reflecting the level of intellectual impairment: Mild, Moderate, Severe, and Profound.

317	**Mild Mental Retardation:**	IQ level 50–55 to approximately 70
318.0	**Moderate Retardation:**	IQ level 35–40 to 50–55
318.1	**Severe Mental Retardation:**	IQ level 20–25 to 35–40
318.2	**Profound Mental Retardation:**	IQ level below 20 or 25

319 Mental Retardation, Severity Unspecified, can be used when there is a strong presumption of Mental Retardation but the person's intelligence is untestable by standard tests (e.g., with individuals too impaired or uncooperative, or with infants).

317 Mild Mental Retardation

Mild Mental Retardation is roughly equivalent to what used to be referred to as the educational category of "educable." This group constitutes the largest segment (about 85%) of those with the disorder. As a group, people with this level of Mental Retardation typically develop social and communication skills during the preschool years (ages 0–5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level. During their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.

318.0 Moderate Mental Retardation

Moderate Mental Retardation is roughly equivalent to what used to be referred to as the educational category of "trainable." This outdated term should not be used because it wrongly implies that people with Moderate Mental Retardation cannot benefit from educational programs. This group constitutes about 10% of the entire population of people with Mental Retardation. Most of the individuals with this level of Mental Retardation acquire communication skills during early childhood years. They profit from vocational training and, with moderate supervision, can attend to their personal care. They can also benefit from training in social and occupational skills but are unlikely to progress beyond the second-grade level in academic subjects. They may learn to travel independently in familiar places. During adolescence, their difficulties in recognizing social conventions may interfere with peer relationships. In their adult years, the majority are able to perform unskilled or semiskilled work under supervision in sheltered workshops or in the general work force. They adapt well to life in the community, usually in supervised settings.

318.1 Severe Mental Retardation

The group with Severe Mental Retardation constitutes 3%–4% of individuals with Mental Retardation. During the early childhood years, they acquire little or no communicative speech. During the school-age period, they may learn to talk and can be trained in elementary self-care skills. They profit to only a limited extent from instruction in pre-academic subjects, such as familiarity with the alphabet and simple counting, but can master skills such as learning sight reading of some "survival" words. In their adult years, they may be able to perform simple tasks in closely supervised settings. Most adapt well to life in the community, in group homes or with their families, unless they have an associated handicap that requires specialized nursing or other care.

318.2 Profound Mental Retardation

The group with Profound Mental Retardation constitutes approximately 1%–2% of people with Mental Retardation. Most individuals with this diagnosis have an identified

neurological condition that accounts for their Mental Retardation. During the early childhood years, they display considerable impairments in sensorimotor functioning. Optimal development may occur in a highly structured environment with constant aid and supervision and an individualized relationship with a caregiver. Motor development and self-care and communication skills may improve if appropriate training is provided. Some can perform simple tasks in closely supervised and sheltered settings.

319 Mental Retardation, Severity Unspecified

The diagnosis of Mental Retardation, Severity Unspecified, should be used when there is a strong presumption of Mental Retardation but the person cannot be successfully tested by standard intelligence tests. This may be the case when children, adolescents, or adults are too impaired or uncooperative to be tested or, with infants, when there is a clinical judgment of significantly subaverage intellectual functioning, but the available tests (e.g., the Bayley Scales of Infant Development, Cattell Infant Intelligence Scales, and others) do not yield IQ values. In general, the younger the age, the more difficult it is to assess for the presence of Mental Retardation except in those with profound impairment.

Recording Procedures

The specific diagnostic code for Mental Retardation is selected based on the level of severity as indicated above and is coded on Axis II. If Mental Retardation is associated with another mental disorder (e.g., Autistic Disorder), the additional mental disorder is coded on Axis I. If Mental Retardation is associated with a general medical condition (e.g., Down's syndrome), the general medical condition is coded on Axis III.

Associated Features and Disorders

Associated descriptive features and mental disorders. No specific personality and behavioral features are uniquely associated with Mental Retardation. Some individuals with Mental Retardation are passive, placid, and dependent, whereas others can be aggressive and impulsive. Lack of communication skills may predispose to disruptive and aggressive behaviors that substitute for communicative language. Some general medical conditions associated with Mental Retardation are characterized by certain behavioral symptoms (e.g., the intractable self-injurious behavior associated with Lesch-Nyhan syndrome). Individuals with Mental Retardation may be vulnerable to exploitation by others (e.g., being physically and sexually abused) or being denied rights and opportunities.

Individuals with Mental Retardation have a prevalence of comorbid mental disorders that is estimated to be three to four times greater than in the general population. In some cases, this may result from a shared etiology that is common to Mental Retardation and the associated mental disorder (e.g., head trauma may result in Mental Retardation and in Personality Change Due to Head Trauma). All types of mental disorders may be seen, and there is no evidence that the nature of a given mental disorder is different in individuals who have Mental Retardation. The diagnosis of comorbid mental disorders is, however, often complicated by the fact that the clinical presentation may be modified

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by the severity of the Mental Retardation and associated handicaps. Deficits in communication skills may result in an inability to provide an adequate history (e.g., the diagnosis of Major Depressive Disorder in a nonverbal adult with Mental Retardation is often based primarily on manifestations such as depressed mood, irritability, anorexia, or insomnia that are observed by others). More often than is the case in individuals without Mental Retardation, it may be difficult to choose a specific diagnosis and in such cases the appropriate Not Otherwise Specified category can be used (e.g., Depressive Disorder Not Otherwise Specified). The most common associated mental disorders are Attention-Deficit/Hyperactivity Disorder, Mood Disorders, Pervasive Developmental Disorders, Stereotypic Movement Disorder, and Mental Disorders Due to a General Medical Condition (e.g., Dementia Due to Head Trauma). Individuals who have Mental Retardation due to Down's syndrome may be at higher risk for developing Dementia of the Alzheimer's Type. Pathological changes in the brain associated with this disorder usually develop by the time these individuals are in their early 40s, although the clinical symptoms of dementia are not evident until later.

Predisposing factors. Etiological factors may be primarily biological or primarily psychosocial, or some combination of both. In approximately 30%–40% of individuals seen in clinical settings, no clear etiology for the Mental Retardation can be determined despite extensive evaluation efforts. The major predisposing factors include:

Heredity (approximately 5%): These factors include inborn errors of metabolism inherited mostly through autosomal recessive mechanisms (e.g., Tay-Sachs disease), other single-gene abnormalities with Mendelian inheritance and variable expression (e.g., tuberous sclerosis), and chromosomal aberrations (e.g., translocation Down's syndrome, fragile X syndrome).

Early alterations of embryonic development (approximately 30%): These factors include chromosomal changes (e.g., Down's syndrome due to trisomy 21) or prenatal damage due to toxins (e.g., maternal alcohol consumption, infections).

Pregnancy and perinatal problems (approximately 10%): These factors include fetal malnutrition, prematurity, hypoxia, viral and other infections, and trauma.

General medical conditions acquired in infancy or childhood (approximately 5%): These factors include infections, traumas, and poisoning (e.g., due to lead).

Environmental influences and other mental disorders (approximately 15%–20%): These factors include deprivation of nurturance and of social, linguistic, and other stimulation, and severe mental disorders (e.g., Autistic Disorder).

Associated laboratory findings. Other than the results of psychological and adaptive behavior tests that are necessary for the diagnosis of Mental Retardation, there are no laboratory findings that are uniquely associated with Mental Retardation. Diagnostic laboratory findings may be associated with a specific accompanying general medical condition (e.g., chromosomal findings in various genetic conditions, high blood phenylalanine in phenylketonuria, or abnormalities on central nervous system imaging).

Associated physical examination findings and general medical conditions. There are no specific physical features associated with Mental Retardation. When Mental Retardation is part of a specific syndrome, the clinical features of that syndrome will be present (e.g., the physical features of Down's syndrome). The more severe the Mental Retardation (especially if it is severe or profound), the greater the likelihood of neurological (e.g., seizures), neuromuscular, visual, auditory, cardiovascular, and other conditions.

Specific Culture, Age, and Gender Features

Care should be taken to ensure that intellectual testing procedures reflect adequate attention to the individual's ethnic or cultural background. This is usually accomplished by using tests in which the individual's relevant characteristics are represented in the standardization sample of the test or by employing an examiner who is familiar with aspects of the individual's ethnic or cultural background. Individualized testing is always required to make the diagnosis of Mental Retardation. The prevalence of Mental Retardation due to known biological factors is similar among children of upper and lower socioeconomic classes, except that certain etiological factors are linked to lower socioeconomic status (e.g., lead poisoning and premature births). In cases in which no specific biological causation can be identified, lower socioeconomic classes are over-represented and the Mental Retardation is usually milder, although all degrees of severity are represented. Developmental considerations should be taken into account in evaluating impairment in adaptive skills because certain of the skill areas are less relevant at different ages (e.g., use of community resources or employment in school-age children). Mental Retardation is more common among males, with a male-to-female ratio of approximately 1.5:1.

Prevalence

The prevalence rate of Mental Retardation has been estimated at approximately 1%. However, different studies have reported different rates depending on definitions used, methods of ascertainment, and population studied.

Course

The diagnosis of Mental Retardation requires that the onset of the disorder be before age 18 years. The age and mode of onset depend on the etiology and severity of the Mental Retardation. More severe retardation, especially when associated with a syndrome with a characteristic phenotype, tends to be recognized early (e.g., Down's syndrome is usually diagnosed at birth). In contrast, Mild Retardation of unknown origin is generally noticed later. In more severe retardation resulting from an acquired cause, the intellectual impairment will develop more abruptly (e.g., retardation following an encephalitis). The course of Mental Retardation is influenced by the course of underlying general medical conditions and by environmental factors (e.g., educational and other opportunities, environmental stimulation, and appropriateness of management). If an underlying general medical condition is static, the course is more likely to be variable and to depend on environmental factors. Mental Retardation is not necessarily a lifelong disorder. Individuals who had Mild Mental Retardation earlier in their lives manifested by failure in academic learning tasks may, with appropriate training and opportunities, develop good adaptive skills in other domains and may no longer have the level of impairment required for a diagnosis of Mental Retardation.

Familial Pattern

Because of its heterogeneous etiology, no familial pattern is applicable to Mental Retardation as a general category. The heritability of Mental Retardation is discussed under "Predisposing Factors" (see p. 43).

Differential Diagnosis

The diagnostic criteria for Mental Retardation do not include an exclusion criterion; therefore, the diagnosis should be made whenever the diagnostic criteria are met, regardless of and in addition to the presence of another disorder. In **Learning Disorders** or **Communication Disorders** (unassociated with Mental Retardation), the development in a specific area (e.g., reading, expressive language) is impaired but there is no generalized impairment in intellectual development and adaptive functioning. A Learning Disorder or Communication Disorder can be diagnosed in an individual with Mental Retardation if the specific deficit is out of proportion to the severity of the Mental Retardation. In **Pervasive Developmental Disorders,** there is qualitative impairment in the development of reciprocal social interaction and in the development of verbal and nonverbal social communication skills. Mental Retardation often accompanies Pervasive Developmental Disorders (75%–80% of individuals with a Pervasive Developmental Disorder also have Mental Retardation).

Some cases of Mental Retardation have their onset after a period of normal functioning and may qualify for the additional diagnosis of **dementia.** A diagnosis of dementia requires that the memory impairment and other cognitive deficits represent a significant decline from a previously higher level of functioning. Because it may be difficult to determine the previous level of functioning in very young children, the diagnosis of dementia may not be appropriate until the child is between ages 4 and 6 years. In general, for individuals under age 18 years, the diagnosis of dementia is made only when the condition is not characterized satisfactorily by the diagnosis of Mental Retardation alone.

Borderline Intellectual Functioning (see p. 684) describes an IQ range that is higher than that for Mental Retardation (generally 71–84). As discussed earlier, an IQ score may involve a measurement error of approximately 5 points, depending on the testing instrument. Thus, it is possible to diagnose Mental Retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for Mental Retardation. Differentiating Mild Mental Retardation from Borderline Intellectual Functioning requires careful consideration of all available information.

Relationship to Other Classifications of Mental Retardation

The classification system of the American Association on Mental Retardation (AAMR) includes the same three criteria (i.e., significantly subaverage intellectual functioning, limitations in adaptive skills, and onset prior to age 18 years). In the AAMR classification, the criterion of significantly subaverage intellectual functioning refers to a standard score of approximately 70–75 or below (which takes into account the potential measurement error of plus or minus 5 points in IQ testing). Furthermore, DSM-IV specifies levels of severity, whereas the AAMR 1992 classification system specifies "Patterns and Intensity of Supports Needed" (i.e., "Intermittent, Limited, Extensive, and Pervasive"), which are not directly comparable with the degrees of severity in DSM-IV. The definition of developmental disabilities in Public Law 95-602 (1978) is not limited to Mental Retardation and is based on functional criteria. This law defines *developmental disability* as a disability attributable to a mental or physical impairment, manifested before age 22 years, likely to continue indefinitely, resulting in substantial limitation in three or more specified areas of functioning, and requiring specific and lifelong or extended care.

Diagnostic criteria for Mental Retardation

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test (for infants, a clinical judgment of significantly subaverage intellectual functioning).

B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

C. The onset is before age 18 years.

Code based on degree of severity reflecting level of intellectual impairment:

317 **Mild Mental Retardation:** IQ level 50–55 to approximately 70
318.0 **Moderate Mental Retardation:** IQ level 35–40 to 50–55
318.1 **Severe Mental Retardation:** IQ level 20–25 to 35–40
318.2 **Profound Mental Retardation:** IQ level below 20 or 25
319 **Mental Retardation, Severity Unspecified:** when there is strong presumption of Mental Retardation but the person's intelligence is untestable by standard tests

Learning Disorders (*formerly* Academic Skills Disorders)

The section on Learning Disorders includes Reading Disorder, Mathematics Disorder, Disorder of Written Expression, and Learning Disorder Not Otherwise Specified.

Diagnostic Features

Learning Disorders are diagnosed when the individual's achievement on individually administered, standardized tests in reading, mathematics, or written expression is substantially below that expected for age, schooling, and level of intelligence. The learning problems significantly interfere with academic achievement or activities of daily living that require reading, mathematical, or writing skills. A variety of statistical approaches can be used to establish that a discrepancy is significant. *Substantially below* is usually defined as a discrepancy of more than 2 standard deviations between achievement and IQ. A smaller discrepancy between achievement and IQ (i.e., between 1 and 2 standard deviations) is sometimes used, especially in cases where an individual's performance on an IQ test may have been compromised by an associated disorder in cognitive processing, a comorbid mental disorder or general medical condition, or the individual's ethnic or cultural background. If a sensory deficit is present, the learning

APPENDIX MM

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).

The General Assembly,

Mindful of the pledge of the States Members of the United Nations under the Charter to take joint and separate action in co-operation with the Organization to promote higher standards of living, full employment and conditions of economic and social progress and development,

Reaffirming faith in human rights and fundamental freedoms and in the principles of peace, of the dignity and worth of the human person and of social justice proclaimed in the Charter,

Recalling the principles of the Universal Declaration of Human Rights, the International Covenants on Human Rights, the Declaration of the Rights of the Child and the standards already set for social progress in the constitutions, conventions, recommendations and resolutions of the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization, the United Nations Children's Fund and other organizations concerned,

Emphasizing that the Declaration on Social Progress and Development has proclaimed the necessity of protecting the rights and assuring the welfare and rehabilitation of the physically and mentally disadvantaged,

Bearing in mind the necessity of assisting mentally retarded persons to develop their abilities in various fields of activities and of promoting their integration as far as possible in normal life,

Aware that certain countries, at their present stage of development, can devote only limited efforts to this end,

Proclaims this Declaration on the Rights of Mentally Retarded Persons and calls for national and international action to ensure that it will be used as a common basis and frame of reference for the protection of these rights:

1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.

2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.

3. The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.

4. Whenever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.

5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and interests.

6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.

7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.

Text accessed at <http://www1.umn.edu/humanrts/instree/t1drmrp.htm> (University of Minnesota Human Rights Library) (visited 12 Jan. 2001).

APPENDIX NN

UN Economic and Social Council resolution 1989/64, adopted on 24 May 1989

Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty

The Economic and Social Council,

Recalling its resolution 1984/50 of 25 May 1984, in which it approved the safeguards guaranteeing protection of the rights of those facing the death penalty,

Recalling also resolution 15 of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Recalling further section X of Council resolution 1986/10 of 21 May 1986, in which the Council requested a study on the question of the death penalty and new contributions of the criminal sciences to the matter,

Taking note of the report of the Secretary-General on the implementation of the United Nations safeguards guaranteeing protection of the rights of those facing the death penalty,

Noting with satisfaction that a large number of Member States have provided the Secretary-General with information on the implementation of the safeguards and have made contributions,

Noting with appreciation the study on the question of the death penalty and the new contributions of the criminal sciences to the matter,

Alarmed at the continued occurrence of practices incompatible with the safeguards guaranteeing protection of the rights of those facing the death penalty,

Aware that effective implementation of those safeguards requires a review of relevant national legislation and the improved dissemination of the text to all persons and entities concerned with them, as specified in resolution 15 of the Seventh Congress,

Convinced that further progress should be achieved towards more effective implementation of the safeguards at the national level on the understanding that they shall not be invoked to delay or to prevent the abolition of capital punishment,

Acknowledging the need for comprehensive and accurate information and additional research about the implementation of the safeguards and the death penalty in general in every region of the world,

1. *Recommends* that Member States take steps to implement the safeguards and strengthen further the protection of the rights of those facing the death penalty, where applicable, by:

(a) Affording special protection to persons facing charges for which the death penalty is provided by allowing time and facilities for the preparation of their defence, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases;

(b) Providing for mandatory appeals or review with provisions for clemency or pardon in all cases of capital offence:

(c) Establishing a maximum age beyond which a person may not be sentenced to death or executed;

(d) Eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution;

2. *Invites* Member States to co-operate with specialized bodies, non-governmental organizations, academic institutions and specialists in the field in efforts to conduct research on the use of the death penalty in every region of the world;

3. *Also invites* Member States to facilitate the efforts of the Secretary-General to gather comprehensive, timely and accurate information about the implementation of the safeguards and the death penalty in general;

4. *Invites* Member States that have not yet done so to review the extent to which their legislation provides for the safeguards guaranteeing protection of the rights of those facing the death penalty as set out in the annex to Economic and Social Council resolution 1984/50;

5. *Urges* Member States to publish, for each category of offence for which the death penalty is authorized, and if possible on an annual basis, information about the use of the death penalty, including the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted, and to include information on the extent to which the safeguards referred to above are incorporated in national law;

6. *Recommends* that the report of the Secretary-General on the question of capital punishment, to be submitted to the Economic and Social Council in 1990, in pursuance of Council resolution 1745 (LIV) of 16 May 1973, should henceforth cover the implementation of the safeguards as well as the use of capital punishment;

7. *Requests* the Secretary-General to publish the study on the question of the death penalty and the new contributions of the criminal sciences to the matter prepared pursuant to section X of Economic and Social Council resolution 1986/10 and to make it available, with other relevant documentation, to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

Text accessed at <http://www.web.amnesty.org/ai.nsf/index/ACT500061997> (Amnesty International: International standards on the death penalty) (visited 12 Jan. 2001).

APPENDIX OO

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QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES

Extrajudicial, summary or arbitrary executions

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission resolution 1997/61

Addendum

Mission to the United States of America

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Introduction

1. The Special Rapporteur on extrajudicial, summary or arbitrary executions visited the United States of America from 21 September to 8 October 1997. The visit took place following several requests

by the Special Rapporteur to the United States Government for an invitation. By letter dated 23 September 1994, the Special Rapporteur inquired whether the Government of the United States would consider inviting him to carry out a visit. By letter dated 25 September 1995, the Special Rapporteur reiterated his request. By letter dated 2 September 1996, the Special Rapporteur expressed concern that no reply had yet been received to his previous communications of 1994 and 1995 and reiterated his interest in conducting a mission to the United States. The invitation to visit the country was given orally to the Special Rapporteur on 8 October 1996 during a meeting held in Geneva with representatives of the Permanent Mission of the United States. The invitation was confirmed in writing by letter dated 17 October 1996.

2. The request for a visit to the United States was based on persistent reports suggesting that the guarantees and safeguards set forth in international instruments relating to fair trial procedures and specific restrictions on the death penalty were not being fully observed. Since his appointment in 1992, the Special Rapporteur has received information concerning a discriminatory and arbitrary use of the death penalty and a lack of adequate defence during trial and appeal procedures in the United States. Executions of juveniles and mentally retarded persons have also been a constant concern for the Special Rapporteur. In addition, information concerning the extension of the scope and the reintroduction of death penalty statutes in several states prompted the Special Rapporteur to request a visit to the United States.

3. The basis for the Special Rapporteur's work in the field of capital punishment lies in several resolutions of the Commission on Human Rights in which the Commission requested the Special Rapporteur "to continue monitoring the implementation of existing international standards on safeguards and restrictions relating to the imposition of the death penalty, bearing in mind the comments made by the Human Rights Committee in its interpretation of article 6 of the International Covenant on Civil and Political Rights, as well as the Second Optional Protocol thereto"

4. Although the main concern of the Special Rapporteur in requesting a visit to the United States was the application of the death penalty, other aspects of his mandate could not be ignored, in particular because reports of deaths in custody and deaths due to excessive use of force by law enforcement officials in the United States were also received by the Special Rapporteur.

5. From 21 September to 8 October 1997, in addition to Washington, D.C., the Special Rapporteur visited the States of New York, Florida, Texas and California. During his visit he met with federal and state authorities. In Washington, D.C. he met with the Deputy Assistant Secretary for Human Rights and other representatives of the Department of State, as well as with representatives from the Department of Justice, and several members of Congress. In New York, he met with the Chief Judge of the New York State Court of Appeals, the District Attorney for Bronx County, the Deputy Police Commissioner on Legal Matters and Representatives of the New York Capital Defenders Office. In addition, he also met with the former Governor of New York State, Mario Cuomo. In Florida, he met with the State Attorney, representatives of the Office of the Public Defender and the Chief of Police of Miami. During his stay in Texas, he held meetings with the Governor and his assistant on legal matters, representatives of the Office of the Attorney General in Austin and representatives of

the Office of the District Attorney in Houston. He also met with the Consul of Mexico in Houston. In California, he met with the Court Administrator of the California Supreme Court, the San Francisco Assistant Chief of Police, as well as with the Chief of Police of Los Angeles. The Special Rapporteur wishes to thank state authorities, and particularly former Governor Cuomo and Governor Bush, for their availability and cooperation with his visit.

6. The Special Rapporteur met with prison authorities in Huntsville, Texas, and in San Quentin, California. He had full access to the Ellis Death Row Unit in Huntsville and was able to meet with all the death row inmates he had requested to meet. In San Quentin, prison authorities offered the Special Rapporteur the possibility of meeting with three death row inmates other than those he had requested to see. The Special Rapporteur did not consider those conditions acceptable and therefore declined the offer. He nevertheless visited the premises of the prison. His repeated requests to visit women on death row in Broward Correctional Institution, Florida, remained unanswered.

7. In addition, the Special Rapporteur had the opportunity to meet with many non-governmental sources, including lawyers representing persons on death row, victims' families, experts on death penalty issues, specialists on juvenile justice and mental retardation, university professors and criminologists. He also met with representatives of non-governmental organizations such as the American Civil Liberties Union, the American Friends Service Committee, the Anthony Baez Foundation, Amnesty International-United States Section, the Death Penalty Information Center, the December 12th Movement, the California Appellate Project, the Ella Baker Center for Human Rights, Human Rights Watch, the International Human Rights Law Group, the International Association against Torture, the National Coalition to Abolish the Death Penalty, the NACCP [*sic*] Legal Defense Fund, New York Lawyers Against the Death Penalty, Parents Against Police Brutality, the Southern Region Rainbow Coalition, the Texas Coalition to Abolish the Death Penalty and the Texas Defender Service.

8. The Special Rapporteur wishes to thank the International Human Rights Law Group in Washington, D.C. for the assistance provided during his mission. Further, he would like to express his gratitude to Human Rights Watch, whose assistance in the organization of appointments at a non-governmental level was highly appreciated. He also wishes to thank the December 12th Movement for organizing public hearings on police violence in New York, as well as those NGOs and individuals who publicly testified during the hearing.

9. Despite the official invitation from the United States Government and its agreement on the dates, many difficulties arose in the organization of official meetings for the mission. The Department of State was only willing to provide assistance in arranging meetings at the federal level, but maintained it had no authority to facilitate the visit at state level. The Special Rapporteur regrets that none of the high-level meetings he requested at the federal level were arranged. In view of the above, he transmitted a letter dated 18 September 1997 to the United Nations High Commissioner for Human Rights expressing his concern at the obstacles his mission was facing. Official meetings at the state level were organized by the Office of the High Commissioner for Human Rights in Geneva and New York as well as by the United Nations Information Center (UNIC) in Washington, D.C.

10. The Special Rapporteur wishes to thank the Department of State for its efforts in trying to facilitate access for him to state prisons. Thus, by letters dated 22 September 1997, the Department of State requested prison authorities at Broward Correctional Institution in Florida, Huntsville in Texas, and San Quentin in California to cooperate with the visit of the Special Rapporteur.

I. THE RIGHT TO LIFE IN INTERNATIONAL LAW

11. The right to life is the supreme right, because without it, no other rights can be enjoyed. International law recognizes the right to life as a fundamental and non-derogable right. The death penalty is an exception to the right to life and, like any exception, it must be interpreted restrictively and carried out with the most scrupulous attention to fundamental principles of non-discrimination, fair trial standards and equal protection before the law. There is no right to capital punishment, and while Governments have the right to enact penal laws, these laws must conform to basic principles of international human rights law.

12. The supremacy of the right to life and the exceptional character of the death penalty are enshrined in several international instruments. Article 3 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights (ICCPR) provide that every individual has the right to life and security of the person, that this right shall be protected by law and that no one shall be arbitrarily deprived of his or her life.

13. Although the death penalty is not yet prohibited under international law, the desirability of its abolition has been strongly reaffirmed on different occasions by United Nations organs and bodies in the field of human rights, inter alia by the Security Council, the Human Rights Committee, the General Assembly and the Economic and Social Council.

14. Another recent indication of the increasing trend towards abolition of the death penalty can be seen in Commission on Human Rights resolution 1997/12 on the question of the death penalty. For the first time, the Commission on Human Rights adopted a resolution on capital punishment in which it called upon all States "that have not yet abolished the death penalty progressively to restrict the number of offences for which the death penalty may be imposed". It further called on States to consider suspending executions, with a view to abolishing the death penalty.

15. The gradual move within the United Nations to a position favouring the abolition of the death penalty was already observed in the reports on United Nations norms and guidelines in criminal justice: from standard-setting to implementation (A/CONF.87/8) and on capital punishment (A/CONF.87/9) presented to the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1980. The reports noted that the United Nations had gradually shifted from the position of a neutral observer, concerned about but not committed on the question of the death penalty, to a position favouring the eventual abolition of the death penalty.

16. Three treaties aiming at the abolition of the death penalty further confirm the tendency of the international community towards abolishing the death penalty: the Second Optional Protocol to the International Covenant on Civil and Political Rights; the Protocol to the American Convention on Human Rights to Abolish the Death Penalty; and the Protocol No. 6 to the European Convention on Human Rights.

A. The International Covenant on Civil and Political Rights: limitations on the imposition of the death penalty

17. The International Covenant on Civil and Political Rights and its first Optional Protocol, were adopted in 1966 by the General Assembly. The ICCPR came into force 10 years later, on 23 March 1976. By ratifying the ICCPR, a State accepts the obligation to give the force of law to the rights proclaimed by the Covenant. Civil and political rights enshrined in the International Covenant include, inter alia, the right to non-discrimination, the right to be treated equally before the law, the right to a fair trial, the right not to be submitted to torture, and the right to life. The object of the Covenant is the creation of minimum legally binding standards for human rights which, according to article 50 of the Covenant, shall extend to all parts of federal States without any limitation or exception. The United States of America ratified the ICCPR on 8 June 1992, with a package of reservations, declarations and understandings. On 8 September 1992, the treaty came into force for the United States.

18. Article 6 (1) of the ICCPR states that the right to life is an inherent right. The term "inherent right" was understood, during the drafting of the Covenant, as a right which is not conferred on a person by society but "rather that society is obliged to protect the right to life of an individual". It further stipulates that no one shall be arbitrarily deprived of his life. The concept of arbitrariness cannot be equated to "against the law", but has to be interpreted more broadly, to include the notion of inappropriateness and injustice. While the United States entered general reservations to article 6, no specific reservation was entered to article 6 (1) of the ICCPR (see paras. 27-35 below).

19. After setting out the general protection of the right to life, article 6 (2) indicates the conditions, in those countries where it has not been abolished, for imposing the death penalty. Article 6 (2), as an exception to the inherent right to life, should not be interpreted as authorizing the imposition of the death penalty in general, but only for those countries where it has not yet been abolished. It is the opinion of the Special Rapporteur that the negative wording of the article does not allow for the reinstatement of the death penalty after it has been abolished. The intent of this provision does not allow for the expansion of the scope of the death penalty. In this context, the Human Rights Committee has expressed the view that the extension of the scope of application of the death penalty raised questions as to the compatibility with article 6.

20. Other limitations imposed by article 6 of the ICCPR are the following.

21. A sentence of death can only be imposed for the most serious crimes. The Human Rights Committee considers that this expression "must be read restrictively to mean that the death penalty should be a quite exceptional measure". The notion of most serious crimes was later developed in the Safeguards guaranteeing protection of the rights of those facing the death penalty, according to which the most serious crimes are those "intentional crimes with lethal or other extremely grave consequences". The Special Rapporteur considers that the term "intentional" should be equated to premeditation and should be understood as deliberate intention to kill.

22. A sentence of death can only be imposed following the strictest observance of the highest procedural safeguards. An indisputable characteristic of the death penalty is its irreversibility. The Special Rapporteur, therefore, believes that the highest fair trial guarantees must be fully observed in trials leading to its imposition. He holds the opinion that all safeguards and due process guarantees must be fully respected, both during the pre-trial and trial, as provided for by the ICCPR and various other international instruments. Article 6 (2) clearly states that the penalty of death can only be carried out pursuant to a final judgement rendered by a competent court. Article 6 (4) provides for the right to seek pardon or commutation.

23. Article 14 of the Covenant, which sets the basic fair trial standards, includes the right to equality before the courts, the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, the right to the presumption of innocence, the right to appeal and the right to be compensated in case of miscarriage of justice. Article 14 (3) lists the minimum fair trial guarantees, which include the right to be informed promptly of the nature and cause of the charge, the right to have adequate time and facilities for the preparation of one's defence [*sic*] and to communicate with counsel of one's own choosing. The Committee has expressed the view that the "requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing . . .". In addition, the Human Rights Committee considers that "the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, and which could no longer be remedied by appeal, constitutes a violation of article 6 of the Covenant".

24. A sentence of death cannot be imposed on minors and cannot be carried out on pregnant women. International law prohibits the imposition of the death penalty on juvenile offenders. Article 6 (5) of the ICCPR provides that the death penalty shall not be imposed for crimes committed by persons below 18 years of age. This principle has been repeated in article 37 (a) of the Convention on the Rights of the Child, rule 17.2 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") and paragraph 3 of the Safeguards guaranteeing protection of the rights of those facing the death penalty. Also, article 6 (4) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), stipulates that the death penalty shall not be pronounced on persons who were under 18 years of age at the time they committed the offence.

25. In addition to the ICCPR, other international instruments ratified by the United States include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

and the International Convention on the Elimination of All Forms of Racial Discrimination. The United States has also signed, but not ratified, the Convention on the Rights of the Child. The Convention on the Rights of the Child has been universally ratified, except by two countries: the United States of America and Somalia.

26. Further, the United States has signed, but not ratified, the American Convention on Human Rights, which also forbids the imposition of the death penalty on juvenile offenders.

B. Reservations by the United States to the ICCPR and the position of the Human Rights Committee

27. At the time of ratification of the ICCPR, the United States entered reservations concerning certain rights contained in the Covenant. By entering a reservation, a State purports to exclude or modify the legal effect of a particular provision of the treaty in its application to that State. According to the Vienna Convention on the Law of Treaties, reservations to multilateral treaties are allowed, providing that the reservation is compatible with the object and purpose of the treaty itself. One of the reservations entered by the United States makes particular reference to the death penalty provision of article 6.

28. According to this reservation, "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 18 years of age".

29. In its concluding observations to the initial report of the United States of America (CCPR/81/Add.4), the Human Rights Committee expressed concern at this reservation which it believes to be incompatible with the object and purpose of the ICCPR.

30. It is the view of the Special Rapporteur that this reservation leaves open the possibility of executing persons with mental retardation. Further, he is of the opinion that the term "future", under the notion of "existing or future laws permitting the imposition of capital punishment" is not compatible with the restrictive spirit of article 6 of the ICCPR.

31. Eleven States parties to the ICCPR objected to the reservation entered by the United States. The Human Rights Committee states that the content and scope of reservations may "undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties". It also states that the absence of a prohibition on reservations (reservations are not prohibited by the Covenant) "does not mean that any reservation is permitted".

32. Further, according to the Committee, "The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party

without benefit of the reservation. In addition, as article 4 of the Covenant declares article 6 to be a non-derogable right, a State which makes a reservation to such a right is under a "heavy onus".

33. The United States also entered an understanding, according to which the Covenant "shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the State and local Governments". The Special Rapporteur considers that nothing in this understanding precludes Federal and State Governments from making the necessary efforts to implement the Covenant throughout the country. Further, he is of the opinion that the federal structure should not be an obstacle to the implementation of the Covenant.

34. The United States also made several declarations. It declared "that the provisions of articles 1 through 27 of the Covenant are not self-executing". In its initial report to the Human Rights Committee, the United States explained that this declaration does not limit the international obligations of the United States; rather, it meant that, as a matter of domestic law, the Covenant did not, by itself, create private rights directly enforceable in United States courts. Further, according to the United States report, fundamental rights and freedoms protected by the ICCPR are already guaranteed in United States law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases. For those reasons, it was not considered necessary to adopt special implementing legislation to give effect to the provisions of the ICCPR in domestic law.

35. In its concluding observations on the initial report of the United States of America, the Human Rights Committee regretted the extent of the reservations, declarations and understandings to the Covenant as, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States.

C. Other restrictions imposed by international law

36. Imposition of the death penalty on mentally retarded or insane persons is also prohibited. Paragraph 6 of the Declaration of the Rights of Mentally Retarded Persons, 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. Further, paragraph 3 of the Safeguards guaranteeing protection of the rights of those facing the death penalty stipulates that the death penalty shall not be carried out on persons who have become insane. 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, 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.

II. THE GENERAL CONTEXT OF THE DEATH PENALTY IN THE UNITED STATES

37. Currently, 40 jurisdictions in the United States of America have death penalty statutes. Thirteen other jurisdictions do not. According to the information received, 3,269 persons are on death row, of whom 47.05 per cent are White, 40.99 per cent are Black, 6.94 per cent are Hispanic, 1.41 per cent are Native American, and 0.70 per cent are Asian. Of the total death row population, more than 98 per cent are male.

38. Since the death penalty was reinstated in 1976, 403 persons have been executed. There have been no federal executions since 1963. Out of these 403 executions, only 6 white persons have reportedly been executed for the murder of a black person. Texas has been responsible for more than 30 per cent of the executions, followed by Virginia (10.17 per cent) and Florida (9.68 per cent). It is reported that since the reinstatement of death penalty statutes, more than 47 persons have been released from death row because of later evidence of their innocence (see paras. 115-116 below).

39. One hundred and fourteen women have reportedly been sentenced to death from 1973 to June 1997. Of them 47 are on death row and 66 had their sentences either reversed or commuted to life imprisonment. Florida, North Carolina and Texas account for the highest imposition of female death sentences. Female executions have been rare. The last woman executed was in 1984 in North Carolina.

40. Nine juvenile offenders, individuals aged less than 18 at the time they committed the crime for which they were convicted, have been executed.

41. In 1972, the Supreme Court found the application of the death penalty unconstitutional and invalidated both federal and state-level death penalty statutes. In Furman v. Georgia (1972), the United States Supreme Court ruled that the existing death penalty laws were being applied in an arbitrary and capricious manner, which violated the Constitution. Justice White, in his concurring opinion in the Furman case, stated that with respect to the death penalty "there was no meaningful basis for distinguishing the few cases in which it was imposed from the many cases in which it was not". In Gregg v. Georgia (1976), the Supreme Court ruled that the death penalty did not violate the Constitution if it was administered in a manner designed to protect against arbitrariness and discrimination. This ruling was used by the states, and eventually the Federal Government, to reintroduce the death penalty in accordance with certain guidelines and provisions aimed at eliminating arbitrariness.

42. However, information brought to the attention of the Special Rapporteur indicates that a significant degree of unfairness and arbitrariness in the administration of the death penalty 25 years after Furman appears to still prevail. In this context, in February 1997, the American Bar Association (ABA) called for a moratorium on executions in the United States until jurisdictions implement procedures and policies intended to ensure that death penalty cases are administered fairly and impartially, in accordance with due process.

43. It was brought to the Special Rapporteur's attention that the guarantee of due process in capital cases has been seriously jeopardized following the adoption of the federal 1996 Anti-Terrorism and Effective Death Penalty Act. This law severely limits federal review of state court convictions and curtails the availability of habeas corpus at the federal level. In addition, the withdrawal of funding for post-conviction defender organizations, which were handling capital punishment cases at the post-conviction level and helping attorneys involved in death penalty cases, seriously limits the extent to which fair trial standards are fully available during the process leading to the imposition of a death sentence.

III. FINDINGS OF THE SPECIAL RAPPORTEUR

A. Current practices in the application of the death penalty

1. Reintroduction of death penalty statutes and extension of the scope

44. The Special Rapporteur has observed a tendency to increase the application of the death penalty both at the state level, either by reinstating the death penalty or by increasing the number of aggravating circumstances, and at the federal level, where the scope of this punishment has recently been dramatically extended.

45. The States of Kansas and New York reinstated the death penalty in 1994 and 1995, respectively. On 7 March 1995, New York became the thirty-eighth state to reinstate the death penalty. The bill, signed by Governor Pataki of New York, came into force on 1 September 1995. According to information received, Governor Pataki reportedly referred to the prevention of violent crime as a justification for the new law. However, during a meeting with the Bronx District Attorney, the Special Rapporteur was informed that from 663 homicides committed in the Bronx in 1990, the figure had gradually lowered in subsequent years, to reach 249 in 1996. Since the reinstatement of the death penalty in New York, 15 persons are said to have been charged with capital murder.

46. The Special Rapporteur has recently been informed that a proposal to reinstate the death penalty in Washington, D.C. for those convicted of killing law enforcement officials is expected to be considered by the Senate at the beginning of 1998.

47. In the past several years, a number of States, including Alabama, Colorado, Delaware, Georgia, Indiana, New Hampshire, North Carolina and Tennessee, have enacted laws which increased the number of aggravating circumstances which qualify a murder as a capital case. In Florida, the legislature has, since 1972, expanded the number of aggravating circumstances from 8 to 14. By increasing the number of aggravating circumstances states are widening the scope of the death penalty.

48. Similarly, at the federal level, several legislative developments have led to an expansion of the scope of the death penalty. Following the reintroduction of the federal death penalty in 1988 through

the Anti-Drug Abuse Act, another law, the Federal Death Penalty Act, was signed into law by the President on 13 September 1994. This new law expanded the federal death penalty to more than 50 new offences. The law provides for the death penalty in a range of crimes involving murder of federal officials. The death penalty could also be applied for non-homicidal offences such as attempted assassination of the President, treason, espionage and major drug-trafficking.

2. Execution of juveniles

49. International law prohibits the imposition of a death sentence on juvenile offenders (those who committed the crime while under 18 years of age). The consensus of the international community in this respect is reflected in the wide range of international legal instruments (see para. 24 above). On 27 March 1987, the Inter-American Commission on Human Rights declared that the United States had violated provisions of the American Convention on Human Rights by permitting the execution of two juvenile offenders, even though, having signed the Convention, it had not ratified it. The Commission recognized the existence among the member States of the Organization of American States of a regional jus cogens norm prohibiting the execution of juvenile offenders and referred to the emergence of a norm of customary international law establishing 18 as the minimum age for imposition of the death penalty. 50. Despite this clear recognition of the prohibition of executing juvenile offenders, the United States of America is one of the few countries whose legislation allows for the imposition of the death penalty on and execution of juveniles. In a letter sent by the United States Government to the Special Rapporteur on 22 September 1993, the Government acknowledged a difference between United States law and international law: "The United States Government realizes that its law differs from the International Covenant on Civil and Political Rights on this point. This difference in law was the basis for a reservation to the United States ratification of the Covenant."

51. Out of the 38 states with death penalty statutes, 14 provide that 18 is the minimum age for execution. In 4 states, 17 is the minimum age, while in 21 other states, 16 is the minimum age. According to the information received, 47 offenders who committed the crimes before the age of 18 are currently on death row. At the federal level, the imposition of the death penalty on juvenile offenders is not permitted.

52. In Thompson v. Oklahoma (1988), the Supreme Court ruled that it was unconstitutional to impose the death penalty on a person who was under 16 years of age at the time of commission of the crime. In Stanford v. Kentucky, the Supreme Court ruled that it was constitutional to impose the death penalty on an offender who was aged 16 at the time of commission of the crime.

53. Although the United States of America has not executed any juvenile offenders while still under 18, it is one of the few countries, together with the Islamic Republic of Iran, Pakistan, Saudi Arabia and Yemen, to execute persons who were under 18 years of age at the time they committed the crime. Charles Rumbaugh was the first juvenile offender executed in the United States since the

reinstatement of the death penalty in 1976. He was executed in Texas in September 1985. The last one, Christopher Burger, was executed in Georgia in December 1993.

54. In a capital case, age should be regarded as a mitigating factor. In Eddings v. Oklahoma(1982), the Supreme Court ruled that the "chronological age of a minor is itself a relevant mitigating factor of great weight". However, the Special Rapporteur was informed that in some capital cases concerning juvenile offenders, age was not presented as a mitigating factor at the sentencing phase of the trial. In this context, he was informed that during the trial in Texas of Robert Anthony Carter, an African-American juvenile offender charged with murder and with no prior criminal record, the jury was not invited to consider his age as mitigating evidence. By letter dated 8 February 1993, the United States Government informed the Special Rapporteur that the death penalty is available in juvenile cases "only when the court has determined to try the defendants as adults". However, the Special Rapporteur was informed that in practice in some states whose laws allow for persons under 18 to face the death penalty, minors charged with aggravated murder are very often tried in adult courts.

55. The Special Rapporteur wishes to emphasize that international law clearly indicates a prohibition of imposing a death sentence on juvenile offenders. Therefore, it is not only the execution of a juvenile offender which constitutes a violation of international law, but also the imposition of a sentence of death on a juvenile offender by itself. Accordingly, the Criminal Justice Section of the ABA, in August 1983, adopted a resolution calling for the abolition of the imposition of the death penalty for juveniles.

56. Since his appointment, the Special Rapporteur has intervened on behalf of the following juvenile offenders: Johnny Franck Garrett, executed in Texas in February 1992; Christopher Burger, executed in Georgia in December 1993; and Azikiwe Kambule, a 17-year-old South African national reportedly facing charges of first-degree murder in Mississippi. The Special Rapporteur was informed that on June 1997 Azikiwe Kambule was sentenced to a term of 35 years in prison on charges of "car jacking and accessory after the fact of murder".

3. Executions of persons with mental retardation

57. According to information received from non-governmental sources, at least 29 persons with severe mental disabilities have been executed in the United States since the death penalty was reinstated in 1976. Twenty-eight capital jurisdictions are said to permit the execution of mentally retarded defendants. Eleven death penalty states, and the Federal Government, prohibit the execution of mentally retarded persons.

58. 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.

59. On 7 February 1989, the ABA adopted a resolution urging that no person with mental retardation, as defined by the American Association on Mental Retardation, should be sentenced to death and executed. It further resolved that the ABA supports enactment of legislation barring the execution of those individuals with mental retardation.

60. The Special Rapporteur has intervened, inter alia, on behalf of Emile Duhamel, reportedly suffering from severe mental retardation and unable to understand the nature of the proceedings against him. The Special Rapporteur met Emile Duhamel while visiting death row inmates in Huntsville, Texas.

B. The administration of the death penalty

61. A death sentence may be imposed both at the federal and state levels. The majority of death penalty sentences are imposed at the state level. Each capital punishment state has its own statute and each state determines how the death penalty will be administrated within the state. However, only a very small proportion of murders result in a sentence of death.

62. It is to be noted that the small percentage of defendants who receive a death sentence are not necessarily those who committed the most heinous crimes. Many factors, other than the crime itself, appear to influence the imposition of a death sentence. Class, race and economic status, both of the victim and the defendant, are said to be key elements. It is alleged that those who are able to afford good legal representation have less chance of being sentenced to death. The influence of public opinion and political pressure cannot be disregarded either. In addition, racial attitudes of lawyers, prosecutors, juries and judges, although not necessarily conscious, are also believed to play a role in determining who will, or who will not, receive a death sentence. Supreme Court Justice Blackmun, in his dissenting opinion in Callins v. Collins(1994) made reference to this problem stating that "(. . .) the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake". He also stated that "Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die".

63. Allegations of racial discrimination in the imposition of death sentences are particularly serious in southern states, such as Alabama, Florida, Louisiana, Mississippi, Georgia and Texas, known as the "death penalty belt". The Special Rapporteur was informed that a discriminatory imposition of capital sentences may be favoured by the composition of the judiciary: in Alabama, only 1 of the 67 elected district attorneys is said to be black, and none of Georgia's 159 counties is reported to have a black district attorney. The majority of judges in these states are also reported to be white.

64. In one of the most prominent related rulings, McCleskey v. Kemp (1987), the Supreme Court considered racial disparities as "an inevitable part of our criminal justice system". In this case, evidence of racial discrimination was based on a study, known as the Baldus Study, which showed that in Georgia, defendants who killed white victims were more than four times as likely to get the death penalty than those who killed Blacks. The Court held that studies demonstrating statistically

that the death penalty was racially discriminatory were not sufficient, and that each defendant had to prove the existence of racial bias in his case and present "exceptionally clear proof" that "the decision makers in his case acted with discriminatory purpose".

65. This ruling has had the effect of allowing the courts to tolerate racial bias because of the great difficulties defendants face in proving individual acts of discrimination in their cases. The Supreme Court has maintained that direct, purposeful discrimination may always support a challenge to a capital conviction, but that statistical evidence alone demonstrating indirect discrimination may not, in itself, be sufficient grounds for a constitutional challenge. Doubts are raised about the compatibility of this ruling with obligations undertaken under the International Convention on the Elimination of All Forms of Racial Discrimination, which requires States parties to take appropriate steps to eliminate both direct and undirect discrimination.

66. Some reports have reached the conclusion that a pattern of racial discrimination exists in the United States justice system. In his report on his mission to the United States (E/CN.4/1995/78/Add.1), the United Nations Special Rapporteur on contemporary forms of racism, Maurice GlΦlΦ Ahanhanzo, stated that "Racial factors affect the judicial process, from the moment of arrest right through to the trial" (para. 60). He concluded that for similar offences or crimes, ethnic minorities are more likely to receive a harsher penalty than a white. According to the Special Rapporteur, "this imbalance is also the result of the inadequate representation of ethnic minorities on juries".

67. The Racial Justice Act was passed by the House of Representatives as an amendment to the 1994 Crime Bill, but was rejected in the Senate. The Act would have allowed the defendant to introduce evidence of racism by the use of statistics and would have removed the need to prove discriminatory intent on the part of any specific individual or institutions. Thus, it would have set in place a system for challenging racially discriminatory sentences. Without the Racial Justice Act, defendants have a very high burden of proving intentional discrimination in their case in order to succeed on appeal.

68. Other elements which may have a direct or indirect influence in the determination and imposition of a death sentence are discussed below.

1. The judiciary

69. Federal judges are appointed for life. At the state level, in only 6 of the 38 death penalty states are judges appointed for life by the state governor. In the other 32 states, judges are subject to election.

70. The possibility of elected or appointed judges is recognized in principle 12 of the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985 and endorsed by the General Assembly in resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. No matter

what system is being used, the judiciary shall decide matters impartially, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect (principle 2).

71. Many sources have expressed concern as to whether the election of judges puts their independence at risk. In its concluding observations to the United States report, the Human Rights Committee expressed its concern about the impact which the current system of election of judges may, in a few states, have on the implementation of the rights provided under article 14 of the ICCPR.

72. During his mission, the Special Rapporteur held meetings with several lawyers and members of the bar in different states who acknowledged having received letters from judges requesting financial contributions for their campaigns for re-election. It is difficult to determine the influence that the electorate and a financial contribution to an election campaign may have on a judge. While in most cases it will depend on the degree of integrity of the individual judge, it is certain that this situation exposes the judge to a higher level of pressure than those who, like federal judges, hold life tenures, do not have to run for re-election and are not accountable to volatile public opinion. The situation has become of serious concern in death penalty cases, particularly because state judges, in view of the recent legislative developments which minimize federal review of state court decisions, are making decisions with considerably less opportunities for review.

73. The concern becomes even more significant in those states where judges have the possibility of overriding the decision of a jury, such as in Alabama, Delaware, Florida and Indiana. It is alleged that because of public support for the death penalty, some judges may not dare to override or overturn a death sentence in fear of the repercussions this may have on his/her professional career. According to the information received, in Alabama, about 25 per cent of persons on death row were said to have been recommended for life sentences by their juries but the judge overrode the decision. In Florida, Alabama and Indiana, judges are alleged to have imposed death sentences in a total of 189 cases in which the jury recommended life imprisonment, death recommendations were said to have been reversed in 60 cases.

74. According to information brought to the attention of the Special Rapporteur, it is very difficult for a judge who has reservations regarding the death penalty to be re-elected. In state judicial elections, judges have been attacked for their decisions in death penalty cases. Mississippi Supreme Court Justice James Robertson was defeated in his 1992 campaign allegedly for having overturned death sentences. He was said to have been aggressively attacked in this respect by prosecutors and victims rights groups. Justice Penny White, of Tennessee's Supreme Court, was not re-elected for having voted for the overturning of a death sentence, allegedly after finding insufficient evidence to uphold the sentence. Reportedly, she was attacked during the judicial elections in August 1996 for her opposition to the death penalty. In 1994, Judge Charles Campbell was reportedly voted off the Texas Court of Criminal Appeals after a reversal in a capital case. In 1992, Judge Norman Lanford was also voted off the State District Court in Texas following his recommendation that a death sentence be overturned due to prosecutorial misconduct.

75. The Special Rapporteur wishes to emphasize that the election of judges does not necessarily influence the outcome of judicial decisions. However, the lack of financial transparency during election campaigns and the short duration of terms make judges more exposed to pressure, which may jeopardize their independence or impartiality. Increasing the length of judicial terms, as well as strict public control on fund-raising in judicial elections, would reduce the risk of unduly influencing judges.

2. Prosecutorial discretion

76. Prosecutors have great discretionary powers in determining in which cases to seek the death penalty. In all murder cases in which the death penalty may be sought (because the case appears to meet the aggravated factors set out in the state statutes as sufficient for capital murder), the prosecutor has the unreviewable discretion to decide to proceed with a capital charge or not. No state sets out additional guidance as to when the prosecutor should seek death. In some statutes, like that in Florida, aggravating factors making a murder eligible for capital murder may be as vague as "especially heinous". Because of this discretion, some prosecutors will seek the death penalty almost all the time while others, in similar cases, will not.

77. The Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, make specific reference to the discretionary powers of the prosecutor. Guideline 17 provides that when prosecutors are vested with discretion, the law shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process.

78. The fact that a death sentence is not mandatorily sought by the prosecutor, and that he/she exercises discretion in deciding whether to seek it or not, may mean that, in fact, the death penalty is sought less often. However, on the other hand, this same discretion allows that for similar cases the decision of the prosecutor can be different, therefore increasing the risk of arbitrariness and bringing a sense of unfairness to those who are "picked out" to be prosecuted as death penalty cases. The question to be raised here is: Where is the borderline between life and death?

79. An example of arbitrariness caused by this discretion can be seen by analysing the death row population in Texas. As of June 1997, the sentences of 136 persons on death row originated from Harris County, followed by 32 from Dallas County, 28 from Tarrant County and 27 from Bexar County. The Special Rapporteur is of the opinion that this statistical difference may be partly explained by the discretionary powers of the prosecutors.

80. Another important aspect of prosecutorial discretion is that the prosecutors have the ability to plea bargain. In many cases, the prosecutor will offer the option of not seeking the death penalty if the defendant agrees to plead guilty to a lesser offence. In cases with several defendants, plea bargains will be offered in return for one of the defendants testifying against his/her co-defendant(s).

81. An additional aspect of the prosecutors' role is that they may seek the opinion of the family of the victim. The Special Rapporteur was informed by several District Attorney's Offices that the view of the family is taken into consideration as long as their request is compatible with the gravity of the offence. Non-governmental sources report that there may be excessive discretion in the selection of which families the office of the prosecutor will or will not approach. According to the information received, the selection of which families the prosecutor approaches has often been alleged to be influenced by race and class. The Special Rapporteur met with victims' families who had been approached by the local prosecutor, but once they informed the prosecutor that they did not wish the death penalty to be sought, the prosecutor stopped cooperating with them. The discretion in selecting which families the office of the prosecutor approaches may indeed increase the risk of arbitrariness in imposing a sentence of death.

82. The Special Rapporteur explained to prosecutors with whom he met that allegations of racial discrimination in deciding when to seek the death penalty were being received at his office. He was informed by District Attorneys in some states that when the decision whether to seek the death penalty is made, no particular information concerning the race of the defendant or the victim is brought to the attention of the District Attorney. However, due to the fact that this information is contained in police files, it is difficult to imagine that this information is not available to the prosecutor.

83. Politics may also interfere in the discretionary power of the prosecutors. In March 1996, New York Governor George Pataki decided to supersede the authority of Bronx District Attorney Robert T. Johnson in the murder case of a police officer. Mr. Johnson had previously expressed his intention to exercise his discretion to pursue life without parole in every appropriate case. The Governor referred the case to the State Attorney-General, Dennis Vacco, who announced he would seek the death penalty. The Special Rapporteur was also informed that the Manhattan District Attorney, Mr. Robert M. Morgenthau, was under pressure from the Governor of the State of New York as well as the Mayor of New York City to seek the death penalty for a defendant accused of killing a police officer. Reportedly the New York Court of Appeals recently ruled that the State Attorney-General of New York may take over a death penalty case if a District Attorney decides as a matter of discretion not to pursue the death penalty. While the discretion of the prosecutor is virtually unreviewable, it is not insulated in practice from pressures which can affect the prosecutor's decisions in ways that may increase arbitrariness.

84. At the federal level, more processes have been put in place to restrict or guide the discretion of the federal prosecutors. For example, the death penalty may only be sought with the written authorization of the Attorney-General. Federal attorneys prepare Death Penalty Evaluations in which they identify aggravating and mitigating circumstances, indicating why a capital sentence is recommended. A committee at the Department of Justice will further evaluate the case and forward its recommendation to the Attorney-General, who will make the final decision.

3. Jury selection process

85. In 28 states of the 38 with death penalty statutes, the sentencing decision is in the hands of the jury. In four states, Alabama, Delaware, Florida and Indiana, the jury makes a recommendation concerning sentencing which can be overridden by the judge. In other states, including Arizona, Colorado, Idaho, Montana and Nebraska, the decision is made by the judge.

86. In the United States a person charged with a capital offence has the right to be tried before a jury. A jury of 12 persons is selected from the community. Juries are selected from panels drawn randomly from local residents, generally through lists of persons with a driver's licence or registered to vote. Prospective jurors will be questioned to find out if they have any biases which will keep them from serving as a member of the jury charged to carry out the law impartially. During the jury selection process, both the prosecutor and the defence [*sic*] lawyer have a right to exclude certain people from the jury, either for a stated reason, or without giving a reason. Exclusion for no explained reason is known as peremptory challenge. The prosecutor and the defense lawyer have the power to use a limited number of peremptory challenges and an unlimited number of challenges for cause. In Baton v. Kentucky, the Supreme Court noted that peremptory challenges on invalid racial grounds are not acceptable. However, in practice it is impossible to acknowledge that the system does not tolerate the use of peremptory challenges along racial lines. As a result, it has not been uncommon that black defendants are tried before a totally or almost all-white jury.

87. In this regard, the Special Rapporteur has intervened, inter alia, on behalf of: (a) Johnny Watkins, black, who was sentenced to death by an all-white jury in Danville, Virginia, and executed on 3 March 1994. The prosecutor had allegedly eliminated all prospective black jurors from the jury through peremptory challenges; and (b) Hernando Williams, black, executed in Illinois in March 1995, after having been convicted and sentenced to death by an all-white jury in Cook County, Illinois, after the prosecutor had excluded all 26 black jurors from jury service. In both cases their victims were reportedly white.

88. During a jury selection for a capital trial, potential jurors will be asked if they are opposed to the death penalty. Those who are oppossed [*sic*] to the death penalty are likely to be taken off the panel of prospective jurors. Many members of minority groups are opposed to the death penalty because it has been disproportionately used against members of their respective communities. Even if a potential juror says that he is against the death penalty but that he may consider imposing it, his exclusion can be justified.

89. It is the Special Rapporteur's view that while the jury system was intended to represent the community as a whole, the community can hardly be represented when those who oppose the death penalty or have reservations about it seem to be systematically excluded from sitting as jurors. 90. Two phases can be differentiated in capital cases. In the initial phase, the jury determines whether the defendant is guilty or innocent. If he/she is found guilty, the second phase of the trial consists in determining the penalty. The possible choices may be death, life imprisonment and, in some states, life imprisonment without possibility of parole. Generally, in the second phase of the trial the jury

has to find, in order to impose a death sentence, that there are statutory aggravating circumstances (most states have between 7 and 10 in their statutes). At least one aggravating circumstance has to be found in order to impose a death penalty. Consideration has to be given, however, to mitigating circumstances (whatever information the defendant offers in order to convince the jury to spare his life). The jury is instructed to balance aggravating and mitigating circumstances before coming to a verdict. If they find at least one aggravating circumstance that outweighs mitigating circumstances, the result can be a death sentence (see para. 119 below).

91. In this second phase of the trial, when the jury has to determine the penalty, the guidance that the jury receives may inappropriately influence the penalty. Thus, according to information received, the information the juries receive concerning the meaning of the sentencing options varies according to the state. For example, in Texas, the jury cannot be instructed on the meaning of "life imprisonment". This situation gives rise to strong concerns because in many cases jurors are said to believe that by choosing life imprisonment the defendant may shortly be released from prison. However, different surveys (see paras. 103-104) show that when a person is informed about the meaning of life imprisonment, if given the option of choosing between the death penalty or life imprisonment, they tend to choose the second option.

4. The right to counsel: impact of de-funding resource centres and the 1996 Anti-Terrorism and Effective Death Penalty Act

92. Federal and state criminal procedures ensure the right to counsel for trial and direct appeal in death penalty cases. There is no guarantee of counsel at post-conviction review. However, this constitutional right to counsel does not always ensure adequate or effective counsel. The importance of adequate legal representation, particularly in capital punishment cases, is essential because ineffective counsel may result in death.

93. When a person is arrested and charged with a capital offence, there are several options concerning counsel. If the defendant has enough financial resources he/she may get a private lawyer. If the defendant cannot afford a private lawyer, the state, in those states where there is an institutionalized public defender system, such as in Florida, or a capital defenders office, as in New York, will provide counsel for indigent defendants. If the state does not have a public defender system, such as Texas, and the defendant is indigent, the defendant has a right to a court-appointed lawyer.

94. The competence of the initial lawyer is fundamental, as many issues, including factual and legal issues which are not raised at the trial stage, are barred from being introduced in the appeal phase. Allegations concerning lack of adequate and effective counsel are of particular concern in those states where the constitutional right to counsel is provided through a court-appointed lawyer. The particularities and the complexity of a capital case make standard professional qualifications inadequate to represent a defendant facing capital punishment. However, when a judge appoints a lawyer to represent a capital defendant, he/she does not necessarily consider the qualifications of the

appointed lawyer. There are no specific criteria which a judge must use to appoint a lawyer. It depends entirely on the judge's decision. An additional difficulty is that court-appointed lawyers are reportedly not allocated sufficient resources to conduct investigations and develop evidence in favour of their clients. Negative racial attitudes of some court-appointed lawyers against their clients have also been documented. Furthermore, the lawyer is appointed by a judge who, in some states, is an elected official. Reportedly, judges are on many occassions [*sic*] elected for their strong position in favour of the death penalty. These factors may reportedly lead to the selection of pro-death penalty lawyers to defend capital cases.

95. Allegations of ineffective counsel in death penalty cases have been brought to the attention of the Special Rapporteur on several occasions. The Special Rapporteur intervened on behalf of Mumia Abu-Jamal, black, sentenced to death in Pennsylvania for the murder of a white police officer, after concerns about the competence of his trial counsel, the inadequate funding provided to the defense to investigate the case and doubts about the evidence collected against him were brought to his attention. He also intervened on behalf of Calvin Burdine, a homosexual, sentenced to death in Texas. According to the information received, his lawyer fell asleep on several occasions during the trial. The lawyer was said to have accepted three jurors onto the jury who were said to have prejudice against homosexuals. Further, the Special Rapporteur was informed that the lawyer failed to object to the statement made by the prosecutor during the sentencing phase of the trial, according to which being sent to the penitentiary was not a very bad punishment for a homosexual. The Texas Court of Criminal Appeals reportedly ruled that his lawyer's failure to stay awake did not affect the outcome of the case. However, the federal court gave Burdine a stay of execution and ruled that another hearing was necessary to establish if his trial had been prejudiced.

96. The importance of the initial defense counsel is also crucial because in some states it is very difficult to obtain relief on the basis of ineffective counsel. According to the information received, in several cases in Texas, despite strong evidence suggesting ineffective counsel, the Court of Criminal Appeals rejected findings and denied relief without a written opinion explaining why they rejected the findings. A similar disregard for appeals on claims of ineffective counsel is reported in the federal court system. In particular, two federal courts, the Fifth Circuit Court of Appeals, which covers Texas, Mississippi and Louisiana, and the Fourth Circuit Court of Appeals, which covers North Carolina, South Carolina, Virginia, West Virginia and Maryland, are reportedly very unlikely to grant relief on ineffective counsel claims.

97. Even though there is no constitutional right to counsel at a post-conviction level, many states and the Federal Government had previously funded post-conviction defender organizations (PCDOs), also known as resource centres, which represented persons at this stage of the proceedings or provided help to lawyers representing them. They also helped by trying to locate counsel for death row prisoners.

98. The already difficult situation concerning adequate counsel has been worsened by the severe cuts in funding for PCDOs in 1995, and by the enactment of the 1996 Anti-Terrorism and Effective Death Penalty Act.

De-funding of PCDOs

99. Created in 1988, the PCDOs helped to raise the quality of representation at post-conviction and habeas corpus proceedings. In 1995, Congress stopped funding for PCDOs. The absence of PCDOs creates a grave difficulty for defendants at the post-conviction level, particularly in those states such as Texas which do not have a formally constituted agency or institution providing specialized court-appointed lawyers for capital defendants. While the judge is obliged to appoint a lawyer for trial and direct appeal, representation is not assured at the post-conviction level. The result is that many death row inmates do not have legal representation at post-conviction level. In some states, like California, the state has provided some money to continue supporting post-conviction representation. However, the Special Rapporteur was informed that 170 death row inmates in California currently have no legal counsel.

Enactment of the 1996 Anti-Terrorism and Effective Death Penalty Act

100. In April 1996, the President of the United States signed into law the Anti-Terrorism and Effective Death Penalty Act. The law was designed to shorten the time for the appeals process for convicts on death row. The law establishes limits on the number of habeas corpus appeals which may be made and sets time limits for federal courts to review decisions by state courts. This law will cause capital cases to proceed more quickly from state court to federal court and most substantive decisions will be made by state court judges. A further effect of this law is that the role of the federal judge in state capital punishment cases is substantially reduced. Under the new law, there is a narrower scope of review, so more aspects of the trial are unreviewable and justice depends more on the actions of the lower court judges. A movement to speed up executions in state law has also been reported. In some states, laws requiring capital defendants to raise all their claims at a single appeal have been enacted. The Special Rapporteur fears that this may lead to the legal impossibility of taking into account new evidence which becomes known at a later stage and to redress inadequacies caused by incompetent counsel.

101. In addition, in some states, such as Texas, where no public defender system exists, there is no institutional experience in defending death penalty cases. In addition, most of the judges are former prosecutors. Over the years, this creates a climate far more favourable to the prosecution than to the defence.

5. The right to seek pardon or commutation

102. Article 6 (4) of the ICCPR provides for the right to seek pardon or commutation of the sentence. The procedure for pardons or commutation differs from state to state. The Special Rapporteur was informed that in several states members of the board of pardons and paroles are appointed by the governor of the state. This may lead to politicization of the pardon or commutation. Pardon or

commutation generally has limited fair-procedure safeguards and are unreviewable. The final decision is made in most cases by the governor and by the President in the federal system. In several states members of the parole boards meet and have granted or recommended pardon on several occasions. However, the Special Rapporteur was appalled to find out that in Texas, the members never meet, do not discuss the cases brought to their attention together and provide their individual votes by phone. Not surprisingly, the board has never recommended pardon in a capital case.

6. The role of public opinion

103. During his mission, the Special Rapporteur was repeatedly told that the death penalty is applied because that is what the people want. However, the Special Rapporteur emphasizes that a thorough analysis of the will of the people may change this assumption considerably. Recent studies in the United States show that people are not simply "in favour of" or "opposed to" the death penalty. According to criminologist Dennis Longmire, in his study on attitudes on capital punishment, positions on the death penalty are not so clear, and 73 per cent of the people have inconsistent attitudes towards this punishment. In his study, he concluded that "people tend to be quick to stand in support of this sanction, but they are just as quick to back off their support when given specific information about its administration". Further, as stated in the Secretary-General's fourth quinquennial report on capital punishment (E/1990/38/Rev.1 and Corr.1 and Add.1), there is a need to differentiate between sporadic popular support of capital punishment and well-informed opinion.

104. According to a 1997 poll conducted by Sam Houston State University, the number of Texans favouring the death penalty has slightly decreased. In 1977, 80 per cent of Texans reportedly supported capital punishment, while in 1997 the number dropped to 76 per cent. Despite this initial high figure, however, 48 per cent of the respondents to the survey who initially reported that they were uncertain about their position became opposed to the death penalty when offered the possibility of a life sentence option. Similar conclusions have been reached by other studies. Thus, William Bowers, in his New York study, found that 71 per cent of the respondents supported the death penalty. However, this figure was reduced to 19 per cent when the alternative of life imprisonment without parole was offered.

C. Lack of awareness of United States international obligations

105. Government officials and members of the judiciary at the federal and state levels with whom the Special Rapporteur held meetings (with the exception of officials in the Department of State) had little awareness of the International Covenant on Civil and Political Rights and international legal obligations of the United States regarding the death penalty. Few knew that the United States had ratified this treaty and that, therefore, the country was bound by its provisions. It was brought to the attention of the Special Rapporteur that state authorities had not been informed by the Federal Government about the existence and/or ratification of this treaty, and were consequently not aware

of it. No efforts appeared to have been undertaken by the Federal Government to disseminate the ICCPR.

106. In several cases, relevant state judicial authorities told the Special Rapporteur that, should a claim be brought before them on the basis of a violation of the ICCPR, they would consider and analyse its implications. However, many others told him that the ICCPR was not a state law and therefore was not applicable.

107. In view of this disturbing finding, at the end of his mission to the United States, the Special Rapporteur sent a fax, dated 8 October 1997, to the Department of State, Human Rights Division, requesting information on the efforts undertaken to disseminate the provisions of the ICCPR following its ratification. At the time of finalization of this report, almost three months later, no answer to his communication had yet been received.

108. There seems to be a serious gap in the relations between federal and state governments, particularly when it comes to international obligations undertaken by the United States Government. The fact that the rights proclaimed in international treaties are already said to be a part of domestic legislation does not exempt the Federal Government from disseminating their provisions. Domestic laws appear de facto to prevail over international law, even if they could contradict the international obligations of the United States.

109. The Special Rapporteur has also found that there is a generalized perception that human rights are a prerogative of international affairs, and not a domestic issue. The fact that only the Department of State has a Human Rights Division, as well as the low level of awareness of international human rights standards within the Department of Justice, are clear indications of this phenomenon. While the Special Rapporteur recognizes the important role that the United States is playing in the establishment and monitoring of human rights standards in many countries of the world, he is compelled to note that human rights seem not to be taken seriously enough in the domestic arena.

110. The Special Rapporteur notes that both the Department of Justice and the Department of State are branches of the Federal Government and it is critical that they work together to ensure that obligations undertaken internationally by the United States are implemented domestically. Domestic implementation is the responsibility of all branches of the Government, executive, judicial and legislative. Within the executive branch, the Justice Department is one of the primary players in enforcing human rights domestically. Thus, it must work cooperatively to educate, disseminate and enforce the human rights obligations undertaken by the United States.

D. Other issues of concern

1. Participation of victims in the justice system

111. The term "victim of crime" is defined, in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly by its resolution 40/34 of 29 November 1985, as a person who has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of his/her fundamental rights, through acts or omissions that are in violation of criminal laws (para. 1). According to this Declaration, victims (who are to be understood as including immediate family or dependants) of crimes are entitled to respect and compassion, as well as, inter alia, to access to mechanisms of justice, proper assistance throughout the legal process and prompt redress. Victims have no right to retaliation.

112. During his mission, the Special Rapporteur observed the existence of a very strong movement for victims' rights. According to the information received, 29 states have amended their constitutions to include specific rights for victims of crime. The Special Rapporteur is concerned by the fact that victims' rights as provided by law in some states may undermine the rights of the accused. Thus, in the Constitution of the State of Florida, section 16, it is stated that: "In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation". Further, it also states that, "Victims of crime . . . are entitled to the right to be informed . . .".

113. The impact of the victims' rights movement led the President, in his State of the Union Address on 4 February 1997, to announce his support for passage of a victims' rights amendment to the Constitution. According to the information received, a proposal to amend the United States Constitution to recognize victims' rights in the criminal justice system is to be considered by Congress. The rights proposed for victims include, among others, the right to notice of all public proceedings concerning the crime and the right not to be excluded from them, the right to a final disposition free from unreasonable delay, and the right to have the victims' safety considered with regard to the release from custody of the defendant.

114. Several aspects of this constitutional amendment, in particular the right to a final disposition free from unreasonable delay, appear to undermine the rights of the accused. This right seems to be intended to speed up prosecutions and limit appeals. There are fears that this right may interfere with the defendant's right to counsel. For example, if the defence would need more time to prepare the case, a victim could claim his constitutional right to have the process concluded, on the basis of which a request for continuance could be denied. Considering that habeas corpus proceedings may take place long after the trial, habeas proceedings already limited by the enactment of the Anti-Terrorism and Effective Death Penalty Act could be further undermined by the amendment as it could lead to shortening time periods.

2. The risk of executing the innocent

115. The Special Rapporteur holds the opinion that there is no such thing as an infallible legal system or one in which mistakes do not occur; to the contrary, mistakes do occur. However, acknowledging a mistake once a person has been executed is meaningless. The Special Rapporteur is concerned that in the United States innocent people may be sentenced to death and even executed. In Furman v. Georgia (1972), Justice Marshall referred to this problem stating that "No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed, but we can be certain that there were some". A report issued on 21 October 1993 by the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary listed 48 persons who had been released from death row from 1973 to 1993 because evidence of their innocence had emerged.

116. The Special Rapporteur intervened on behalf of Ricardo Aldape Guerra, convicted and sentenced to death in 1982 for the killing of a police officer in Houston. A federal judge ruled in 1994 that he should be released or retried, as the police and prosecutors in the case had acted in bad faith. The ruling was upheld by the United States Court of Appeals. A new trial was granted, but the Houston District Attorney dropped the charges. Ricardo Aldape Guerra, who had always denied that he shot the officer, was released in 1997.

3. Executions of foreign nationals

117. The United States ratified the Vienna Convention on Consular Relations in November 1969. By ratifying the Convention, the United States is obliged to comply with the requirements of its provisions. Article 36 provides for foreign nationals arrested in another country to be informed without undue delay of their right to contact their consulate for assistance.

118. Information received suggests that many of the foreigners who are currently sentenced to death in the United States were never informed of their rights under the Vienna Convention on Consular Relations. It is alleged that some 60 foreigners were sentenced to death without having had the assistance of their consulate. Some of them, like Mexican Irineo Tristan Montoya, sentenced to death in Texas, were executed. On 9 July 1997, in an apology issued by the Department of State on his case, it was stated that, "The Department of State extends, on behalf of the United States, its most profound apology for the apparent failure of the competent authorities to inform Mr. Tristan Montoya that he could have a Mexican consular officer notified of his detention".

119. Although information received makes it clear that the State Department has, on several occasions, informed officials of various states, including governors and attorneys-general, of their duties under article 36, it appears that the periodic advisories given by the Department receive no consideration. It is of concern that reportedly no courts in any death penalty case have found that the preclusion of notification of the right to contact their consulate for assistance is sufficient to warrant

relief. In the case of Joseph Standley Faulder, a Canadian national, the Fifth Circuit Court of Appeals called Texas's violation of the Convention a harmless error. Patrick Jeffries, also a Canadian citizen, sentenced to death in 1983 in Washington State, was never informed about his right under the Vienna Convention to contact the Canadian consulate for assistance. Allegedly, because of the omission, he was not able to obtain adequate legal representation and mitigating factors were not introduced in the sentencing phase of his trial, therefore leaving the jury no alternative but to sentence him to death.

120. Further, the lack of awareness on the part of judicial authorities about the Vienna Convention makes it difficult for lawyers to raise violations of this treaty. During the trial of Virginio Maldonado, a 31-year-old Mexican national, the defense lawyer claimed a violation of the rights of his client under this treaty. According to the information received, the trial judge stated, referring to the Vienna Convention on Consular Relations: "I don't know that it exists . . . I am not an international law expert". Further, the prosecutor in the case argued the law was irrelevant because it was not a Texas law. .

121. The Special Rapporteur is of the view that not informing the defendant of the right to contact his/her consulate for assistance may curtail the right to an adequate defense, as provided for by the ICCPR.

IV. DEATH AS A RESULT OF EXCESSIVE USE OF FORCE BY LAW ENFORCEMENT OFFICIALS

122. During his visit to the United States, the Special Rapporteur devoted a small proportion of his time to collecting information about other types of violations of the right to life, particularly those caused by excessive use of force.

123. According to the information received, deadly force nationwide is more likely to be disproportionately used on racial minorities. Cases of persons killed by police brought to the attention of the Special Rapporteur all concerned members of ethnic minorities, mainly African-Americans and Hispanics. Young African-Americans are said to be looked upon as potential criminal suspects. The Special Rapporteur was informed that according to a recent study conducted in the Washington, D.C. area on who is stopped for traffic violations, only 14 per cent of drivers were white while 73 per cent were African-American. According to the information received, of the complaints filed with the New York City Civilian Complaint Review Board (CCRB) from January to June 1996, 75 per cent were filed by African-Americans or Hispanics. In 65 per cent of the cases, the police officers involved were white.

124. Many police departments are trying to have a more balanced ethnic representation among their personnel in an effort to make them more representative of the local population. The Special Rapporteur was informed that in Miami, 50 per cent of the police officers are Hispanic, 25 per cent are African-American and 25 per cent white. In New York, 72.2 per cent of the officers are white,

15.2 per cent are Hispanic and 11.5 per cent are African-American. Balancing the composition of police departments according to the ethnic distribution of the local population may also have a positive impact in reducing allegations of racial bias.

125. During public hearings he held in New York, the Special Rapporteur was informed, inter alia, that the following persons had been killed by police officers:

(a) José Antonio Sánchez, Dominican, killed on 22 February 1997 by a police officer during a raid on the El Caribe restaurant in Queens where he worked as a cook. Police claimed Sánchez attacked them with a knife;

(b) Frankie Arzuega, aged 15, Puerto Rican, killed on 12 January 1996 after being shot in the back of the head as he sat in the back seat of a car stopped by police officers of the 90th Precinct in Brooklyn. Police claimed the driver of the car tried to drive off while being questioned by one of the police officers. No weapons were found. Officers did not report the case for three days, and were not disciplined;

(c) Yong Xin Huang, aged 16, Chinese, shot on 24 March 1995 by a Brooklyn police officer investigating reports of a child with a gun. He was shot at close range behind the ear. He was playing with a pellet gun;

(d) Anibal Carrasquillo, aged 21, Puerto Rican, shot dead by a police officer in Brooklyn on 22 January 1995. Police reportedly claimed he was acting in a suspicious manner. No weapon was found and an autopsy revealed that he was shot in the back;

(e) Aswon Watson, aged 23, African-American, killed on 13 June 1996 in Brooklyn. Reportedly shot 18 times by officers of the 67th Precinct while sitting in a stolen car. No arms were found. A grand jury chose not to indict the officers;

(f) Anthony Rosario, aged 18, and Hilton Vega, aged 21, both Puerto Rican, shot on 22 January 1995 by police from the 46th Precinct in the Bronx while trying to rob an apartment. Rosario was shot 14 times in the back and side. In March 1995 a grand jury voted not to bring criminal charges against the police officers. The CCRB supported the family claims, agreeing that excessive force was used and recommended that formal charges be brought against the officers. The CCRB sent its report to the Police Commissioner, who was said to have criticized the Board.

126. In addition, Anthony Baez, aged 29, Puerto Rican, was killed on 22 December 1994 by a police officer of the 46th Precinct in the Bronx who applied a chokehold on him. The officer who killed him had previously had 14 complaints of brutality lodged against him. According to the information received, the use of chokeholds was banned in 1993 by the New York Police Department (NYPD). Other police departments, such as those in San Francisco and Los Angeles, are said to continue using it if necessary to protect the lives of officers.

127. The Special Rapporteur was also informed about deaths committed as a result of the use of pepper spray. Pepper spray is a weapon that attacks the respiratory system. While it is meritorious that police look for strategies and weapons that do not cause injuries, pepper spray has raised concerns because several persons are said to have died due to its use. At least two individuals died in San Francisco after pepper spray was used. Aaron William, an African-American, reportedly died in police custody after being beaten and pepper-sprayed by police officers. The Special Rapporteur was particularly shocked at the death of Sammy Marshall in San Quentin prison in California. Marshall, a 51-year-old man, was on death row for murder. On 27 February 1997, the California Supreme Court reversed his death sentence. According to the information received, he was never informed about it. On 15 June, several guards allegedly entered his cell and asked him to come out. When he refused, pepper spray was used, which reportedly caused his death.

128. The Special Rapporteur was informed about the existence of a special unit in the Los Angeles Police Department, known as the Special Investigation Section (SIS), created in 1965 and composed of a group of about 20 officers who are known to conduct controversial operations which have on many occasions resulted in deaths. According to the information received, on 12 February 1990 a McDonald's restaurant in the Sunland area of Los Angeles was robbed by four individuals while SIS members monitored the incident without intervening. Allegedly, once the four individuals had left the SIS agents opened fire as they were trying to leave in a car. Three of the robbers were killed and one was seriously injured. None of them was said to have fired any shots at the officers.

129. The existence of an independent civilian review system through which persons may file complaints of police misconduct offers the possibility of more impartiality. In New York, the CCRB was established in 1993. It is composed of 13 members appointed by the mayor, five of whom are chosen by the mayor, five by the City Council and three by the Police Commissioner. The Board is an independent, non-police agency with the power to investigate allegations of misconduct filed by citizens against NYPD officers. It has the power to receive, investigate, hear, make findings and recommend action on complaints concerning New York City police officers involving excessive or unnecessary use of force, abuse of authority and discourtesy or offensive language. Once a case has been investigated, the Board may recommend any of the following dispositions with regard to the complaint: substantiated (the officer actually committed the alleged act), unsubstantiated (not enough evidence), exonerated (the incident occurred but the actions of the officer were lawful), or unfounded (acts did not occur). In cases of killings, the CCRB can carry out an investigation even if Internal Affairs is also doing it. The CCRB reports its findings to the Police Commissioner, but it has no authority to guarantee that disciplinary action will be taken. This will be decided by the police department while the officer under investigation may continue to work.

130. All sources consulted have agreed that police departments in the United States have high written standards in regard to training and guidelines on the use of force. Principles reflected in the Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169 of 17 December 1979), as well as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, are reportedly fully reflected in police regulations. This is

despite the fact that there is little, if any, awareness of the existence of these international standards. The Special Rapporteur is of the opinion that there is a need for federal authorities to take concrete measures to ensure that all levels of armed officials are trained and meet those standards.

131. It was difficult for the Special Rapporteur to obtain information concerning killings committed by the police in the United States. National data seemed not to be available. The Special Rapporteur was informed that there have been some attempts to collect national figures on police violence. The introduction in Congress of a bill called the Police Stop Statistics Act, which would require each individual police department to collect data on police stops, including whether a search was conducted or if violence was used, is an example.

132. The Special Rapporteur is aware of the dangerous situations that police officers face, and that the majority of confrontations which require use of force do not result in death, testimony to the degree of professionalism which exists in United States police departments. However, in many of the cases brought to his attention, the use of lethal force was said not to have been justified.

133. The low rate of criminal prosecution in cases of police brutality remains the principal cause for the perpetuation of violations of human rights by the police, in particular violations of the right to life. The manner in which a Government reacts to human rights violations committed by its agents, through action or omission, clearly shows the degree of its willingness to ensure effective protection of human rights. States have the obligation to conduct exhaustive and impartial investigations into allegations of violations of the right to life, to identify, bring to justice and punish the perpetrators, to grant adequate compensation to the victims or their families, and to take effective measures to avoid the recurrence of such violations.

134. The fact that few police officers are subject to criminal prosecution for abuse of force resulting in death has been attributed to several factors, as described below:

135. Lack of proper investigations. On many occasions police misconduct — including killings caused by police — is investigated by an Internal Affairs Department (internal system for dealing with complaints and allegations of misconduct) within the police. According to the information received, they do not have independent subpoena power to call witnesses and compel their participation in proceedings. The District Attorney's Office generally receives notice of every shooting, but it does not necessarily get involved. The fact that it is the police department that investigates a shooting in which police officers were involved creates a conflict of interest. In most cases, police officers are not permanently assigned to the Internal Affairs Department; they work there for some years and then go back to the regular police force. It would be unrealistic to expect impartiality from those who conduct investigations against colleagues, particularly when their positions may later be reversed. Unless there is an independent oversight, these cases will not be properly investigated. This is why it is very important to have an independent body to investigate complaints against the police.

136. Compensation for damages does not generally come from the Police Department. The fact that money paid for damages normally does not come from police departments but from the municipality does not act as an incentive for the police department and allows the situation to be perpetuated. The Special Rapporteur was informed that in some police departments, such as in San Francisco, the situation has changed and that money comes from the police department itself. Consultations in this direction are also said to be under way in New York city.

137. Political influence of police in the country. Police unions in the United States are reported to be an important political entity. Not only do they represent their members, but they also make political endorsements. Politicians, when running for election, including for president, are particularly interested in receiving support from police unions because they are perceived as being "tough" on crime. In the context of misconduct, police are likely to benefit from political protection. At the federal level, there has reportedly been a lack of interest in investigating police misconduct. Criminal prosecution is rare for similar political reasons: local district attorneys who run for office need support from police unions. In addition, the district attorney depends on the police department to conduct investigations. Unlike in many countries, the police in the United States are structurally independent of the judge as well as of the prosecutor's office. Therefore, prosecutors must always be aware, even as they seek to prosecute abusive police, that they will require the cooperation of these same police in all future criminal investigations and prosecutions. Therefore, it is allegedly difficult for a district attorney to decide to bring charges against a police officer. The district attorney must decide whether there is sufficient evidence to bring the case before a grand jury, which makes the decision whether or not the evidence justifies bringing an indictment.

138. It has also been brought to the attention of the Special Rapporteur that the standards of criminal liability for police are very high. Hence, not only does it have to be proven whether the officer used unreasonable force, but also whether he intended to use it. In many cases, the intention to use excessive force is difficult to prove.

139. The Special Rapporteur has further been informed that the Justice Department has the power to investigate entire police departments for patterns and practices of misconduct and can require certain practices to be changed. In New York City, the Justice Department intervened only after the Abner Louima case.

V. CONCLUSIONS AND RECOMMENDATIONS

"Where, after all, do universal rights begin? In small places, close to home — so close and so small that they cannot be seen on any maps of the world .... Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world." — Eleanor Roosevelt

A. Concerning the use of the death penalty

140. The Special Rapporteur shares the view of the Human Rights Committee and considers that the extent of the reservations, declarations and understandings entered by the United States at the time of ratification of the ICCPR are intended to ensure that the United States has only accepted what is already the law of the United States. He is of the opinion that the reservation entered by the United States on the death penalty provision is incompatible with the object and purpose of the treaty and should therefore be considered void.

141. Not only do the reservations entered by the United States seriously reduce the impact of the ICCPR, but its effectiveness nationwide is further undermined by the absence of active enforcement mechanisms to ensure its implementation at state level.

142. The Special Rapporteur is of the view that a serious gap exists between federal and state governments, concerning implementation of international obligations undertaken by the United States Government. He notes with concern that the ICCPR appears not to have been disseminated to state authorities and that knowledge of the country's international obligations is almost non-existent at state level. Further, he is of the opinion that the Federal Government cannot claim to represent the states at the international level and at the same time fail to take steps to implement international obligations accepted on their behalf.

143. The Special Rapporteur is aware of the implications of the United States system of federalism as set out in the Constitution and the impact that it has on the laws and practices of the United States. At the same time, it is clear that the Federal Government in undertaking international obligations also undertakes to use all of its constitutionally mandated powers to ensure that the human rights obligations are fulfilled at all levels.

144. The Special Rapporteur questions the overall commitment of the Federal Government to enforce international obligations at home if it claimed not to be in a position to ensure the access of United Nations experts such as special rapporteurs to authorities at state level. He is concerned that his visit revealed little evidence of such a commitment at the highest levels of the Federal Government.

145. The Special Rapporteur believes that the current practice of imposing death sentences and executions of juveniles in the United States violates international law. He further believes that the reintroduction of the death penalty and the extension of its scope, both at federal and at state level, contravene the spirit and purpose of article 6 of the ICCPR, as well as the international trend towards the progressive restriction of the number of offences for which the death penalty may be imposed. He is further concerned about the execution of mentally retarded and insane persons which he considers to be in contravention of relevant international standards.

146. The Special Rapporteur deplores these practices and considers that they constitute a step backwards in the promotion and protection of the right to life.

147. Because of the definitive nature of a death sentence, a process leading to its imposition must comply fully with the highest safeguards and fair trial standards, and must be in accordance with restrictions imposed by international law. The Special Rapporteur notes with concern that in the United States, guarantees and safeguards, as well as specific restrictions on capital punishment, are not being fully respected. Lack of adequate counsel and legal representation for many capital defendants is disturbing. The enactment of the 1996 Anti-terrorism and Effective Death Penalty Act and the lack of funding of PCDOs have further jeopardized the implementation of the right to a fair trial as provided for in the ICCPR and other international instruments.

148. Despite the excellent reputation of the United States judiciary, the Special Rapporteur observes that the imposition of death sentences in the United States seems to continue to be marked by arbitrariness. Race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death. As Justice Marshall stated in Godfrey v. Georgia, "The task of eliminating arbitrariness in the infliction of capital punishment is proving to be one which our criminal justice system — and perhaps any criminal justice system — is unable to perform".

149. The politics behind the death penalty, particularly during election campaigns, raises doubts as to the objectivity of its imposition. The Special Rapporteur believes that the system of election of judges to relatively short terms of office, and the practice of requesting financial contributions particularly from members of the bar and the public, may risk interfering with the independence and impartiality of the judiciary. Further, the discretionary power of the prosecutor as to whether or not to seek the death penalty raises serious concern regarding the fairness of its administration.

150. The process of jury selection may also be tainted by racial factors and unfairness. The Special Rapporteur notes with concern that people who are opposed to or have hesitations about the death penalty are unlikely to sit as jurors and believes that a "death qualified" jury will be predisposed to apply the harshest sentence. He fears that the right to a fair trial before an impartial tribunal may be jeopardized by such juries. Moreover, he is convinced that a "death qualified" jury does not represent the community conscience as a whole, but only the conscience of that part of the community which favours capital punishment.

151. The high level of support for the death penalty, even if studies have shown that it is not as deep as is claimed, cannot justify the lack of respect for the restrictions and safeguards surrounding its use. In many countries, mob killings and lynchings enjoy public support as a way to deal with violent crime and are often portrayed as "popular justice". Yet they are not acceptable in any civilized society.

152. While acknowledging the difficulties that authorities face in fighting violent crime, he believes that solutions other than the increasing use of the death penalty need to be sought. Moreover, the inherent cruelty of executions might only lead to the perpetuation of a culture of violence.

153. The Special Rapporteur is particularly concerned by the current approach to victims' rights. He considers that while victims are entitled to respect and compassion, access to justice and prompt

redress, these rights should not be implemented at the expenses of those of the accused. Courts should not become a forum for retaliation. The duty of the State to provide justice should not be privatized and brought back to victims, as it was before the emergence of modern States.

154. While the Special Rapporteur would hope that the United States would join the movement of the international community towards progressively restricting the use of the death penalty as a way to strengthen the protection of the right to life, he is concerned that, to the contrary, the United States is carrying out an increasing number of executions, including of juveniles and mentally retarded persons. He also fears that executions of women will resume if this trend is not reversed.

155. The Special Rapporteur wishes to emphasize that the use of the death penalty in violation of international standards will not help to resolve social problems and build a more harmonious society but, on the contrary, will contribute to exacerbated tensions between races and classes, particularly at a moment when the United States is proclaiming its intention to combat racism more vigorously.

156. In view of the above, the Special Rapporteur recommends the following to the Government of the United States:

(a) To establish a moratorium on executions in accordance with the recommendations made by the American Bar Association and resolution 1997/12 of the Commission on Human Rights;

(b) To discontinue the practice of imposing death sentences on juvenile offenders and mentally retarded persons and to amend national legislation in this respect to bring it into conformity with international standards;

(c) Not to resume executions of women and respect the de facto moratorium in existence since 1984;

(d) To review legislation, both at federal and state levels, so as to restrict the number of offences punishable by death. In particular, the growing tendency to reinstate death penalty statutes and the increase in the number of aggravating circumstances both at state and federal levels should be addressed in order not to contravene the spirit and purpose of article 6 of the ICCPR and the goal expressed by the international community to progressively restrict the number of offences for which the death penalty is applied;

(e) To encourage the development of public defender systems so as to ensure the right to adequate legal representation for indigent defendants; to reinstate funding for legal resource centres in order to guarantee a more appropriate representation of death row inmates, particularly in those states where a public defender system does not exist. This would also help to diminish the risk of executing innocent persons;

(f) To take steps to disseminate and educate government officials at all levels as well as to develop monitoring and appropriate enforcement mechanisms to achieve full implementation of the provisions of the ICCPR, as well as other international treaties, at state level;

(g) To include a human rights component in training programmes for members of the judiciary. A campaign on the role of juries could further aim at informing the public about the responsibilities of jurors;

(h) To review the system of election of members of the judiciary at state level, in order to ensure a degree of independence and impartiality similar to that of the federal system. It is recommended that in order to provide a greater degree of independence and impartiality that judges be elected for longer terms, for instance 10 years or for life;

(i) In view of the above, to consider inviting the Special Rapporteur on the independence of judges and lawyers to undertake a visit to the United States;

(j) To develop an intensive programme aimed at informing state authorities about international obligations undertaken by the United States and at bringing national laws into conformity with these standards; to increase the cooperation between the Department of Justice and the Department of State to disseminate and enforce the human rights undertakings of the United States;

(k) To lift the reservations, particularly on article 6, and the declarations and understandings entered to the ICCPR. The Special Rapporteur also recommends that the United States ratify the Convention on the Rights of the Child. He further recommends that the United States consider ratifying the first and second Optional Protocols to the ICCPR.

B. Concerning killings by the police

157. The Special Rapporteur is concerned by the reports of violations of the right to life as a result of excessive use of force by law enforcement officials which he received during his mission, and he will continue to monitor the situation closely.

158. While acknowledging that the police face extremely difficult situations in their daily work, authorities have an obligation to ensure that the police respect the right to life.

159. Preliminary recommendations to the Government of the United States include the following:

(a) All alleged violations of the right to life should be investigated, police officials responsible brought to justice and compensation provided to the victims. Further, measures should be taken to prevent recurrence of these violations;

(b) Patterns of use of lethal force should be systematically investigated by the Justice Department;

(c) Training on international standards on law enforcement and human rights should be included in police academies. This is particularly relevant because the United States has taken a leading role in training police forces in other countries;

(d) Independent organs, outside the police departments, should be put in place to investigate all allegations of violations of the right to life promptly and impartially, in accordance with principle 9 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions;

(e) In order to avoid conflict of interest with the local district attorney's office, special prosecutors should be appointed more frequently in order to conduct investigations into allegations of violations of the right to life, to identify perpetrators and bring them to justice.

Notes

Annex (Reproduced in the language of submission only)

AS APPROVED BY THE ABA HOUSE OF DELEGATES 3 February 1997

AMERICAN BAR ASSOCIATION SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES SECTION OF LITIGATION SECTION OF TORT AND INSURANCE PRACTICE COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW MASSACHUSETTS BAR ASSOCIATION THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK NEW YORK STATE BAR ASSOCIATION

RECOMMENDATION

RESOLVED, That the American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with the following longstanding American Bar Association policies

intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed:

(i) Implementing ABA "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" (adopted February 1989) and Association policies intended to encourage competency of counsel in capital cases (adopted February 1979, February 1988, February 1990, August 1996);

(ii) Preserving, enhancing and streamlining state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal habeas corpus proceedings (adopted August 1982, February 1990);

(iii) Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant (adopted August 1988, August 1991); and

(iv) Preventing execution of mentally retarded persons (adopted February 1989) and persons who were under the age of 18 at the time of their offences (adopted August 1983).

FURTHER RESOLVED, That in adopting this recommendation, apart from existing association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offenses, the Association takes no position on the death penalty.

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Geneva, Switzerland

<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/ce9d6cdd9353d632c125661300459b39?Opendocument>

APPENDIX PP

February 1989

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
INDIVIDUAL RIGHTS AND RESPONSIBILITIES SECTION
RECOMMENDATION

Be it Resolved, That the American Bar Association urges that no person with mental retardation, as defined by the American Association on Mental Retardation, should be sentenced to death or executed; and

Be it Further Resolved, That the American Bar Association supports enactment of legislation barring the execution of defendants with mental retardation.

Text accessed at <http://www.abanet.org/irr/feb89b.html> (visited 15 Jan. 2001).

APPENDIX QQ

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966

***entry into force* 23 March 1976, in accordance with Article 49**

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation,

based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.
General comment on its implementation

Article 4

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, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. 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.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society,

or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and

conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Twelve members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

(a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three

months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties

concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1.

(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on tie basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

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Geneva, Switzerland

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).

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).

Text accessed at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm> (visited 12 Jan. 2001).

APPENDIX RR

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*59 CRIMINAL LAW AND HUMAN RIGHTS: IMPLICATIONS OF THE UNITED STATES RATIFICATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

John Quigley [FNa1]

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I. INTRODUCTION

The 1992 ratification by the United States of the International Covenant on Civil and Political Rights [FN1] ("Covenant") opens U.S. practice on human rights issues to scrutiny under international standards. To be sure, human rights standards found in the customary law of nations already bound the United States, apart from this country's adherence to any human rights treaty. [FN2] With every decision, domestic courts around the globe contribute to the customary law of nations; [FN3] in a similar way, the opinions and practices of intergovernmental human rights committees and courts claim authority in the domestic courts of the United States. Customary law notwithstanding, accession to the Covenant may significantly enlarge our obligations under human rights standards. Ideally, the Covenant provides the human rights advocate with what customary law is wanting: an authoritative, textual exposition of protected rights and routinized mechanisms for their enforcement.

The Covenant requires governments to observe a broad spectrum of standards in their treatment of individuals and provide remedies for violations. It is no less than an international bill of rights, part of an effort to codify the Universal Declaration of Human Rights, the United Nations' post-war proclamation of the rights of man. [FN4] As of February 1993, 116 member states of the United Nations had acceded to its terms.

*60 The General Assembly approved the text and opened the Covenant for ratification in 1966; [FN5] at the prospect of accession, the United States demurred. It was not until 1977 that President Carter made the United States a treaty signatory [FN6] and asked the Senate to give its advice and consent to ratification. [FN7] The Senate did not act during Carter's term, and President Reagan did not seek Senate action. [FN8]

In 1991, President Bush requested the Senate's consent to ratification, but, seeking to limit U.S. obligations under the Covenant, submitted a package of formal reservations and qualifying

statements. [FN9] The Senate Foreign Relations Committee unanimously recommended the Covenant to the Senate, [FN10] and the Senate voted in favor of ratification, subject to the Administration's proposed emendations. [FN11] On June 8, 1992, the President deposited the signed instrument of ratification with the U.N. Secretary- General; [FN12] three months later, on September 8, 1992, the treaty entered into force in the United States. [FN13]

Criminal law is a principal area of concern in the Covenant. Rights guarantees in such areas as speech, assembly, and privacy limit the criminalization of conduct. [FN14] The Covenant provides certain procedural *61 protections to criminal suspects, the accused, and convicted prisoners, [FN15] and several provisions pertain to the conduct of criminal trials. [FN16]

In Part Three of this Article, I will examine the provisions of the International Covenant on Civil and Political Rights that concern criminal law and procedure, with an eye to their potential conflict with the domestic law of the United States. However, as the impact of these new rights turns upon their implementation, I will next address the general question of the Covenant's enforceability.

II. LIMITATIONS ON U.S. OBLIGATIONS UNDER THE COVENANT

The U.S. government took steps, in ratifying the Covenant, to minimize international scrutiny into its domestic policies. The Bush Administration hedged U.S. acceptance of the Covenant with reservations, understandings, and declarations; the Administration sought to ensure that present practice would prevail where it conflicts with the Covenant. [FN17] To the qualifications proposed by President Bush, the Senate added the so-called "Helms proviso": the Covenant should not be read to require or authorize legislation or other action by the United States that the U.S. Constitution would prohibit. [FN18]

On the international level, the United States has protected itself from effective legal oversight on its compliance with Covenant provisions,*62 particularly in refusing to sign the treaty's Optional Protocol. Pursuant to the Optional Protocol, individuals whose protected rights have "been violated by State action" have filed complaints with the Human Rights Committee, the body established by the treaty to monitor compliance with its provisions. [FN19] As of February 1993, sixty-seven states were parties to the Optional Protocol. [FN20]

The enforcement mechanisms to which the United States is subject have little bite. As a party to the Covenant, the United States must submit a periodic report to the Human Rights Committee; [FN21] but the Committee has few investigatory powers and has been reluctant to take other affirmative steps toward more effective monitoring. [FN22] Having acceded to an optional provision of the Covenant, the United States has opened itself to complaints by other states. [FN23] Any state party that has acceded to the provision may lodge a complaint against the United States and have it heard before the Human Rights Committee. [FN24] The Committee would then sit in closed, confidential session to entertain oral and written statements from the two states; [FN25] pursuant

to these hearings, it would issue a non-binding written report. [FN26] To date, not one state party has filed a complaint against another under this procedure: [FN27] states are loath to jeopardize relations, or to invite retaliatory filings. [FN28] As it stands, this procedure will not provide effective international enforcement of U.S. obligations.

*63 Article 2 of the Covenant mandates that states provide enforcement mechanisms through their domestic law. [FN29] The United States government, however, entered a declaration in apparent opposition to this mandate. The declaration asserts that the prescriptive provisions of the Covenant (Articles 1 to 27) are not "self-executing": absent further action by the Congress to incorporate provisions into the domestic law, the courts may not enforce them. [FN30] "The intent," explained the Foreign Relations Committee, was "to clarify that the Covenant will not create a private cause of action in U.S. courts .... [E]xisting U.S. law generally complies with the covenant; hence implementing legislation is not contemplated." [FN31]

The Senate declaration has uncertain legal status. It is neither an Act of Congress, having the force of federal law, nor a reservation to the Covenant, having all the authority of treaty law under the Supremacy Clause. [FN32] The declaration has effect only insofar as it bears upon a judicial appraisal of the Covenant's force. This appraisal is not a fait accompli; it is not clear how much weight the Senate's declaration will carry with the courts. [FN33]

In determining whether treaty provisions are "self-executing," the U.S. Supreme Court examines the intent of the parties to the treaty: did the states parties intend to confer legal rights upon individuals? [FN34] *64 While the Senate's declaration carries weight, the force ascribed to the Covenant by other states persuades one of the contrary. [FN35] Courts in the United Kingdom, for example, have permitted private causes-of-action under the Covenant: although Parliament has not expressly written the Covenant into domestic law, as British law requires, [FN36] barristers have invoked and courts have recognized actionable rights in Covenant provisions. [FN37] The Human Rights Committee routinely asks states about the status of the Covenant in their courts; [FN38] many states have replied that rights granted by the Covenant are enforceable in their courts. [FN39]

Advocates for enforceability have a technical argument at their disposal. Article 2 of the Covenant demands that the United States create a system for enforcement; the Senate's declaration, lacking the full authority of a reservation, does not mitigate this obligation. Because the United States has not created an enforcement mechanism in the other branches of government, it necessarily relies upon the judiciary to meet its obligation. [FN40] The courts should decide on this basis that the prescriptive provisions of the Covenant are self-executing. [FN41]

*65 The Covenant binds not only the federal government but the states as well; it therefore applies to criminal proceedings in state courts. An "understanding" entered by the United States stipulates that responsibility for federal compliance rests with the federal government, state compliance with the individual states. [FN42] This "understanding" further specifies that "to the extent that state and local governments exercise jurisdiction over such matters, the Federal

Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant." [FN43] In monitoring the activity of state courts, the federal government assumes a role limited to its functions under the U.S. Constitution. The Covenant does not enlarge its domain.

Although the United States has sought to restrict the domestic enforceability of the Covenant, the treaty opens new vistas to criminal defense lawyers. Even in the worst case, should the judiciary determine that the treaty is not self- executing, state and federal courts must use these human rights norms to give content to state and federal constitutional provisions. [FN44] The criminal defense lawyer may profitably invoke Covenant provisions on any number of substantive and procedural issues. In the remainder of this Article, I discuss how the Covenant expands individual rights in several important areas of criminal law.

III. U.S. CRIMINAL LAW AND THE INTERNATIONAL COVENANT

A. Presumption of Innocence and Burden of Proof

The Covenant on Civil and Political Rights seems to take a more expansive view than U.S. law on the presumption of innocence. On its face, the language of the Covenant mirrors that of the constitutional *66 safeguard: "Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law." [FN45] The Human Rights Committee has noted one consequence of the presumption in accord with U.S. criminal law: [FN46] "the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt." [FN47]

Where the international and U.S. standards may yet differ is over the burden of proof for affirmative defenses. States that have adopted the presumption of innocence have held that in no case shall the accused shoulder the burden to prove an asserted defense. Although earlier law took a contrary position, by the Twentieth Century both the common law and civil law had burdened the prosecution with disproving an asserted defense. [FN48] Current law in the United States, in both federal and state jurisdictions, deviates from this firm rule: in federal courts, the accused must prove the elements of the insanity defense, and in certain state jurisdictions, the elements of various defenses. [FN49]

In 1895, the United States Supreme Court ruled that the burden of persuasion for the insanity defense lies upon the prosecution; [FN50] soon after, federal courts were bringing this rule to bear on other defenses. [FN51] But in 1984, in the aftermath of the trial of John Hinkley, Jr., for attempted assassination of the President, Congress shifted the burden of persuasion of insanity back onto the accused: in federal prosecutions, the accused must support an insanity defense with "clear and convincing evidence." [FN52]

The practice in individual U.S. states varies. Some states require the prosecution to negate all defensive claims, while others assign the burden to the prosecution for certain defenses and to the accused for *67 others. Nearly all states require the prosecution to negate self-defense, defense of another, defense of property, and defense of habitation; [FN53] most require the state to negate necessity and provocation. [FN54] On the other hand, for the defenses of duress, intoxication, and insanity, many states place the burden of proof on the accused. [FN55] These state practices have withstood constitutional challenge. In Martin v. Ohio, [FN56] the United States Supreme Court ruled that the burden to show self-defense in a murder trial may well lie on the accused; this assignment of the burden of proof does not offend the constitutional right to due process of law. [FN57]

International bodies have produced little pertinent case law on this issue, largely because, in the European states that generate most of our human rights case law, the burden to prove a defense rarely rests on the accused. One decision that may bear relevance interprets the European Convention for the Protection of Human Rights and Fundamental Freedoms, which includes a presumption of innocence provision. [FN58] The United Kingdom had convicted a man of living off the earnings of a prostitute, relying upon a statutory presumption of mens rea: "a man who lives with or is habitually in the company of a prostitute . . . shall be presumed to be knowingly living on the earnings of prostitution unless he proves the contrary." [FN59] The European Commission of Human Rights, which hears private complaints under the European Convention, judged the statutory presumption inoffensive to the presumption of innocence: the statute was "neither irrebuttable nor unreasonable." [FN60] Yet the Commission warned "that this *68 form of provision could, if widely or unreasonably worded, have the same effect as a presumption or guilt." [FN61] The U.S. statutory code that places the burden of proof for the insanity defense on the accused would not satisfy the standard advanced in this case. There is no reason to presume every accused murderer sane at the time of his act; furthermore, this presumption, encompassing an inconceivably broad range of fact situations, extends far more broadly than the presumption in the European Court's case, the presumption of knowledge to a material fact under certain specified conditions.

Although international human rights bodies supply little case law in this area, the practice of other parties to the Covenant are instructive. The way a state interpreted a doctrine prior to its incorporation into an international body of law has some bearing on the intended meaning of the international law doctrine. In the interpretation of "presumption of innocence" that prevailed among other parties to the Covenant, the burden of proof for affirmative defenses rests on the prosecution; [FN62] this interpretation, and not the aberrant rule of some U.S. jurisdictions, should have the stronger claim to doctrinal meaning.

B. Construction of Statutes

The Covenant prohibits conviction for acts that were not criminal at the time of their commission. [FN63] The state must not convict under law enacted subsequent to the alleged crime, neither under a fresh statute, nor under an amendment to an established statute. The ex post facto

doctrine in U.S. constitutional law accommodates the Covenant prohibition. However, the Covenant may conflict with U.S. law in the area of statutory construction: under a plausible interpretation of the treaty, the state must not convict under a statute made applicable by unreasonable judicial alteration; [FN64] U.S. law does not observe so strict a rule.

When a court construes a statute in a way that alters its meaning, it runs the risk of condemning an act that was not a crime at the time of its commission. The United States Supreme Court has recognized the superseding rights of the accused in such cases as a matter of due process of law. [FN65] Nonetheless, the Court has permitted state courts, in some situations, to condemn acts that no statute had prohibited.

*69 In a plurality opinion in Massachusetts v. Oakes, [FN66] four members of the Supreme Court held that a legislature may save a statute from consitutional failure and that a court may apply the amended statute to the case immediately before it. The state statute in Oakes was an overbroad regulation of speech: it prohibited the depiction of nude minors, [FN67] infringing upon a category of speech protected by the First Amendment of the U.S. Constitution. [FN68] The Supreme Judicial Court of Massachusetts found the statute defective and invalid on this basis. While the Supreme Court waited to hear the case, the state legislature amended the statute to cure its deficiency. [FN69] The plurality opinion held that the Massachusetts court could apply the amended statute on remand; courts need only conclude that the original statute, notwithstanding the question of its constitutionality, put the defendant on notice about the criminality of his activities. [FN70]

In other cases, courts themselves have repaired the constitutional defect. In Ohio v. Osborne, [FN71] the Ohio Supreme Court cured a state statute of overbreadth simply by adding material elements to the prohibited crime. The statute at issue criminalized the possession of photographs of nude minors. The court acknowledged that such a prohibition was, on its face, unconstitutional under prior United States Supreme Court cases. [FN72] It proceeded to add material elements: in addition to showing nudity, the depiction had to be "lewd" or involve a "graphic focus on the genitals." [FN73]

A case heard under the European human rights system recognizes the international prohibition against acts that were not criminal at the time of their commission and suggests limits to the judiciary's power of statutory construction. [FN74] An Austrian court convicted a man for income tax evasion under an altered interpretation of the statute. [FN75] The accused had concealed a tax evasion for the benefit of a third party. At the time of the concealment, the Austrian Supreme Court *70 required evidence of personal benefit as an element of the statutory offense; but sometime thereafter, the Supreme Court reconstrued the statute, discarding this element. On the record, the applicant did not meet the old standard; the court convicted him under the new one. The defendant asserted before the European Human Rights Commission that Austria had convicted him of an act that had not been criminal at the time of commission. Agreeing with his contention, the European Commission held that this conviction had possibly violated the defendant's rights under the

European Convention, since the act did not constitute an offense at the time of the accused's act. [FN76]

The European case demonstrates that a judicial construction that materially changes the elements of an offense, or unreasonably expands their definition, cannot be used to condemn an act committed before the new interpretation. This standard calls into question the convictions upheld by the U.S. Supreme Court in Oakes and Osborne.

C. The Right to Privacy

The Covenant, like the U.S. Constitution, places a protective screen around a number of civil liberties; the state may not criminalize conduct that arises within the exercise of these liberties. The right to privacy guaranteed by the Covenant may occasion considerable conflict between U.S. constitutional and international norms. Human rights case law interpreting the right to privacy provision clearly differs from constitutional law on at least one issue, the state prohibition of "sodomy," which the Supreme Court has permitted. [FN77]

Many U.S. states have criminalized "sodomy," which in some statutes comprises every sexual act other than heterosexual intercourse. [FN78] The United States Supreme Court has found these statutes valid under the U.S. Constitution. [FN79] The Covenant, unlike the Constitution, contains an explicit privacy provision: "No one shall be subjected to arbitrary or unlawful interference with his privacy . . . . " [FN80]

Although an anti-sodomy statute has not yet come before the Human Rights Committee, it has engaged the attention of the European Court of Human Rights, which has been charged with enforcing a privacy right, found in the European Convention, that closely follows the language of the Covenant. The European Court found that the privacy right protects the homosexual activity of consenting adults *71 from criminal sanction. [FN81] Interpreted thus, the privacy provision of the Covenant countermands the anti-sodomy statute, which the U.S. Constitution, as interpreted by the Bowers Court, permits.

D. Prison Sentences and Prison Conditions

The United States has shielded itself with reservations and understandings from the Covenant's provisions on criminal punishment. But for these stipulations, conflict would have emerged between U.S. and international standards in two major areas: severe sentences and retroactive reduction of sentence. First, the comparatively long prison terms set by federal and state penal codes, in several severe instances, violate Article 7 of the Covenant, which prohibits "cruel, inhuman or degrading . . . treatment or punishment." [FN82] However, the United States entered a reservation that equates the Covenant standard with the one found in the Fifth, Eighth, and

Fourteenth Amendments of the Constitution. [FN83] Second, the Covenant's Article 15 provides for retroactive sentence reduction: when the legislature lightens the penalty for a crime, the state retroactively reduces the outstanding sentences of those already convicted. [FN84] The United States entered a reservation to avoid this provision. [FN85]

Prison conditions have received attention from courts in the United States; [FN86] the Covenant's Article 7, prohibiting "cruel, inhuman or degrading treatment or punishment," [FN87] and Article 10, mandating treatment of prisoners "with humanity and with respect for the inherent dignity of the human person," apply as well. [FN88] The Human Rights Committee has cited states for violations of these provisions. In one instance, the Committee identified "inhuman treatment," in violation of Article 7, in an Uruguayan prison: cells flooded in the rainy season and were grossly overcrowded, and the prison administration *72 kept inmates indoors all day. [FN89] The Committee, finding a violation in another case where the prisoner was "kept incommunicado," has also held that solitary confinement may be a per se violation of Article 7. [FN90]

While the Covenant — in the Committee's opinion — imposes certain standards of treatment on states parties, the impact of the Committee's views on U.S. prison conditions is not clear. As discussed above, the U.S. reservation to Article 7 preempts new standards of treatment, installing the constitutional prohibition against "cruel and unusual punishment" in place of the Covenant's "inhuman treatment" provision. However, the United States did not enter a reservation to Covenant Article 10, [FN91] which the Committee has also applied in prisoners' rights cases.

Prisoner franchise is another open issue, despite U.S. reservations. Inmates at a federal prison in Quebec brought the issue before the Committee; they asserted the right to vote in general elections under a Covenant provision that guarantees the right to vote of "every citizen." [FN92] The government of the Province of Quebec understood this right to apply to inmates: when the Covenant entered into force for Canada, it amended its legislation to return the suffrage to inmates of the provincial prisons. [FN93] However, the inmates were housed in a Canadian federal prison, and the Canadian government denied the right to vote to those convicted of serious offenses. [FN94] The Committee did not resolve the inmates' complaint on the merits because it found that they had not exhausted remedies available in the Canadian courts. [FN95] The issue remains open as a matter of human rights case law; however, the language of the Covenant, as understood by the Quebec government, would guarantee the suffrage right of prisoners.

E. Capital Punishment

Although the Covenant does not prohibit capital punishment, it does discourage it. The Covenant takes a moral position against capital punishment by stating that "nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State *73 Party." [FN96] While capital punishment still exists in many countries, a growing international movement supports its abolition. Most Western European states have ratified a treaty that outlaws capital

punishment in peacetime. [FN97] Draft agreements from both the United Nations and the Organization of American States also call for the abolition of the death penalty. [FN98]

The Covenant does not ban the death penalty outright, but it restricts its use, proclaiming that "in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes." [FN99] The Covenant also requires that pardon and commutation procedures be available and that capital punishment not be imposed on pregnant women or minors, individuals under eighteen years of age at the time of their crime. [FN100]

The United States Senate entered a reservation to the Covenant to preserve the right to use capital punishment. The Senate stipulated "[t]hat 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." [FN101] Even with this Senate reservation, numerous questions arise concerning United States compliance under the Covenant.

1. Capital Punishment Only for the Most Serious Crimes

The Covenant does not define the "most serious crimes" for which the death penalty may be imposed, but the Human Rights Committee has said this term "must be read restrictively to mean that the death penalty should be a quite exceptional measure." [FN102] At the state level, capital punishment is used only for murder, and then only murder under circumstances considered to aggravate the seriousness of the *74 act. [FN103] Questions of compliance in the various states arise most prominently where capital punishment has been proposed for accomplices, even if the accomplices did not share the principal's intent to kill. The U.S. Supreme Court has held that death sentences may be imposed for accomplices guilty of "major participation in the felony committed, combined with reckless indifference to human life." [FN104] It is unclear whether this use of the death penalty is incompatible with the Covenant.

At the federal level, Congress has recently considered using the death penalty for a variety of drug-related offenses. [FN105] This would clearly implicate questions of compliance with the Covenant.

2. Capital Punishment of Juveniles

The U.S. practice of executing persons who were under the age of eighteen at the time of the offense is clearly at odds with the Covenant, prompting the Senate to enter an explicit reservation. [FN106] During Senate deliberations over the Covenant, it was noted that "[t]he international consensus against the execution of juvenile offenders . . . is overwhelming. Only a very few

governments continue to execute juvenile offenders — besides the United States these include Bangladesh, Iran, Iraq, Nigeria and Pakistan." [FN107] The entry of this reservation clearly signifies an effort on the part of the United States to protect and perpetuate current practice rather than to conform to the Covenant.

Nineteen U.S. states have no statutory minimum age for capital punishment, and seven others statutorily authorize capital punishment when the offender is under eighteen at the time of the offense. [FN108] The United States Supreme Court has held it to be constitutionally permissible to execute persons who are as young as sixteen at the time of the offense. [FN109]

The Inter-American Commission on Human Rights has held the diverse use of capital punishment by against minors by the various *75 U.S. states to be a violation of the American Convention on Human Rights. The Commission ruled that by leaving decisions concerning the execution of juveniles to state legislatures, the United States created a patchwork pattern of legislation whose arbitrariness violated rights to life and equality before the law. [FN110]

3. Capital Punishment of the Mentally Retarded

The Covenant is silent on the question, but most states of the world prohibit the execution of the mentally retarded. [FN111] In the United States, many of those sentenced to death suffer mental retardation, [FN112] and the United States Supreme Court has ruled this practice constitutional. [FN113] Although the Covenant does not explicitly prohibit the execution of the mentally retarded, it does prohibit the arbitrary taking of life; [FN114] where the condemned person is seriously lacking in understanding, the taking of life might be considered arbitrary. [FN115]

4. Excessive Delay

The post-trial procedures preceding execution create other possible violations of the Covenant. Persons sentenced to death are typically kept on "death row" for a substantial time before being executed. Such confinement is generally quite close, on the rationale that these prisoners have greater incentive than others to escape.

The Human Rights Committee considered the question of lengthy detention pending execution in Pratt and Morgan v. Jamaica. [FN116] By the time the Committee heard this case, seven years had elapsed since the death sentence was imposed; most of the delay was caused by the unexplained tardiness of the appellate court in rendering its decision on an appeal. Although the Covenant has no provision on delay in an appeal, the Committee relied on Article 14(3)(c), which gives a right "to be tried without undue delay," and Article 14(5), which gives a right to an appeal. Reading the two together, the Committee found *76 a right to a speedy decision on an appeal which the delay in this case violated. [FN117] Elsewhere, commenting on appellants' rights outside the

capital punishment context, the Committee has held that the right "to be tried without undue delay" includes both first instance proceedings and appellate proceedings. Furthermore, it includes not only the commencement of such proceedings, but also the rendering of a judgment. [FN118]

The reservations entered by the United States do not reach rulings concerning the Covenant's provision on delay. In addition to its ruling in Pratt and Morgan, the Committee has found violations of the right to a speedy appeal in other cases. [FN119] Delay in appeals is a perennial problem in U.S. courts, making violation of the Covenant likely.

Delay prior to trial is also a violation of the Covenant. The Human Rights Committee has held that pre-trial delay "should be an exception and as short as possible." [FN120] Although the Committee has not defined what time period is too long, it found a violation in one case of extreme delay. In Bolanos v. Ecuador, where the accused was held in detention for five years before indictment, the Committee held that this delay violated the Covenant's Article 9(1), which prohibits arbitrary detention, and Article 9(3), which states that "it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial." [FN121] The Committee also found violations of Article 14(3)(c), the right "to be tried without undue delay," and Article 14(1), which gives a right to a fair hearing, because Bolanos had been given no trial at all. [FN122] The Committee ruled that Bolanos should be released from custody pending trial. It also ruled that he should be paid compensation for his unlawful detention, citing Article 9(5), which gives "an enforceable right to compensation" in the case of unlawful detention. [FN123] The right *77 to compensation for lengthy pre-trial detention typically is not enforceable in U.S. courts.

5. Cruel and Inhuman Treatment

In Pratt and Morgan, a stay of execution was granted, but authorities delayed twenty hours (until forty-five minutes before the scheduled execution) before informing Pratt of the stay. [FN124] The Committee found this constituted cruel and inhuman treatment, [FN125] and concluded that the appropriate remedy was commutation of thedeath sentence. [FN126] U.S. courts have not ruled on a failure to inform a condemned prisoner of a stay, but the Committee decision suggests that the Covenant would be implicated by such a case.

In Soering v. United Kingdom, the European Court of Human Rights determined that the death row confinement in Virginia constituted inhuman and degrading treatment, as defined in the European Convention. [FN127] In that case, the United States requested the extradition from the United Kingdom of Jens Soering, who was sought by Virginia authorities for capital murder in connection with a homicide in Virginia. [FN128] Following the United Kingdom decision to surrender Soering, he complained to the European Commission of Human Rights, arguing that he would be confined to death row if convicted of capital murder in Virginia. [FN129] Soering submitted evidence on the likely length of incarceration and on conditions on Virginia's death row,

asserting that extradition to the United States would constitute cruel treatment under the European Convention. [FN130] The European Court of Human Rights concurred that incarceration on Virginia's death row would constitute cruel treatment and ruled that the United Kingdom would violate the European Convention if it surrendered Soering. [FN131]

The United States Senate, as indicated, entered a reservation to the Covenant's Article 7 (prohibiting "cruel, inhuman or degrading treatment*78 or punishment"), restricting the reach of the article to that of the cruel and unusual punishment clause in the Eighth Amendment of the U.S. Constitution. [FN132] Thus the Human Rights Committee is limited to considering whether death row incarceration in the United States violates the United States' own constitutional standards.

6. Racial Discrimination in Capital Punishment

Racial bias in the implementation of capital punishment in the United States may constitute a violation of the Covenant. In addition to prohibiting the "arbitrary" deprivation of life, [FN133] the Covenant outlaws discrimination on account of race. [FN134] In a number of U.S. states, capital punishment has been imposed more readily where the victim of the crime was white than where the victim was black. [FN135] This discrepancy raises questions of procedural fairness and the possibility of racial bias where the determination to impose capital punishment is discretionary.

The United States Supreme Court addressed this issue in a case from Georgia. [FN136] As part of his evidence, the petitioner presented the results of a study indicating that one who kills a white person in Georgia is four times as likely to be sentenced to death as one who kills a black person. [FN137] The Court said, however, that before it will reverse a capital sentence for racial bias, it must find either that those who exercised discretion in the instant case acted out of bias or that the legislature maintained the death penalty "because of an anticipated racially discriminatory effect." [FN138]

The Human Rights Committee has not been called upon to decide whether disparate impact suffices to establish race discrimination under the Covenant. [FN139] If the Committee should rule that disparate impact *79 is sufficient, the U.S. Supreme Court's insistence on a showing of intent would be subject to challenge.

7. Jury Selection in Capital Cases

Finally, in the trial of capital cases in the United States, prosecutors typically are permitted to exclude from the jury potential jurors who say that they could not impose the death penalty due to their moral beliefs. [FN140] Prosecutors argue that such jurors will be more likely to acquit defendants. [FN141] However, the very process of questioning potential jurors about the death penalty may predispose the jury members to think that the accused has committed a capital crime.

A controlled experiment that involved "deathqualifying" subjects concluded that persons who were asked questions about their views on the death penalty prior to hearing evidence were more likely to convict. [FN142] Since "death qualified" jurors are, by definition, more likely to recommend death, a capital jury is thus doubly skewed; it is both more likely to convict and more likely to recommend death. [FN143]

In a case challenging the exclusion of non-death qualified jurors, the U.S. Supreme Court recognized this bias, saying it would "assume that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries." [FN144] It held, however, "that the Constitution does not prohibit the States from 'death qualifying' juries in capital cases." [FN145] Dissenting, Justice Marshall asserted that death qualified jurors have a "proprosecution bias" [FN146] and are "more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more mistrustful of defense attorneys, and less concerned about the danger of erroneous ***80** convictions." [FN147] Marshall concluded that "[t]he very process of death qualification focuses attention on the death penalty before the trial has even begun" and therefore "predispose[s] the jurors that survive it to believe that the defendant is guilty." [FN148]

The Covenant requires a "fair and public hearing by a competent, independent and impartial tribunal." [FN149] It is doubtful that those accused in capital cases are tried by an "impartial tribunal" when those most likely to find in their favor are excluded. The Covenant would seem to require at least that "death-scrupled" jurors not be excluded from the jury that decides guilt or innocence. A second jury could be impanelled to consider the sentence. Of course, the issue of excluding "death-scrupled" jurors from such a sentencing jury would still remain.

F. Extradition

1. Extraditing from the United States

The Covenant may require a change in certain U.S. practices in the field of extradition. One issue is the so-called "rule of non-inquiry" which U.S. courts invoke in refusing to entertain evidence that the extraditee may be tortured or otherwise mistreated if surrendered to the requesting state. Courts have not uniformly followed this rule, and some have indicated that they would rule against extradition, given evidence that the individual would be mistreated. [FN150] Other courts, however, have ignored the issue, leaving to the Secretary of State whether to decline to surrender the individual because of anticipated ill treatment. [FN151] Since the Secretary of State does not consider such matters publicly, it is generally not known to what extent the Secretary considers concerns of possible mistreatment.

***81** In Soering v. United Kingdom, the European Court of Human Rights stated that under the European Convention "a Contracting State may not surrender an individual unless satisfied that the

conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention." [FN152] That the mistreatment is not inflicted by the sending state "cannot absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction." [FN153] Thus a state violates its own obligation not to inflict cruel, inhuman, or degrading treatment when, pursuant to an extradition request, it surrenders individuals to a state that foreseeably will subject them to unlawful treatment. Although no similar case has arisen under the Covenant, the result is likely follow the decision reached by the European Court.

2. Securing Individuals Abroad for Trial in the United States

Another extradition issue raised by the United States' adherence to the Covenant relates to the other side of extradition — securing individuals abroad for trial in the United States. In the 1980s, the executive branch approved a policy which, in limited instances, called for the kidnapping abroad of individuals sought for trial in the United States. [FN154] In Alvarez- Machain v. United States, [FN155] the Court considered the legal issues involved when federal authorities hired private kidnappers who seized a suspect in Mexico and brought him by force to the United States. The United States Supreme Court said that this practice did not deprive a U.S. court of jurisdiction to try the individual, even if the United States had, as it did with Mexico, an extradition treaty stipulating specific procedures for the surrender of suspects. [FN156]

In Alvarez-Machain, the Court did not consider whether the kidnapping violated the international human rights of the individual seized. While the Covenant does not specifically address the abduction of suspects abroad, a number of analysts have concluded that under the Covenant such abduction violates Article 9(1), which states that "[e]veryone has the right to liberty and security of person. No one *82 shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." [FN157]

In two cases from Uruguay, the Human Rights Committee confirmed the view that forcible abduction abroad for prosecution in the abducting state violates the Covenant. In Celiberti v. Uruguay, [FN158] Uruguayan police entered Brazil, seized a woman and brought her back to Uruguay for criminal proceedings. The Committee found that this violated Article 9 of the Covenant "because the act of abduction into Uruguayan territory constituted an arbitrary arrest and detention." [FN159]

In Lopez Burgos v. Uruguay, [FN160] Uruguayan police, apparently in conjunction with Argentine para-military groups, seized Lopez Burgos in Argentina and held him there secretly for two weeks. They then clandestinely transported him by force to Uruguay, where they incarcerated him. [FN161] The Committee again found the abduction abroad to consititute "arbitrary arrest and detention." [FN162]

The facts of Celiberti v. Uruguay and Lopez Burgos v. Uruguay were similar to those in Alvarez-Machain in that the abduction was carried out abroad and the person was subsequently forced into the territory of the abducting state. Although Mexico objected to the abduction of Alvarez-Machain, and Brazil and Argentina did not protest in the two Uruguayan cases, this difference is not significant because Article 9(1) protects the rights of individuals: Article 9(1) is violated whether or not there is a protest by the state in which the abduction occurs.

Another potential distinction between these cases is that private kidnappers in Alvarez were hired by the United States, while Uruguayan police performed the abductions in the Uruguay cases. However, the Committee's conclusion in Celiberti and Lopez-Burgos applies equally to Alvarez: because abduction by agents of another state occurs outside the law of that state, the abduction is not carried out in accordance with procedures established by law. Rather, it is a criminal *83 act in the state where it occurs, whether the kidnappers are hired private parties or police of the state sponsoring the kidnapping.

3. Unlawful Abductions as Cruel and Unusual Punishment

Abduction abroad is likely to require the use of considerable force and thus may infringe on the Covenant's provisions prohibiting "cruel, inhuman or degrading treatment or punishment." [FN163] The abductor may also violate that provision which requires that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." [FN164] In practice, forcible abduction has frequently involved inhumane treatment, like the drugging of the suspect [FN165] or transport in a closed container. [FN166] In any event, where, as in Alvarez-Machain, the U.S. government hires private kidnappers, it has no control over how well the suspect is treated.

The abductee, moreover, may reasonably fear death or serious injury at the hands of the kidnappers, particularly if the kidnapping occurs in countries in which "death squads" operate. The risk is therefore high that the abductee will initiate violence to attempt an escape.

Such violation of personal integrity is illustrated by the facts of Celiberti. The Uruguayan police held Celiberti captive for one week in her apartment in Brazil and took her children away from her before forcibly transporting her to Uruguay. Several Brazilian police officers who, without authorization, collaborated with the Uruguayan police were later prosecuted in Brazil for their role in the abduction. [FN167]

In recognition that an abductee's rights are at stake, a U.S. Court of Appeals decided in United States v. Toscanino that if the treatment is sufficiently cruel, the abductee's right to due process of law is violated. [FN168] In that case, the U.S. Department of Justice hired Uruguayan police officers, to abduct a narcotics suspect in Uruguay and to bring him over the border to Brazilian authorities who were cooperating with the Department of Justice. Brazilian authorities

allegedly knocked the suspect unconscious, drugged him, and then interrogated him under severe torture, all with the knowledge of a *84 United States attorney. Brazilian officials refused the request of the suspect, who was Italian, to contact his consulate in Brazil. [FN169] Based in part on the abusive treatment, the Second Circuit held that the case against the suspect should be dismissed. [FN170]

4. Procedural Rights and Conditions of Detention

A person heldin detention has the right to redress in the event of abuse. An abductee, however, has legal redress until delivered to the authorities in the state that ordered the abduction. A detainee must be detained within a legal framework so that "all measures affecting the human rights of a person under any form of detention . . . shall be ordered by or be under the effective control of a judicial or other authority under the law." [FN171] Here "other authority" means a quasijudicial officer "whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence." [FN172] Forcible abduction would violate these conditions insofar as detention is not under the control of a "judicial or other authority."

The related right to complain to the authorities about the fact of or conditions of detention is also violated by forcible abduction abroad. "A detained . . . person shall immediately be provided, by the authority responsible for his . . . detention . . . with . . . an explanation of his rights . . . relating to his . . . detention . . . and how to avail himself of his rights." [FN173] Such appeal clearly is not available in most abduction cases.

Another result of the lack of a legal regime in abduction cases is that detainees have no means to enforce their rights to any necessary medical treatment. [FN174] This is a particular problem in an abduction *85 because of the high risk that the detainee will be injured while being seized or while attempting to escape. Fearing exposure, abductors are unlikely to seek medical treatment for the detainee.

Moreover, the abductors may, as in Celiberti, take the abductee away from a child or another person in need of care. In a normal arrest situation, a detainee could complain to higher authority. The Covenant guarantees a right for a detainee to be treated "with respect for the inherent dignity of the human person," [FN175] a right that would seem to require attention to children who are in need as a result of being deprived of the care of the detainee. A detainee has the right to handle such matters and to inform her family immediately of the detention. [FN176]

Forcible abduction may also violate the right to prompt appearance before a judicial officer competent to assess the lawfulness of a detention. [FN177] The Covenant provides that

> [a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power . . . . Anyone

> who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. [FN178]

The Human Rights Committee has said that "prompt" means that a person must be brought before a judge within "a few days." [FN179] This right to prompt judicial review of the lawfulness of a detention is denied a person abducted abroad. Furthermore, in the event of an error where the wrong person is abducted, the lack of access to a court means that there is no legal remedy.

IV. CONCLUSION: THINKING ABOUT ENFORCEMENT

This Article has dealt with a large number of rights issues implicated by the recent United States ratification of the Covenant. Without providing a definitive resolution, this Article has sought to identify areas in which U.S. practice can be challenged under the Covenant.

*86 A definitive analysis of U.S. conformity to international standards will remain elusive. International rights standards, like domestic U.S. legal standards, are not static, and many Covenant provisions lack authoritative definition. It is clear, however, that any future observance of the Covenant demands heightened sensitivity: prosecuting attorneys must take the Covenant into account in selecting charges, in overseeing police investigative practices, and in conducting trials; defense attorneys must utilize Covenant provisions to the benefit of their clients; law school courses and continuing legal education programs on civil rights must consider issues that the Covenant raises.

In many aspects of criminal proceedings, the United States has been at the forefront of rights protection and has even served as a model for other states. In the 1990s, however, with a Supreme Court more inclined to constrict rights than to expand them, the stage is set for increasing divergence between rights recognized by the United States Supreme Court and those guaranteed by international standards. This Article has highlighted certain international standards already more protective of individual freedoms than those found in the U.S. Constitution and the constitutions of the states. In the International Covenant on Civil and Political Rights, advocates have an effective tool for maintaining or expanding the rights of criminal defendants in domestic U.S. courts.

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[FN1]. International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter Covenant].

[FN2]. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

[FN3]. See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[FN4]. G.A. Res. 217A, U.N. GAOR, 3rd Sess., Res. 71, art. 13(2), U.N. Doc. A/810 (1948).

[FN5]. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967).

[FN6]. 13 WEEKLY COMP. PRES. DOC. 1488 (Oct. 5, 1977), reprinted in 77 DEP'T ST. BULL. 586 (1977).

[FN7]. 14 WEEKLY COMP. PRES. DOC. 395 (Feb. 23, 1978), reprinted in 78 DEP'T ST. BULL. Apr. 1978, at 48 (Carter proposed a list of qualifications to limit U.S. liability under the Covenant). The Covenant enters into force for a state only upon that state's formal ratification of the document, Covenant, supra note 1, art. 48. The U.S. Constitution gives the President "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const., art. 2, § 2.

[FN8]. U.S. SENATE, COMM. ON FOREIGN RELATIONS, 102ND CONG., 2ND SESS., REPORT ON INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 2 (1992), reprinted in 31 I.L.M. 648, 649 (1992) ("the Reagan Administration did not indicate any interest in ratifying the Covenant"). Unlike unadopted legislation, a submitted treaty does not "expire" at the end of a term of Congress. Thus, the Senate remained seized of the Covenant even after Carter ceased to be president, but with Reagan uninterested in ratification there was little point in Senate action. Craig H. Baab, The Process for United States Ratification of Human Rights Instruments, 20 GA. J. INT'L & COMP. L. 265, 269 (1990).

[FN9]. U.S. SENATE, COMM. ON FOREIGN RELATIONS, 102ND CONG., 2ND SESS., REPORT, supra note 8, at 25 (letter of George Bush to Senator Pell, Chairman, Committee on Foreign Relations, Aug. 8, 1991). See also Bush Urges Senate to Ratify U.N. Civil Rights Covenant, Reuters, Sept. 10, 1991, available in LEXIS, Nexis Library, CURRNT file.

[FN10]. S. EXEC. REP. NO. 23, 102d Cong., 2d Sess. (1992), reprinted in 138 CONG. REC. S4096 (daily ed. Mar. 24, 1992).

[FN11]. 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992).

[FN12]. The President signed the ratified document on June 1, 1992, telephone interview with Treaty Division, Legal Advisor's Office, U.S. Department of State. See White House Statement on Signing the International Covenant on Civil and Political Rights, 28 WEEKLY COMP. PRES. DOC. 1008 (1992).

[FN13]. Telephone interview with Treaty Division, Legal Advisor's Office, U.S. Department of State. See also Covenant, supra note 1, art. 49 (Covenant enters into force three months after deposit of instrument of ratification).

[FN14]. See, e.g., treaty guarantees of the right to privacy, Covenant, supra note 1, art. 17; freedom of conscience, id., art. 18; freedom of expression, id., art. 19; freedom of assembly, id., art. 21; freedom of association, id., art. 22; equal protection under the law, id., art. 26.

[FN15]. The Covenant treats the following procedural topics: capital punishment, Covenant, supra note 1, art. 6; torture and lesser forms of brutality, id., art. 7; arbitrary arrest, id., art. 9(1); the right upon arrest to be informed of the charges, id., art. 9(2); prompt arraignment, id., art. 9(3); habeas corpus, id., art. 9(4); compensation for unlawful detention, id., art. 9(5); and prison conditions, id., art. 10; prosecution only for an act that was an offense at the time committed, id., art. 15(1).

[FN16]. A partial list: the right to a fair hearing, Covenant, supra note 1, art. 14(1); openness of court proceedings, id.; the presumption of innocence, id., art. 14(2); the right to be informed in detail of the charges, id., art. 14(3)(a); an opportunity to prepare a defense, id., art. 14(3)(b); speedy trial, id., art. 14(3)(c); the right to defend oneself in person

or through counsel of choice, including free counsel where required, id., art. 14(3)(d); the right to cross-examine prosecution witnesses and to compel the attendance of defense witnesses, id., art. 14(3)(e); assistance without charge of an interpreter, id., art. 14(3)(f); protection against self-incrimination, id., art. 14(3)(g); special proceedings for juveniles, id., art. 14(4); the right to appeal a conviction, id., art. 14(5); compensation for punishment under a false conviction, id., art. 14(6).

[FN17]. See CONG. REC. supra note 11, at S4783 (enumeration of reservations and understandings). See also U.S. SENATE, COMM. ON FOREIGN RELATIONS, 102ND CONG., 2ND SESS., REPORT, supra note 8, at 3. ("The overwhelming majority of the provisions in the Covenant are compatible with existing U.S. domestic law. In those few areas where the two diverge, the Administration has proposed a reservation or other form of condition to clarify the nature of the obligation being undertaken by the United States.") To date, other states party to the Covenant have not formally responded to the U.S. reservations.

[FN18]. CONG. REC., supra note 11, at S4784 ("Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States").

[FN19]. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302. See Selected Decisions of the Human Rights Committee, Under the Optional Protocol, Volume 1, Human Rights Committee, U.N. Doc. CCPR/C/OP/1 (1985) (a collection of 31 opinions of the Committee). See also P.R. Ghandhi, The Human Rights Committee and the Right of Individual Communication, 57 BRIT. Y.B. INT'L L. 201, 214, 249-50 (1986) (stating that the Committee has developed a reputation for competence and objectivity).

[FN20]. Telephone interview with Treaty Section, U.N. Headquarters (Feb. 1, 1993).

[FN21]. Covenant, supra note 1, art. 28.

[FN22]. Covenant, supra note 1, arts. 28, 40. See Dana D. Fischer, Reporting under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee, 76 AM. J. INT'L L. 142, 144-53 (1982); Farrokh Jhabvala, The Practice of the Covenant's Human Rights Committee, 1976-82: Review of State Party Reports, 6 HUM. RTS. Q. 81, 95-104 (1984).

[FN23]. Covenant, supra note 1, art. 41. On June 8, 1992, the U.S. ambassador to the United Nations deposited a U.S. declaration, pursuant to a corresponding declaration included by the Senate, "that the United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant." 138 CONG. REC., supra note 11, at S4784. In this Article, the term "state" is normally used to refer to a state of the world. When it is used to refer to a state of the U.S., that meaning will be made clear.

[FN24]. As of February, 1993, 37 states had entered a declaration under Article 41. Telephone interview with Treaty Section, U.N. Headquarters (Feb. 1, 1993).

[FN25]. Covenant, supra note 1, art. 41.

[FN26]. Id., art. 41(1)(a).

[FN27]. Ghandhi, supra note 19, at 204. See also Scott Leckie, The Inter- State Complaint Procedures in International Human Rights Law: Hopeful Prospects or Wishful Thinking?, 10 HUM. RTS. Q. 249, 266, 303 (1988).

[FN28]. John P. Humphrey, The International Law of Human Rights in the Middle Twentieth Century, in THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS 75, 86 (1973); Leckie, supra note 27, at 253-54 (identifying "political and economic considerations" as the major source of "the reluctance among states to utilize inter-state complaint procedures"). Reluctance to file a complaint against another state will be even greater as regards the U.S., because of the country's political and economic power.

[FN29]. Covenant, supra note 1, art. 2(3)(b) (the parties agree to provide remedies enforceable "by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy").

[FN30]. CONG. REC., supra note 11, at S4784.

[FN31]. U.S. SENATE, COMM. ON FOREIGN RELATIONS, 102ND CONG., REPORT, supra note 8, at 19.

[FN32]. U.S. Const. art. 6. See Power Authority of N.Y. v. Federal Power Comm'n, 247 F.2d 538 (D.C. Cir. 1957) (holding that a qualification statement made by the Senate in a resolution of consent to a treaty, but not made as a reservation, did not have the force of domestic law in the United States).

[FN33]. See Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314; Asakura v. City of Seattle, 265 U.S. 332 (1924); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 154 (1965) ("Whether an international agreement of the United States is or is not self-executing is finally determined as a matter of interpretation by courts in the United States if the issue arises in litigation.").

[FN34]. United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833) (in deciding whether a U.S.-Spain treaty provision on Spanish land grants in Florida remained valid after Spain's cession of Florida to the U.S., the Court held that since the security of private property was intended by the parties, the Court would allow the grantee under the Spanish grant to invoke the treaty as a basis for the continuing validity of his title). See also People of Saipan v. Dep't of the Interior, 502 F.2d 90 (9th Cir. 1974):

> The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution.

Id. at 97.

[FN35]. Cindy A. Cohn, The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights, 13 HUM. RTS. Q. 295, 317-20 (1991).

[FN36]. The U.K. has no rule comparable to art. 6 of the U.S. Constitution which makes treaties the "law of the land." Thus, in the U.K. a treaty does not become domestic law unless explicitly transformed into domestic law by an act of Parliament.

[FN37]. Cohn, supra note 35, at 319-20.

[FN38]. See, e.g., Report of the Human Rights Committee, U.N. GAOR, 44th Sess., Supp. No. 40, at 12 (§ 53), U.N. Doc. A/44/40 (1989) (question addressed to Norway); id. at 21 (§ 98) (question addressed to Mexico); id. at 44 (§ 192) (question addressed to the Netherlands); id. at 120-21 (§ 546) (question addressed to Italy).

[FN39]. See, e.g., id. at 44 (§ 194) (reply of Netherlands that "any legislative act contrary to a provision of the Covenant would become inapplicable"); id. at 121 (§ 549) (reply of Italy that the Covenant is frequently invoked by Italian courts). Report of the Human Rights Committee, U.N. GAOR, 43rd Sess., Supp. No. 40, at 83 (§ 368), U.N. Doc. A/43/40 (1988) (reply of France that its courts rely on the Covenant); id. at 137 (§ 588) (reply of Japan that the Covenant prevails over domestic legislation before Japanese courts).

[FN40]. Note, The Remedies of Law of the International Covenant on Civil and Political Rights: Current Trends and a Conceptual Framework for the Future, 20 N.Y. J. INT'L L. & POL. 525, 530-37 (1988). See also id. at 540-42 (review of Human Rights Committee reports finding that states must provide compensation and injunctive relief as appropriate to remedy violations).

[FN41]. A judicial finding that this declaration is invalid would not invalidate the Covenant itself. Power Authority of N.Y. v. Federal Power Comm'n, 247 F.2d 538, 544 (a judicial decision that a qualification statement is not domestic law did not impair the validity of the Senate's consent to ratification).

[FN42]. "Federal and state governments must work in their own way and to the proper extent. . . . [T]he federal government shall implement the Covenant to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein"; in other respects, the Covenant shall be implemented "by the state and local governments." CONG. REC., supra note 11, at S4784.

[FN43]. Id.

[FN44]. See, e.g., Thompson v. Oklahoma, 487 U.S. 815, 831 n.34 (citing Covenant's prohibition on execution of juveniles in course of decision finding it unconstitutional to execute a convict aged 15 years at the time of offense). See also Gordon Christenson, Using Human Rights Law to Inform Due Process and Equal Protection Analyses, 52 U. CIN. L. REV. 3, 4-5 (1983); Farooq Hassan, The Doctrine of Incorporation: New Vistas for the Enforcement of International Human Rights?, 5 HUM. RTS. Q. 68, 83 (1983); Louis Henkin, Rights: American and Human, 79 COLUM. L. REV. 405, 413-20 (1979); Jordan Paust, On Human Rights: The Use of Human Rights Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts, 10 MICH. J. INT'L L. 543, 609-11 (1989); Louis B. Sohn, United States Attitudes Toward Ratification of Human Rights Instruments, 20 GA. J. INT'L & COMP. L. 255, 263-64 (1990).

[FN45]. Covenant, supra note 1, art. 14(2).

[FN46]. Cage v. Louisiana, 498 U.S. 39 (1990); In re Winship, 397 U.S. 358 (1970).

[FN47]. Report of the Human Rights Committee, U.N. GAOR, 39th Sess., Supp. No. 40, at 144, U.N. Doc. A/39/40 (1984).

[FN48]. George Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 YALE L.J. 880, 910-19 (1968). In England, the House of Lords ruled that the prosecution must disprove a defense, with the sole exception of the defense of insanity. Woolmington v. D.P.P., 1935 App. Cas. 462; Chan Kau v. The Queen, 1955 App. Cas. 206.

[FN49]. See infra notes 53-55 and accompanying text.

[FN50]. The accused must first raise reasonable doubt as to the presumption of sanity in her case; then the burden of persuasion shifts to the prosecution. Davis v. United States, 160 U.S. 469, 485-88 (1895).

[FN51]. See, e.g., Johnson v. United States, 291 F.2d 150, 155-56 (8th Cir. 1961) (defense of coercion); Frank v. United States, 42 F.2d 623, 628- 29 (9th Cir. 1930) (self-defense).

[FN52]. Insanity Defense Reform Act of 1984, 98 Stat. 2057, § 20 (1984), 18 U.S.C. § 17(b) (1984). In federal prosecutions, the burden of persuasion for defenses other than insanity rests with the government.

[FN53]. Martin v. Ohio, 480 U.S. 228, 236 (1987) (only Ohio and South Carolina impose burden of persuasion on accused); but see South Carolina Supreme Court cases imposing burden on state: State v. Bellamy, 359 S.E.2d 63 (S.C. 1987); State v. Glover, 326 S.E.2d 150 (S.C. 1985); State v. Davis, 317 S.E.2d 452 (S.C. 1984). See also 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 99-100 (1984); Jeffrey F. Ghent, Annotation, Homicide: Modern Status of Rules as to Burden and Quantum of Proof to Show Self-Defense, 43 A.L.R.3d 221 (1972). For defense of another person, see ROBINSON, supra, at 104. For defense of property, id. at 108-09. For defense of habitation, id. at 111-12.

[FN54]. For the defense of necessity, see ROBINSON, supra note 53, at 47. For the defense of provocation, see Mullaney v. Wilbur, 421 U.S. 684, 696 (1975).

[FN55]. For the defense of duress, see 22 C.J.S. Duress or Coercion § 52 (1989); ROBINSON, supra note 53, at 350-51. For the defense of intoxication, see 22 C.J.S. Intoxication §§ 109-113 (1989); ROBINSON, supra note 53, at 293-94, 340 (when intoxication is deemed to negate an element, generally for "specific intent" offenses, burden of persuasion is on the state). For the defense of insanity, see W.E. Shipley, Annotation, Modern Status of Rules as to Burden and Sufficiency of Proof of Mental Irresponsibility in Criminal Case, 17 A.L.R.3d 146 (1968).

[FN56]. Martin v. Ohio, 480 U.S. 228 (1987).

[FN57]. Id. at 233-34.

[FN58]. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(2), 213 U.N.T.S. 222, [hereinafter European Convention]. The language of the European Convention comports with that of the International Covenant.

[FN59]. X v. U.K., App. No. 5124/71, 42 Eur. Comm'n H.R. Dec. & Rep. 135 (1973).

[FN60]. Id.

[FN61]. Id.

[FN62]. See Fletcher, supra note 48.

[FN63]. Covenant, supra note 1, art. 15(1).

[FN64]. See infra notes 74-76 and accompanying text.

[FN65]. See Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).

[FN66]. 491 U.S. 576 (1989).

[FN67]. Id. at 578-79.

[FN68]. See Erznoznik v. Jacksonville, 422 U.S. 205, 210 (1975).

[FN69]. Oakes, 491 U.S. at 582. The Massachusetts legislature added the element of "lascivious intent" to its standard and exemptions for those depictions with scientific, medical, educational, or cultural purposes. Id. at 582-83.

[FN70]. Id. at 584-85.

[FN71]. The Ohio Supreme Court decided Osborne together with a related case. Ohio v. Young, 525 N.E.2d 1363 (Ohio 1988).

[FN72]. Erznoznik v. Jacksonville, 422 U.S. 205 (1975).

[FN73]. Ohio v. Young, supra note 71, at 1368. The U.S. Supreme Court did not overturn the conviction on due process grounds. See Osborne v. Ohio, 496 U.S. 913 (1990) (Ohio court's construction of statute to avoid overbreadth comports with due process requirement, since defendant had fair warning of the criminality of his actions).

[FN74]. European Convention, supra note 58, art. 7(1).

[FN75]. X. v. Austria, App. No. 8490/79, 22 Eur. Comm'n H.R. Dec. & Rep. 140 (1981).

[FN76]. Id. at 142-43.

[FN77]. On the meaning found in the privacy right by foreign courts, see generally Francis X. Beytagh, Privacy in Perspective: The Experience Under Foreign Constitutions, 15 U. TOL. L. REV. 449 (1984).

[FN78]. Bowers v. Hardwick, 478 U.S. 186, 193-94 (1986).

[FN79]. Id. at 191.

[FN80]. Covenant, supra note 1, art. 17(1).

[FN81]. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 25 (1981).

[FN82]. Covenant, supra note 1, art. 7.

[FN83]. CONG. REC., supra note 11, at S4783. The constitutional standard is uncertain, but the present Court would probably interpret it quite narrowly. Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (two Justices holding that the Eighth Amendment imposes no limits on prison terms established by state legislatures; three Justices holding that on the facts of the case — a mandatory life sentence with no parole for possession of 672 grams of cocaine — the sentence did not violate constitutional standards).

[FN84]. Covenant, supra note 1, art. 15(1).

[FN85]. "That because U.S. law generally applies to an offender the penalty in force at the time the offense was committed, the United States does not adhere to the third clause of paragraph 1 of Article 15." CONG. REC., supra note 11, at S4783.

[FN86]. Rhodes v. Chapman, 452 U.S. 337 (1981).

[FN87]. Covenant, supra note 1, art. 7.

[FN88]. Id., art. 10(1).

[FN89]. Massiotti and Baritussio v. Uruguay, Comm. No. R6.25, Report of the Human Rights Committee, U.N. GAOR, 37th Sess., Supp. No. 40, at 187, U.N. Doc. A/37/40 (1982).

[FN90]. Report of the Human Rights Committee, U.N. GAOR, 37th Sess., Supp.No. 40, at 95, U.N. Doc. A/37/40 (1982).

[FN91]. Reservations and understandings appear at CONG. REC. supra note 11, at S4783.

[FN92]. Covenant, supra note 1, art. 25. See C.F. v. Canada, Comm. No. 113/1981, Report of the Human Rights Committee, U.N. GAOR, 40th Sess., Supp. No. 40, at 217, U.N. Doc. A/40/40 (1985).

[FN93]. C.F. v. Canada, supra note 92, at 217.

[FN94]. Id. at 224 (§ 8.1).

[FN95]. Id. at 224-25 (§§ 10.1, 10.2, 11).

[FN96]. Covenant, supra note 1, art. 6(6).

[FN97]. Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty, art. 1 ("The death penalty shall be abolished. No one shall be condemned to such penalty or executed.") opened for signature Nov. 22, 1984, entered into force Mar. 1, 1985, Europ. T.S. No. 117.

[FN98]. Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, Dec. 15, 1989, reprinted in 29 I.L.M. 1464 (1990), entered into force July 11, 1991; Protocol to the American Convention on Human Rights to Abolish the Death Penalty, O.A.S. Res. 1042, June 8, 1990, reprinted in 29 I.L.M. 1447 (1990).

[FN99]. Covenant, supra note 1, art. 6(2).

[FN100]. Id., art. 6(4) and 6(5).

[FN101]. 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992).

[FN102]. Report of the Human Rights Committee, U.N. GAOR, 37th Sess., Supp. No. 40 at 94, U.N. Doc. A/37/40 (1982).

[FN103]. Coker v. Georgia, 433 U.S. 584 (1977) (holding the death penalty for rape, at least of an adult person, to be unconstitutional, and suggesting that crimes other than murder are not sufficiently serious to warrant death penalty).

[FN104]. Tison v. Arizona, 481 U.S. 137 (1987).

[FN105]. Comprehensive Violent Crime Control Act of 1991, H.R. 1400, 102d Cong., 1st Sess. (1991).

[FN106]. See supra note 101, and accompanying text.

[FN107]. Letter of Carole Nagengast, Chair, Board of Directors, Amnesty International USA to Hon. Claiborne Pell, Chairman, Senate Foreign Relations Committee, U.S. Senate, Mar. 27, 1992, reprinted in 138 CONG. REC., S4781 (daily ed. Apr. 2, 1992).

[FN108]. Thompson v. Oklahoma, 487 U.S. 815, 826 & nn.26 & 30 (1988).

[FN109]. Id. at 838 (holding execution of those under the age of 16 at the time of offense impermissible, but leaving open question of executions of those 16 or older); Stanford v. Kentucky, 492 U.S. 361 (1989) (permissible to execute those aged 16 or older at time of offense).

[FN110]. Terry Roach and Jay Pinkerton v. United States, Res. No. 3/87, Case 9647, Inter-Am. C.H.R., 925th Sess., Mar. 27, 1987.

[FN111]. Capital Punishment Report of Secretary General, U.N. Doc. E.1985/43 (Apr. 26, 1985) ("With regard to mental illness, the majority of countries reported that this precludes the possible sentencing or execution of capital offenders.")

[FN112]. AMNESTY INTERNATIONAL, WHEN THE STATE KILLS: THE DEATH PENALTY, A HUMAN RIGHTS ISSUE 42 (1989).

[FN113]. Perny v. Lynaugh, 109 S.Ct. 2934 (1989) (permissible to execute a person with understanding of a seven-year-old).

[FN114]. Covenant, supra note 1, art. 6(1).

[FN115]. For a discussion of issues involving due process protections for the mentally retarded, see Note, Insanity of the Condemned, 88 YALE L.J. 533 (1979).

[FN116]. Pratt and Morgan v. Jamaica, comm. nos. 210/1986 and 225/1987, Report of the Human Rights Committee, U.N. GAOR, 44th Sess., Supp. No. 40, at 222, U.N. Doc. A/44/40 (1989).

[FN117]. Id. at 229 (§ 13.3).

[FN118]. Report of the Human Rights Committee, U.N. GAOR, 39th Sess., Supp. No. 40, at 145, U.N. Doc. A/39/40 (1984).

[FN119]. See Larry James Pinkney v. Canada, comm. no. 27/1978, International Covenant on Civil and Political Rights, Human Rights Committee, Selected Decisions under the Optional Protocol (Second to Sixteenth Sessions) 98, U.N. Doc. CCPR/C/OP/1 (1985) (finding violations of Article 14(3)(c) (right to be tried without delay) and 14(5) (right to an appeal) where the Canadian appellate court heard an appeal 34 months after conviction. Tardy production of the trial transcript apparently caused the delay). See also B. v. Austria, 175 Eur. Ct. H.R. (ser. A) (1990) (finding a violation of the European Covention for a 33-month delay in the writing of the trial court judgment by the trial judge and ordering Austria to pay damages to the person detained during this interval).

[FN120]. Report of the Human Rights Committee, U.N. GAOR, 37th Sess., Supp. No. 40, at 95, U.N. Doc. A/37/40 (1982).

[FN121]. Floresmilo Bolanos v. Ecuador, comm. no. 238/1987, Report of the Human Rights Committee, U.N. GAOR, 44th Sess., Supp. No. 40, at 246, 248, U.N. Doc. A/44/40 (1989).

[FN122]. Id. at 248.

[FN123]. Id. at 248.

[FN124]. Pratt and Morgan v. Jamaica, comm. nos. 210/1986 and 225/1987, Report of the Human Rights Committee, U.N. GAOR, 44th Sess., Supp. No. 40, at 230 (§ 13.6), U.N. Doc. A/44/40 (1989).

[FN125]. Id. at 230 (§§ 13.7, 14). The Committee did not, however, find the delay in appeal to be cruel and inhuman treatment.

[FN126]. Id. at 231 (§ 15). The Committee called for the same remedy in Frank Robinson v. Jamaica (finding violation of the right to counsel).

[FN127]. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).

[FN128]. Id. at 12 (§ 14).

[FN129]. As related in Ahmad v. Wigen, 726 F. Supp. 389, 413 (E.D.N.Y. 1989).

[FN130]. Id. at 413.

[FN131]. Soering v. United Kingdom, supra note 106, at 44-45 (§ 111). See also John Quigley & S. Adele Shank, Death Row as a Violation of Human Rights: Is It Illegal to Extradite to Virginia?, 30 VA. J. INT'L L. 241 (1989).

[FN132]. 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992). See supra note 98 and accompanying text.

[FN133]. Covenant, supra note 1, art. 6(1).

[FN134]. Covenant, supra note 1, art. 26.

[FN135]. Samuel R. Gross & Robert Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 STAN. L. REV. 27, 94 (1984). General Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities, U.S. Gov. Doc. GAO/GGD-90-57, Feb. 1990, at 6 (analysis of studies of race factor in death sentencing shows that the studies reveal "a strong race of victim influence," with the death penalty imposed more frequently where the victim is white than where the victim is black).

[FN136]. McCleskey v. Kemp, 481 U.S. 279 (1987).

[FN137]. Id. at 287.

[FN138]. Id. at 298.

[FN139]. This issue was taken to the Inter-American Commission of Human Rights by the Ohio Public Defender and by the Urban Morgan Institute for Human Rights of the University of Cincinnati in Willie Lawrence Celestine v. United States, Case 10.031, Inter-Am. C.H.R., OEA/ser.L/V/II.76, doc. 44 (1989), § 41, noted in Christina M. Cerna & Wendy Young, The Inter-American Commission on Human Rights and the Death Penalty, 34 FED. BAR NEWS & J. 398, 402 (1987); Louisiana Executes Murderer as Appeals Are Turned Down, N.Y. TIMES, July 20, 1987, at A14. The Commission concluded that the evidence of discrimination presented in the case was insufficient to warrant a finding of racial bias. The Commission acknowledged, however, that racial bias is prohibited in the imposition of the death penalty.

[FN140]. Witherspoon v. Illinois, 391 U.S. 510 (1968).

[FN141]. Lockhart v. McCree, 476 U.S. 162, 173 (1986).

[FN142]. Craig Honey, On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 LAW & HUM. BEHAV. 121, 126-28 (1984) (experiment showed that persons who are subjected to the death qualification process are more likely to convict and sentence to death).

[FN143]. James Luginbuhl & Kathi Middendorf, Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials, 12 LAW & HUM. BEHAV. 263, 279 (1988).

[FN144]. Lockhart v. McCree, 476 U.S. at 173.

[FN145]. Id.

[FN146]. Lockhart v. McCree, 476 U.S. 162 at 188 (Marshall, J., dissenting). See also William C. Thompson et al., Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts, 8 LAW & HUM. BEHAV. 95, 103 (1984) (experiment showed that persons eligible on the basis of their beliefs to serve on a capital jury construed evidence more favorably to the prosecution than did those who would be ineligible).

[FN147]. Lockhart v. McCree, 476 U.S. at 188 (Marshall, J., dissenting). See also Phoebe C. Ellsworth et al., The Death-Qualified Jury and the Defense of Insanity, 8 LAW & HUM. BEHAV. 81, 88-89 (1984) (experiment showed that persons who would be eligible on the basis of their beliefs to serve on a capital jury are substantially less likely to accept a plea of insanity than those who would be ineligible).

[FN148]. Lockhart v. McCree, 476 U.S. at 188 (Marshall, J., dissenting).

[FN149]. Covenant, supra note 1, art. 14(1). See also European Convention, supra note 58, art. 6(1) ("an independent and impartial tribunal"); American Convention on Human Rights, Nov. 22, 1969, art. 4, entered into force June 1978. art. 8(1) ("a competent, independent, and impartial tribunal").

[FN150]. Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960) (stating it would not find a person extraditable who "would be subject to procedures or punishment" that were "antipathetic to a federal court's sense of decency"); Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972), cert. denied, 409 U.S. 869 (1972) (finding procedures likely to be followed in requesting state to be fair).

[FN151]. Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990); John Quigley, The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law, 15 N. CAR. J. INT'L L. & COM. REG. 401 (1990).

[FN152]. Soering v. United Kingdom, supra note 127, at 33-34 (§ 86).

[FN153]. Id. at 34.

[FN154]. Memorandum from Assistant Attorney General William P. Barr on the Authority of the FBI to Override Customary or Other International Law in the Court of Extraterritorial Law Enforcement Activities (June 21, 1989), referenced in Neil A. Lewis, 2 U.S. Officials Clash at Hearing on Power to Seize of Fugitives, N.Y. TIMES, Nov. 9, 1989, at A10; Michael Isikoff, U.S. "Power" on Abductions Detailed, WASH. POST, Aug. 14, 1991, at A14.

[FN155]. Alvarez-Machain v. United States, 112 S. Ct. 2188 (1992).

[FN156]. Id. at 2193-97.

[FN157]. Covenant, supra note 1, at art. 9(1). See M. Cherif Bassiouni, Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition, 7 VAND. J. TRANSNAT'L L. 25, 59-60 (1973) (forcible abduction said to

violate human right to liberty and freedom from arbitrary detention). See also, Yvonne G. Grassie, Federally Sponsored International Kidnapping: An Acceptable Alternative to Extradition?, 64 WASH. U. L.Q. 1205, 1215-16 (1986); John Quigley, Government Vigilantes at Large: The Danger to Human Rights from Kidnapping of Suspected Terrorists, 10 HUM. RTS. Q. 193, 199 (1988).

[FN158]. Lilian Celiberti de Casariego v. Uruguay, Comm. no. R. 13/56, Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, at 185, U.N. Doc. A/36/40 (1981).

[FN159]. Id. at 188.

[FN160]. Sergio Ruben Lopez Burgos v. Uruguay, Comm. no. 12/52, Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, at 176, U.N. Doc. A/36/40 (1981).

[FN161]. Id. at 176-77 (§ 2.2).

[FN162]. Id. at 183 (§ 13).

[FN163]. Covenant, supra note 1, art. 7.

[FN164]. Id., art. 10.

[FN165]. United States v. Toscanino, 500 F.2d 267, 270 (2d. Cir. 1974). See also United States v. Reed, 639 F.2d 896 (2d Cir. 1981) (abductee held with gun to head during plane ride from Bimini to Florida).

[FN166]. N.Y. TIMES, Nov. 18, 1964, at A1; Nov. 19, 1964, at A1; Nov. 25, 1964, at A6. Mordechai Luk was kidnapped by Egyptian officials in Italy, drugged and locked in a trunk for transport to Egypt, apparently on a charge of spying. He was discovered at Rome airport when an airport employee heard a moan from inside the trunk.

[FN167]. Celiberti v. Uruguay, supra note 121, at 186 (§ 2.2).

[FN168]. United States v. Toscanino, supra note 162.

[FN169]. Id. at 269-70.

[FN170]. Id. at 281.

[FN171]. Subcommission on Prevention of Discrimination and Protection of Minorities, United Nations Human Rights Commission, Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, art. 3, Res. 5C (XXXI), Sept. 13, 1978, reprinted in NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW (1987).

[FN172]. Draft Body of Principles, supra note 171, art. 3.

[FN173]. Id., art. 12.

[FN174]. Covenant, supra note 1, art. 10 ("All persons deprived of their liberty shall be treated with humanity . . . .") See also U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 30, 1955, Standard Minimum Rules for the Treatment of Prisoners, art. 91, approved by U.N. Economic and Social Council Res. 663C (XXIV), July 31, 1957, as amended by Economic and Social Council Res. 2076 (LXII), May 13, 1977 (right of untried prisoner to be treated by own doctor or dentist at own expense); Draft Body of Principles, supra note 171, art. 21 (medical officer

at place of detention shall examine detainee promptly after admission); id., art. 22 (right to physician of choice); U.N. General Assembly, Code of Conduct for Law Enforcement Officials, art. 6, G.A. Res. 34/169, Dec. 17, 1979, U.N. GAOR, 34th Sess., Supp. No. 46, at 185, U.N. Doc. A/34/46 (1980) (duty of police to take immediate action to secure medical attention whenever required); Parliamentary Assembly, Council of Europe, Declaration on the Police — Part A, Res. 690 (1979), art. 14 (obligation of police to secure necessary medical attention for detainee). See also RODLEY, supra note 148, at 260.

[FN175]. Covenant, art. 10(1).

[FN176]. Standard Minimum Rules for the Treatment of Prisoners, supra note 174, art. 92. See also Draft Body of Principles, supra note 171, art. 17 (right to reasonable opportunity to communicate with outside world).

[FN177]. RODLEY, supra note 148, at 261-63.

[FN178]. Covenant, supra note 1, art. 9. See also RODLEY, supra note 148, at 267.

[FN179]. Report of the Human Rights Committee, U.N. GAOR, 37th Sess., Supp. No. 40, at 95, U.N. Doc. A/37/40 (1982).

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APPENDIX SS

302 SC 18

STATE of South Carolina, Respondent,

v.

Larry Gene BELL, Appellant.

No. 23163.

Supreme Court of South Carolina.

Heard May 3, 1988.

Decided Feb. 26, 1990.

Defendant was convicted in the General Sessions Court, Lexington County, Lawrence E. Richter, Jr., J., of capital murder, and was sentenced to death. On appeal, the Supreme Court, Toal, J., held that: (1) recorded telephone conversation between defendant and family of prior victim was admissible, and (2) solicitor's closing argument was not improper.

Affirmed.

1. Criminal Law ⇐1152(2)
Jury ⇐108

Determination of whether juror is qualified to serve on death penalty case is within sound discretion of trial judge, and is not reviewable on appeal unless wholly unsupported by evidence.

2. Criminal Law ⇐1134(5)

Voir dire examination must be reviewed in its entirety to determine whether trial judge erred in his qualification or disqualification of prospective jurors.

3. Jury ⇐33(2)

Constitutional standard of fairness requires that defendant have panel of impartial, indifferent jurors. U.S.C.A. Const. Amend. 14.

4. Jury ⇐103(9)

Qualification of jurors who knew that capital murder defendant had previously been sentenced to death for another murder was not error where jurors stated that they could set aside any opinions garnered from their prior knowledge and would be able to give defendant fair and impartial trial.

5. Jury ⇐108

Failure to strike jurors who purportedly equivocated concerning their views on death penalty was not abuse of discretion where jurors indicated that they would be able to give sentence of life or death depending on facts and circumstances.

6. Criminal Law ⇐369.2(1)

Evidence of other crimes is competent to prove specific crime charged when it tends to establish motive, intent, absence of mistake or accident, common scheme or plan embracing commission of two or more crimes so related to each other that proof of one tends to establish the other, and identity of person charged with commission of crime on trial; other acts evidence must be logically relevant to particular purpose or purposes for which it is sought to be introduced, and must be established by clear and convincing evidence.

7. Criminal Law ⇐369.2(1)

Evidence of other crimes is never admissible unless relevant to establish material fact or element of crime charged.

8. Criminal Law ⇐369.2(4)

Tapes of murder defendant's telephone calls to prior victim's family were admissible, though they contained evidence of other crimes, given similarities between instant and prior murder; evidence of prior murder was admissible as evidence of larger plan or scheme of which charged crime was part.

9. Criminal Law ⇐371(4, 12)

Conversations between murder defendant and family of prior victim were admissible to show defendant's motive and state of mind when he kidnapped and murdered victim; evidence of defendant's sexual motivation in kidnapping and murdering prior victim was probative of his intent in committing similar crime against instant victim.

10. Criminal Law ⇐338(7)

If prejudicial effect of evidence outweighs its probative value, such evidence should be excluded.

11. Criminal Law ⇐369.2(4)

Probative value of redacted telephone conversations between murder defendant and family of prior victim outweighed prejudicial effect, given similarity of crimes.

12. Criminal Law ⇐404.70

Bag of women's underwear seized by investigators from murder defendant's bedroom was admissible, given similarity between underwear seized and that found on minor victim's body.

13. Homicide ⇐358(1)

Trial court did not err in asking capital murder defendant, in presence of jury, whether he desired to exercise his statutory right to 24-hour waiting period between guilt and sentencing phases of trial; though defendant claimed prejudice from jury's observation that trial would be delayed solely due to his decision to rely on his statutory right, protracted length of proceedings had been explained to jury during voir dire and court clearly articulated that right to waiting period was statutorily mandated. Code 1976, § 16-3-20(C).

14. Homicide ⇐343

Any error in allowing evidence of prior offense to be introduced during penalty phase of capital murder prosecution through testimony of prosecutor who represented State in prior proceeding was harmless, absent showing of prejudice; defendant's strategy at penalty phase was to draw attention to prior deviant behavior, including offense in question, in order to support his contention in mitigation that he was mentally ill.

15. Criminal Law ⇐699, 1154

Trial judge is vested with broad discretion in dealing with range of propriety of closing argument, and ordinarily his rulings on such matters will not be disturbed; appellant has burden of showing that any alleged error in argument deprived him of fair trial.

16. Criminal Law ⇐723(1)

Solicitor's closing argument, in capital murder prosecution, must be carefully tailored so as not to appeal to personal bias of jurors, and may not be calculated to arouse jurors' passion or prejudice.

17. Criminal Law ⇐719(3), 723(1)

Solicitor's closing argument in capital murder prosecution, suggesting that instant case was appropriate for death penalty, did not improperly inject solicitor's personal opinion concerning death penalty into proceedings, did not improperly challenge jury by telling them what he would do if jury failed to impose death sentence, and did not improperly imply that imposition of life sentence would be "cop out."

18. Criminal Law ⇐723(1)

Solicitor's closing comment in capital murder prosecution, suggesting that imposition of sentence less than death penalty would be "blight on the memory" of victim, was not improper reference to victim or suggestion that solicitor was appearing on behalf of victim.

19. Homicide ⇐311

Instruction, in penalty phase of capital murder prosecution, which at least twice referred implicitly and explicitly to nonstatutory mitigating circumstances, sufficiently instructed jury on issue of nonstatutory mitigating circumstances.

20. Homicide ⇐311

Exact position of word "sympathy" in string of nouns describing factors that jury may not consider in sentencing capital murder defendant is not of constitutional import.

21. Homicide ⇐311

Omission of word "mere" before term "sympathy," in instruction on factors jury could not consider in sentencing capital murder defendant, was not error.

22. Criminal Law ⇐822(1)

"Sympathy" instruction, in capital murder prosecution, was not erroneous when considered in context of instructions as a whole; jury was told that they could recommend life sentence "for any reason you can think of or for no reason at all," and that they could consider both statutory and nonstatutory mitigating factors; reasonable juror would not have been misled

into believing that he or she could not consider mitigating evidence.

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Jack B. Swerling, S.C. Office of Appellate Defense, John H. Blume and David I. Bruck, both of Bruck & Blume, Columbia, for appellant.

Atty. Gen. T. Travis Medlock, Chief Deputy Atty. Gen. Donald J. Zelenka, Asst. Attys. Gen. Harold M. Coombs, Jr. and Norman Mark Rapoport, Columbia, and Sol. Donald V. Myers, Lexington, for respondent.

TOAL, Justice:

A jury convicted appellant, Larry Gene Bell, of the murder and kidnapping of Debra Mae Helmick. For these crimes, Bell was sentenced to death. We consolidate Bell's direct appeal with our mandatory review of his death sentence pursuant to S.C.Code Ann. § 16-3-25 (1985). We affirm his conviction and sentence.

The facts of the instant case must be considered together with the facts surrounding the abduction and murder of Shari Faye Smith (hereinafter Shari). On the afternoon of Friday, May 31, 1985, Bell abducted seventeen year old Shari from beside the mailbox in front of her home in Lexington County. On June 3, 1985, the Smith family began to receive a series of phone calls from Bell concerning Shari. After Bell related the precise whereabouts of Shari's body in one telephone call to the Smiths, he called again to describe how Shari died. Bell explained to Dawn Smith, Shari's sister, that he "took duct tape and wrapped it all the way around [Shari's] head." Bell also insisted that Dawn report the information concerning the duct tape and the suffocation to the coroner so he could accurately determine the cause of death.

Two weeks after Shari's abduction, at a time after Shari's body had been found but while Bell was still at large, Bell abducted and murdered another young girl. This victim was nine and a half year old Debra Mae Helmick. Debra Mae, her three year old brother, and her parents lived in a rented trailer in the Shiloh Trailer Park in Richland County. On June 14, 1985, at 4:00 p.m., Debra Mae and her brother were playing in the front yard beneath their trailer's front window. A neighbor, looking out of the window of his trailer, observed what he described as a "silver" car drive rapidly into the trailer park, past the Helmick trailer and his trailer. The car turned around and stopped near the children. The neighbor saw a man he later identified as defendant Bell get out of the car with what appeared to be a white bag in his hand. Bell walked toward the children, grabbed Debra Mae around her waist and ran back to his car. Debra Mae was screaming and kicking. Bell threw her into his car. She continued to struggle and scream, kicking the inside roof of the car. The neighbor ran out of his trailer and attempted to stop the car. Bell accelerated the car and exited the trailer park. The neighbor got within 40 feet of the Bell automobile. He observed that the license was a South Carolina tag, first letter "D". The neighbor then ran to the Helmick trailer to alert Mr. Helmick.

Eight days after the abduction of Debra, Bell again called the Smith family to give them precise directions to find Debra's body. Following the directions given by Bell, the police located Debra's severely decomposed body in Lexington County on June 22, 1985. Debra's body was clothed in a tank top, shorts, her cotton panties, and over her panties, a pair of silk adult bikini briefs. Adhesive material, not inconsistent with duct tape, was found in Debra's hair, suggesting that she, like Shari, had been suffocated. Bell was apprehended by the police on June 27, 1985, while driving a grayish 1978 Riviera. Although the car's affixed license plate read "OCH 241," a search of the car's trunk revealed the existence of a second license plate. This plate read "DCE 604." Also found in the trunk was the registration card for the car, which indicated that "DCE 604" was the Riviera's license plate number.

In June of 1986, Bell was tried for the murder and kidnapping of Shari Smith,

found guilty of these crimes and sentenced to death.[1] In March of 1987, Bell was tried, convicted and sentenced to death for the murder and kidnapping of Debra Mae Helmick. Bell now appeals from the 1987 conviction and sentence.

I. GUILT PHASE

A. JURY QUALIFICATION

Bell alleges that the judge erred in the jury qualification.[2] First, Bell maintains that the trial judge erred in qualifying nine jurors who knew the appellant had previously been sentenced to death for the murder and kidnapping of Shari Faye Smith. Such knowledge, Bell submits, rendered his conviction and sentence of death constitutionally unreliable. Second, Bell contends that the judge abused his discretion in not striking three jurors who purportedly equivocated concerning their views on the death penalty.

[1, 2] The determination of whether a juror is qualified to serve on a death penalty case is within the sound discretion of the trial judge, and is not reviewable on appeal unless wholly unsupported by the evidence. *State v. Spann*, 279 S.C. 399, 308 S.E.2d 518 (1983), *appeal dismissed, cert. denied*, 466 U.S. 947, 104 S.Ct. 2146, 80 L.Ed.2d 533 (1984). A *voir dire* examination must be reviewed in its entirety to determine whether the trial judge erred in his qualification or disqualification of prospective jurors. *State v. Drayton*, 293 S.C. 417, 361 S.E.2d 329 (1987), *cert. denied*, 484 U.S. 1079, 108 S.Ct. 1060, 98 L.Ed.2d 1021 (1988).

[3, 4] 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. Here, 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 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, we 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.

Consistent with the holdings in *DeLee* and *Murphy*, we conclude here that each juror who had knowledge of Bell's prior conviction and death sentence stated that he could set aside his impression or opinion and render a verdict based on evidence presented in the courtroom. In response to

1. This conviction and sentence was affirmed in *State v. Bell*, 293 S.C. 391, 360 S.E.2d 706 (1987); *cert. denied* 484 U.S. 1020, 108 S.Ct. 734, 98 L.Ed.2d 682 (1988).

2. We note that venue in this case, which originally lay in Lexington County, was changed to the upstate county of Pickens.

the questions by the attorneys and the Court, each juror expressed his belief that he could set aside any prejudice, passion or bias that he/she might harbor. Hence, we hold that the judge did not abuse his discretion in qualifying the challenged jurors.

In so holding, we 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. Bell relies, by analogy, on the United States Supreme Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). In *Caldwell*, the prosecutor urged the jury not to view itself as the final determiners of whether the petitioner would die, since a death sentence would be reviewed for correctness by the Mississippi Supreme Court. The Court concluded that this invitation to rely on the Mississippi Court's review would generate a bias toward returning a death sentence. *Caldwell*, 472 U.S. at 333, 105 S.Ct. at 2642.

We find that the reasoning of *Caldwell* does not control the case at bar. The jurors here disavowed themselves prior to their qualification of any bias or prejudice against the appellant, specifically with respect to his previous sentence of death.

[5] Likewise, we find that the judge did not abuse his discretion in qualifying three jurors because of their views concerning the death penalty. In *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court held that if a venireman's views regarding capital punishment would prevent or substantially impair the performance of his duties as a juror, then he should be excluded for cause. *Wainwright*, 469 U.S. at 420, 105 S.Ct. at 850.

The decision as to whether a venireman's views would substantially impair the performance of his duties as a juror rests with the sound discretion of the judge, and no reversal shall occur unless the record establishes an abuse of discretion. *DeLee v. Knight*, 266 S.C. at 112, 221 S.E.2d at 847. Here, all three jurors indicated that they would be able to give a sentence of life or death depending on the facts and circumstances. Reviewing the entire *voir dire* of the first juror challenged, we conclude that the judge properly found that the juror would consider the case on its merits. The other two jurors initially misunderstood the bifurcation of the trial, but later, after clarification, responded that they could impose either the death penalty or a life sentence. The trial judge, therefore, did not abuse his discretion in qualifying the challenged jurors.

B. ADMISSIBILITY OF EVIDENCE

Bell contends that the trial court abused its discretion in admitting evidence of other crimes and bad acts. Specifically, Bell submits that the trial court erred in two ways: first, by admitting several recordings of telephone calls made by Bell to Shari Smith's mother and sister, and second, by admitting a bag containing women's underwear.

We will first consider whether the judge erred in admitting the redacted tapes of the telephone conversations between Bell and the Smith family. As previously discussed, two weeks before the kidnapping of Debra Mae Helmick in Richland County, teenager Shari Smith was kidnapped from Lexington County and murdered. Bell was convicted and sentenced to death for this murder. *State v. Bell*, 293 S.C. 391, 360 S.E.2d 706 (1987).

During the time Shari was missing, members of the Smith family received a series of phone calls from Bell. All of the telephone conversations, except one, were recorded by the police. The trial judge, over objection, decided to admit certain portions of the tapes, excising portions he believed to be prejudicial.

The judge admitted portions of five conversations between Bell and the Smiths. In the first tape, Bell disclosed the time and manner of the abduction, and said that Shari had "the fear of God in her." In the second tape, admitted in its entirety, Bell gave the following directions which led police to Shari's body:

> Listen carefully. Take Highway 378 West to Traffic Circle. Take Prosperity

Exit, go one and a half miles, turn right at sign, Moose Lodge Number 108, go one quarter mile, turn left at white framed building, go to backyard, six feet beyond we're waiting. God chose us.

In the third tape, Bell described Shari's death to her sister, Dawn Smith:

THE CALLER: Okay. And I did make love to her and we had oral sex for uh—three different times and uh—she died—can you handle this now?

D. SMITH: Yes.

THE CALLER: Okay. I tied her up to the bed post and uh—with electric cord and uh—she didn't struggle, cry or anything. She let me voluntarily, from her chin to her head—oh, yeah, and be sure to tell—okay, I'll go ahead and tell you. And I took duct tape and wrapped it all the way around her head and suffocated her and tell the coroner or get the information out how she died....

In the fourth tape, Bell reiterated that Shari died by suffocation with duct tape. In the fifth tape, Bell, in his final call to the Smith's residence, directed the Smiths and the police to Debra's body. The directions were as follows:

Listen carefully. Go One North—well, One West, turn left at Peach Festival Road or Bill's Grill, go three and a half miles through Gilbert, turn right, last dirt road before come to stop sign at Two Notch Road. Go through chain and no trespassing sign. Go 50 yards and to the left, go 10 yards. Debra Mae is waiting. God forgive us all.

Bell objects to the admission of the evidence of other crimes as found on the redacted tapes.

In order for this Court to reverse a case based on erroneous admission or exclusion of evidence, error and prejudice must be shown. *State v. McElveen*, 280 S.C. 325, 313 S.E.2d 298 (1984).

[6] In *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), we articulated the exceptions to the general rule that evidence of other crimes is not admissible to prove the crime charged. Our Court found that evidence of other crimes was competent to prove the specific crime charged when it tends to establish the following: (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; and (5) the identity of the person charged with the commission of the crime on trial. *Lyle*, 125 S.C. at 416, 118 S.E. at 807. The evidence must be logically relevant to the particular purpose or purposes for which it is sought to be introduced. *Id.* Additionally, the other acts evidence must also be established by clear and convincing evidence. *Id.*[3]

[7, 8] Bell requests that this Court limit the *Lyle* rule by finding that other acts evidence is admissible only if necessary. Relying mainly on *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987), Bell argues that the trial judge erred in admitting the other acts evidence because it was not needed. Bell notes that the State had the testimony of an eyewitness who identified Bell as the abductor as well as other evidence linking him to the crime. In *Johnson*, we stated that "evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged." 293 S.C. at 324, 360 S.E.2d at 319. Consistent with our rulings since *Lyle*, we define "necessary" as synonymous with "relevant". Thus, evidence of other crimes is never admissible unless relevant to establish a material fact or element of the crime charged. The evidence contained on the tapes was relevant here. It connected Bell to the commission of the murder of Debra by demonstrating the similarities between the Helmick and Smith murders. It was also relevant because the Smith and Helmick murders were so intertwined.

The State, however, must also show that the evidence sought to be introduced fits

3. Proof of an actual conviction, of course, is one way in which a proponent of the evidence can establish bad acts and satisfy the "clear and convincing" standard. *State v. Drew*, 281 S.C. 440, 316 S.E.2d 367 (1984).

into one of the *Lyle* exceptions. The evidence of the details of the kidnapping and murder of Shari Smith, we conclude, was properly admitted as evidence of a larger plan or scheme of which the crime on trial was a part. In *State v. Anderson*, 253 S.C. 168, 169 S.E.2d 706, *cert. denied*, 396 U.S. 948, 90 S.Ct. 386, 24 L.Ed.2d 253 (1969), we espoused the following test for the admissibility of evidence to show a common plan or scheme:

> The question is whether the particular item of evidence tends to show the existence, the nature or the content of the plan. Much of the showing is evidence of the conduct of the defendant, and the specific question becomes whether the particular conduct circumstantially tends to prove the design or plan.

Anderson, 253 S.C. at 181–82, 169 S.E.2d at 712. *See also, State v. Woomer*, 276 S.C. 258, 277 S.E.2d 696 (1981) (Evidence of other killings committed prior to the crime on trial was admissible to show the existence and commission of a preconceived plan which tended strongly to implicate the defendant as a participant).

In the present case, the tape recorded conversations concerning Shari Smith's murder and kidnapping show the existence and the nature of Bell's plan. The State demonstrated that Bell devised a plan to kidnap and murder young, blonde girls and then utilize the Smith family as a platform to disclose the crimes. Bell's plan surrounding the murders of Shari and Debra implicated him as the murderer. The murders of Shari and Debra were joined together through Bell's own actions. The plan and commonality of the two crimes, such that the first crime tends to prove the second crime, is disclosed throughout the tapes.

In the first tape, the link between the two crimes can be seen: both blonde girls were kidnapped in broad daylight in late afternoon, on a Friday, from in front of their respective homes. Moreover, in the second tape, the precise directions given by Bell to Shari Smith's body are echoed in the directions he gave to lead the police to Debra Helmick's body. Bell commenced both calls with the phrase "listen carefully." He ends the directions by referring to God. He also ominously stated in both tapes that Shari and Debra are waiting. In the third tape, Bell recounted how Shari Smith died. He told Dawn Smith that Shari died by suffocation. The manner of Shari Smith's death—suffocation by duct tape—was consistent with the way Debra died. A SLED analyst testified that residue found in Debra's hair was consistent with the type of adhesive found on duct tape. Thus, it could be concluded that Debra suffered death in a manner identical to that of Shari.

Similarly, the sexual activity with Shari disclosed by Bell was also probative of a common scheme because Debra was found with a pair of silk underwear pulled over her cotton underwear, inferentially connoting sexual activity. The circumstances surrounding the murder of Shari Smith were so blended with the murder of Debra that the proof of Shari's murder established the material fact that Bell murdered and kidnapped Debra. Furthermore, the proof of the common scheme—the kidnapping, murder and contact with the Smith family—strongly implicated Bell as the person who committed the crimes. By his own actions, Bell linked the two crimes together, and consequently, the evidence on the tapes was probative of his conduct.

[9] The conversations between the Smith family and Bell were also admissible to show Bell's motive and state of mind when he kidnapped and murdered Debra. Evidence of prior acts which demonstrates motive is admissible. *See State v. Grainger*, 275 S.C. 417, 272 S.E.2d 175 (1980) (Evidence that defendant was a drug dealer was admissible to establish motive for flight which resulted in the death of a police officer).

Bell recounted to Dawn Smith his sexual experiences with Shari during one of the telephone conversations. The trial judge properly admitted the conversation because it demonstrated a possible sexual motive for the kidnapping of Debra. As discussed earlier, Debra's body was discovered with an extra pair of adult female silk bikini

underwear on top of her cotton children's underwear. Although Debra's body was too decomposed to ascertain whether sexual intercourse or the like had occurred, the existence of the adult underwear on the child was evidence that Bell was impelled to kidnap her for bizarre sexual reasons. Evidence of Bell's sexual motivations was properly considered by the jury.

[10] Although we find that the evidence is admissible under two of the *Lyle* exceptions, we must also determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. If the prejudicial effect outweighs its probative value, such evidence should be excluded. Whether prejudicial error has been committed must be determined on the basis of the record in its entirety and the result will generally turn on the facts of each case. *U.S. v. Johnson*, 610 F.2d 194 (4th Cir.1979), *cert. denied* 446 U.S. 911, 100 S.Ct. 1840, 64 L.Ed.2d 264 (1980).

[11] We reversed the appellant's conviction in *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987) because the admission of prior acts evidence was prejudicial. The case at bar, however, is unlike *Johnson*. Here, the redacted telephone conversations between Bell and the Smith family were highly probative of the State's contention that Bell also kidnapped and murdered Debra. In *Johnson*, most of the other crime evidence had little probative value, and instead served merely to "prejudice the jury by focusing its attention on appellant's propensity to commit criminal acts." *Johnson*, 293 S.C. at 326, 360 S.E.2d at 320. Therefore, we hold that because of the highly probative nature of the tapes here, their prejudicial impact did not outweigh their probative value.

[12] Bell also contends that the judge abused his discretion in admitting into evidence a bag of women's underwear seized by investigators from Bell's bedroom. The women's silk bikini underwear were similar to the extra pair of adult underwear found on Debra's body. Since the police seized the bag of underwear from Bell's bedroom, and because the seized underwear were similar to the kind the victim was wearing, the panties were admissible since they tended to make Bell's guilt more probable. *State v. Schmidt*, 288 S.C. 301, 342 S.E.2d 401 (1986) (Evidence is relevant if it tends to establish or to make more or less probable some matter at issue upon which it directly or indirectly bears). We therefore hold that the admission of the bag of women's underwear was proper.

C. STATUTORY WAITING PERIOD

[13] Bell further contends that he was prejudiced when he was required to exercise his right to the statutory waiting period between the guilt phase and the sentencing phase of his bifurcated trial in the presence of the jury. The judge, after inquiring whether the appellant desired to exercise his right to the statutory waiting period, explained to the jury that there existed a "statutorily provided for" [4] waiting period of twenty-four hours before the sentencing phase could commence. Since the verdict was rendered on a Friday, the judge informed the jury that the trial would not commence again until Monday. The jury was sequestered through the weekend.

Bell asserts that the judge's actions prejudiced him because the jury was told that it would have to be sequestered for an additional two days solely due to his decision to rely on his statutory right. Since the judge explained that the trial would be lengthy during the *voir dire*, we believe all the jurors understood the projected length of the proceedings. Moreover, the judge clearly articulated that the right to a twenty-four hour waiting period was statutorily mandated, and the defendant's right. We hold, therefore, that the trial judge did not err in asking Bell whether he desired to exercise his statutory waiting period in the presence of the jury.

II. SENTENCING PHASE

A. TESTIMONY OF ASSISTANT SOLICITOR

[14] In the penalty phase, the State presented testimony from a former Assist-

4. S.C.Code Ann. § 16-3-20(C).

ant Solicitor who represented the State in a guilty plea proceeding involving Bell. Bell pled guilty to assault and battery of a high and aggravated nature in 1976. The Solicitor testified that Bell attempted to abduct a young woman at gunpoint in 1975. The victim of the crime did not testify concerning the assault.

Although Bell agrees that the information concerning the details of prior offenses could be introduced during the penalty phase, *see State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984), he maintains that such evidence in the form of the Solicitor's testimony was inadmissible hearsay. We need not address this issue, since Bell was clearly not harmed by the admission of this evidence.

Bell cannot show prejudice because he also presented numerous witnesses in mitigation who testified generally about his propensity to assault women, and specifically about the assault the Solicitor recounted. Indeed, we perceive Bell's trial strategy as one which sought to draw the jury's attention to his bizarre sexually deviant behavior in order to support his contention in mitigation that he was mentally ill. Having failed to show prejudice, Bell cannot complain about the Solicitor's testimony. *Cf. State v. Blackburn*, 271 S.C. 324, 247 S.E.2d 334 (1978) (it is a settled rule that the admission of improper evidence is harmless where it is merely cumulative to other evidence).

B. SOLICITOR'S CLOSING ARGUMENT

Bell asserts that the Solicitor's closing argument in the sentencing phase contained three areas of prejudicial comment. First, Bell contends that the Solicitor and Assistant Solicitor injected their opinions as to the appropriateness of the death penalty into their arguments. Second, Bell maintains that the Solicitor implied that the imposition of anything less than a death sentence would indicate the jurors' weaknesses. Third, Bell asserts that the Solicitor made improper references to the victim.

[15, 16] A trial judge is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily his rulings on such matters will not be disturbed. *State v. Patrick*, 289 S.C. 301, 345 S.E.2d 481 (1986). The Court must review the argument in the context of the entire record. *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981). The appellant has the burden of showing that any alleged error in argument deprived him of a fair trial. *Id.* The Solicitor's argument, however, must be carefully tailored so as not to appeal to the personal bias of a juror, and may not be calculated to arouse the juror's passion or prejudice. *Id.*

[17] Bell complains that the Solicitors injected their personal opinions into their summations. As an example, one Solicitor stated during his closing argument that if "this [wasn't] a case in which a jury should impose the death penalty, if this [wasn't] the type of case in which the State should seek the death penalty and expect the death penalty, then there is none." The Solicitor also implored the jury "to do what's right." He stated that if "it was not right in this case, it was never right."

Bell relies on *State v. Woomer*, 277 S.C. 170, 284 S.E.2d 357 (1981) and *State v. Butler*, 277 S.C. 543, 290 S.E.2d 420 (1982) to support his proposition that the Solicitors injected their personal opinions into their closing arguments. In *Woomer*, we held that the Solicitor minimized the juror's responsibility for the appellant's fate by stressing that he had already made the same decision he was asking them to make. The Solicitor there commented as follows:

> You know, the initial burden in this case is not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. I mean I did the same thing you all did. I had to make up my mind in regards to this and under the law, if there is any question about it, you ask the judge, I have to make the first decision as to whether or not a person is going to be tried for the electric chair.

277 S.C. at 175, 284 S.E.2d at 359. Because the Solicitor injected his personal opinion

into the jury's deliberation, we reversed the defendant's sentence.

In *Butler*, we held that:

> When a solicitor's personal opinion [was] explicitly injected into the jury's determinations as though it were in itself evidence justifying the sentence of death, the resulting death sentence may not be free from the influence of any arbitrary factor as required by S.C.Code Ann. § 16–3–25(c)(1) and the Eighth Amendment to the Constitution.

277 S.C. at 546, 290 S.E.2d at 421.

We find that the Solicitor's comments in *Woomer* and *Butler* are easily distinguishable from the instant case. Here, the Solicitor did not inject his personal opinion concerning the death penalty into the proceedings. Nor did the Solicitor comment on his involvement in deciding whether or not to prosecute for the death penalty. The Solicitor's comments did not diminish the role of the jury to decide Bell's fate, thus, we hold that the argument was proper.

Similarly, Bell's reliance on *State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981) and *State v. Davis*, 239 S.C. 280, 122 S.E.2d 633 (1961) is misplaced. In *Plath*, the Solicitor stated in closing argument that he would never ask for the death penalty again if the jury did not return with a recommendation that the death penalty be imposed. In *Davis*, the same Solicitor commented that if the jury turned the defendant accused of rape loose, he would have to turn loose all others accused of rape.

The Solicitor's comments here are distinguishable from the erroneous ones in *Davis* and *Plath*. Here, the Solicitor did not challenge the jury by telling them what he would do if the jury failed to impose a death sentence. We conclude that the Solicitor's argument was proper.

Bell next maintains that the Solicitor improperly implied to the jury that their imposition of a life sentence would be a "cop out". We reject Bell's argument.

In *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987), the Solicitor argued that any recommendation of less than death would be evidence the jurors lacked courage and had "copped out". The Solicitor also referred to those "bad life sentences" and attempted to pressure the jury into rejecting appellant's evidence in mitigation by referring to public opinion. We concluded that the Solicitor's final argument was not carefully tailored to avoid appealing to the personal bias of a juror. We also found that the argument was calculated to arouse the jurors' passion or prejudice. *See also, State v. Cockerham*, 294 S.C. 380, 365 S.E.2d 22 (1988) (Solicitor commented that defendant depended on the jurors' "soft underbell[ies], lack of courage," and "lack of commitment" to not give him the death penalty).

The Solicitor here did not attack the courage or lack thereof of the jury to impose the death sentence in his closing argument. In *Cockerham* and *Reed*, the Solicitors launched personal attacks against the jury. The Solicitor did not bully the jury as the Solicitors did in *Reed* and *Cockerham*. The only similarity between *Reed*, *Cockerham* and the instant case is the use of the colloquialism, "cop-out". Reviewing the Solicitor's comments in the context of the entire record as we are required to do, *State v. Lindner*, 276 S.C. 304, 278 S.E.2d 335 (1981), we hold that the comments did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431, 437 (1974).

[18] Bell also contends that the Solicitor's comments improperly referred to the victim. We disagree. The Solicitor, at the beginning of his summation, remarked that his voice would be the last one heard on behalf of the State and Debra Helmick. The Solicitor suggested to the jury that imposing a sentence less than the death penalty would be a "blight on the memory" of Debra Helmick. He also commented:

> I sat in my chair before you came out this morning and I tried to imagine what Debra Mae Helmick would look like sitting on that witness stand today. Well, we know she's not here and we know why she's not here.

In *State v. Middleton*, 295 S.C. 318, 323, 368 S.E.2d 457, 459 (1988), *cert. denied* —— U.S. ——, 109 S.Ct. 189, 102 L.Ed.2d 158 (1988), this Court upheld the argument of the Solicitor wherein he stated: "To sentence [appellant] other than to death would be a mockery of the memory of Shirley Mae Mack." Hence, we have already addressed and disposed of such an argument in *Middleton*.

The appellant also argues that the Solicitor suggested he was appearing on behalf of Debra. In *State v. Bell*, 293 S.C. 391, 360 S.E.2d 706 (1987), *cert. denied* 484 U.S. 1020, 108 S.Ct. 734, 98 L.Ed.2d 682 (1988), we upheld a similar Solicitor's argument. We thus find no error in the Solicitor's comment that he was appearing on behalf of the State and Debra Mae Helmick.

In reviewing the Solicitor's comments in the context of the entire record, we find no errors in the Solicitors' closing arguments.

C. JURY INSTRUCTIONS

Bell asserts that the trial court erred in instructing the jury during the penalty phase. First, Bell maintains that the penalty phase instructions improperly restricted the jury's ability to consider all mitigating evidence by suggesting that only statutory mitigating circumstances were relevant.

The trial judge charged the jury as follows:

> In arriving at your recommendation you may consider any mitigating circumstances otherwise authorized or allowed by law and you may consider certain so-called statutory aggravating and mitigating circumstances which are supported by the evidence.

After defining mitigating circumstances, the judge stated:

> As a matter of fact, you may recommend that the defendant receive a life sentence irrespective of whether you find the existence in the evidence of an alleged statutory mitigating circumstance or not. In fact, you may recommend a sentence of life imprisonment for any reason you can think of or for no reason at all.

[19] The issue presented is whether the trial judge properly presented nonstatutory mitigating circumstances to the jury. We have previously upheld the contested charge as sufficient to instruct a nonstatutory mitigating circumstance. *State v. Singleton*, 284 S.C. 388, 326 S.E.2d 153 (1985), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2346, 85 L.Ed.2d 863 (1985).

Bell's contention that *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) supports his argument is without merit. In *Hitchcock*, the Supreme Court held that a sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. Here, the trial court referred implicitly and explicitly to nonstatutory mitigating circumstances at least twice. The trial court instructed the jury that they could give a life sentence for any reason or for no reason at all. The trial court also stated that the jurors could consider any mitigating circumstances otherwise authorized or allowed by law. Thus, based on our prior case law and because *Hitchcock* does not control here, we hold that the Court properly charged the jury on mitigating circumstances.

Bell next asserts that the trial court erred by implying in his instruction that the jury could not consider "sympathy" arising from the case in mitigation.

The trial judge charged:

> In considering whether to recommend that the defendant be sentenced to death or to life imprisonment, I charge you that you are not to allow any passion, prejudice, or any other arbitrary factor to influence your judgment. As jurors, you must decide the issues involved in this proceeding without bias and without prejudice to any party. You cannot allow yourselves to be governed by sympathy, by prejudice, by passion, or by public opinion. Both the State and the defendant have the right to expect that each of you will carefully and impartially consider all the evidence in the case and you will follow the law as I have given it to you in determining your recommendation.

Bell contends that this instruction is erroneous in light of *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), and that it diverts the jury from its constitutional duty to consider mitigating factors in favor of the defendant. In *Brown*, the United States Supreme Court held that an instruction informing jurors that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" during the penalty phase did not violate the Eighth and Fourteenth Amendments of the United States Constitution.

38 The Court fashioned a two-pronged analysis to guide us in our review of Bell's contention. The initial focus is on the "specific language challenged." If the specific instruction fails constitutional muster, we are told next to "review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law." *Brown*, 107 S.Ct. at 839. In *Brown*, the Court noted that it need not reach the second step of analysis, since "a reasonable juror would not interpret the challenged instruction in a manner that would render it unconstitutional." *Id.* at 839–40.

[20] Bell argues that the instruction given in his trial constitutionally differs from the one approved in *Brown*. He points out that the word "sympathy" is the first word in the string of nouns in the instant instruction, while it is third in the *Brown* instruction. He also notes that the word "mere" is missing from the instant instruction, unlike the instruction in *Brown*.

The *Brown* Court stated:

> We also think it highly unlikely that any reasonable juror would almost perversely single out the word "sympathy" from the other nouns which accompany it in the instruction: conjecture, passion, prejudice, public opinion, and public feeling. Reading the instruction as a whole, as we must, it is no more than a catalog of the kind of factors that could improperly influence a juror's decision to vote for or against the death penalty.

Id. at 840. This analysis applies with equal force to the instant instruction. We therefore reject Bell's argument that the exact position of the word "sympathy" in a string of nouns is of constitutional import.

[21] This same excerpt from *Brown* disposes of Bell's complaints about the absence of the word "mere." As well-reasoned by the Court, the word "sympathy" is listed among other factors (prejudice, passion, *etc.*) which are clearly improper bases for a jury decision. Hence, as the Court stated, "a rational juror could hardly hear this instruction without concluding that it was meant to confine the jury's deliberations to considerations arising from the evidence presented, both aggravating and mitigating." *Id.*

[22] 39 Even if we assume *arguendo* that Bell overcomes the first step in the *Brown* analysis, he surely fails at step two. Reviewing the judge's instructions as a whole, Bell's jury was told that they could recommend a "sentence of life imprisonment for any reason you can think of or for no reason at all." (Tr. at 2145–46). They were also told that they were allowed to consider mitigating circumstances, both statutory ones and those "otherwise authorized or allowed by law." Further, the instant "sympathy" instruction about which Bell complains was given at the end of the penalty phase, after Bell had finished putting forth all of his evidence in mitigation. A reasonable juror would simply not isolate the word "sympathy", disregard all of Bell's evidence and all of the trial judge's previous instructions, and refuse to consider mitigating evidence. We therefore hold that Bell's complaints regarding the "sympathy" charge are without merit.

Lastly, Bell asserts that the trial judge erred in rejecting his attempt to waive any *ex post facto* objection to the application of the thirty year provision of the Omnibus Criminal Justice Improvement Acts of 1986. Additionally, Bell argues that the trial judge erred in failing to charge the jury that a person sentenced to life imprisonment for murder would not be eligible for parole until after service of twenty years. We rejected both these arguments in *State v. Matthews*, 296 S.C. 379, 373

S.E.2d 587 (1988), *cert. denied* — U.S. ——, 109 S.Ct. 1559, 103 L.Ed.2d 861 (1989). We, therefore, hold that these arguments are without merit here.

D. PROPORTIONALITY REVIEW

We have reviewed the entire record and conclude the death sentence was not the result of passion, prejudice or any other arbitrary factor, and the evidence supports the jury's finding of aggravating circumstances. S.C.Code Ann. § 16–3–25(C)(1)–(2). The death penalty is not excessive or disproportionate to the penalty imposed in similar cases. S.C.Code Ann. § 16–3–25(C)(3). *See, State v. Bell*, 293 S.C. 391, 360 S.E.2d 706 (1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 734, 98 L.Ed.2d 682 (1988); *State v. Adams*, 279 S.C. 228, 306 S.E.2d 208 (1983) *cert. denied*, 464 U.S. 1023, 104 S.Ct. 558, 78 L.Ed.2d 730 (1983); *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982), *cert. denied* 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 367 (1983).

We therefore affirm Bell's conviction and sentence.

AFFIRMED.

GREGORY, C.J., and HARWELL, CHANDLER and FINNEY, JJ., concur.



CITY OF DARLINGTON, City of Hartsville, J. Ronald Ward, Cecil Chandler, Pat Howle, Earl Johnson, James Hammons, Roseann W. Harry, Oby G. Lyles, Jr., L.M. Cannarella, T. James Bell, Jr., Pam P. Carrol, William A. Gaskins, Franklin Hines, Mary F. Jordan, T.B. Thomas, Tom Stewart, Marion "Bud" Gandy, Mrs. Guy Beatty, George Beckroge, Bishop Lenist Hunter, Beth Weaver, Mrs. Ann Osborne, Donald Sylvester, Bill Segars, Edward L. Melton, James T. Gainey, Marvin Odom, A.M. Odom, W.R. "Bill" Gunnells, William A. Bramlett, Jr., Jan Bramlett, Robert Hitch, Susan Hitch, Robert B. Moody, Barbara W. Moody, Don A. Parnell, Jack W. Price, Laurie G. Price, Respondents,

v.

Robert L. KILGO, Jr., Jerrell Sansbury, Rosa Lee Gerald, Robert L. Bryant, Bobbie S. Gardner, Lucious T. Bacote, Richard Griggs, Maxie O. Redic, Jr., and Billy D. O'Neal, Appellants.

No. 23213.

Supreme Court of South Carolina.

Heard June 8, 1989.

Decided May 7, 1990.

Cities brought action against county administrator and members of county counsel, seeking an injunction to prohibit county council's implementation of plan which created a fire district which included all unincorporated areas of the county without seeking an agreement with the cities. The Common Pleas Court, Darlington County, George M. Stuckey, Jr., Special Circuit Judge, enjoined the county administrator and members of county council from creating a fire district which included property within five miles of the cities' boundaries unless and until the parties executed an agreement. Members of council and administrator appealed. The Supreme Court, Finney, J., held that: (1) the County Fire Protection Services Act allows municipalities to continue to offer fire protection service in areas previously served under contract, and such areas cannot be included in any county fire district plan without prior agreement with the municipality, and (2) five-mile radius protected by cities under contract constituted a "service area" under the County Fire Protection Services Act, and thus the five-mile radius could not be included in any county fire district plan without prior agreement with the cities.

Affirmed.

Goolsby, Acting J., dissented and issued an opinion in which Harwell, J., concurred.

APPENDIX TT

spond" but there is nothing that indicates what tomorrow's will be. *Goldberg v. Kelly*, 397 U.S. 254, 276, 90 S.Ct. 1011, 1024, 25 L.Ed.2d 287 (1970) (Black, J., dissenting). The results from today's balance certainly do not jibe with the result in *Goldberg* or *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).* The lack of [1563] any principled standards in this area means that these procedural due process cases will recur time and again. Every different set of facts will present a new issue on what process was due and when. One way to avoid this subjective and varying interpretation of the Due Process Clause in cases such as these is to hold that one who avails himself of government entitlements accepts the grant of tenure along with its inherent limitations.

Because I believe that the Fourteenth Amendment of the United States Constitution does not support the conclusion that Ohio's effort to confer a limited form of tenure upon respondents resulted in the creation of a "property right" in their employment, I dissent.



* Today the balancing test requires a pretermination opportunity to respond. In *Goldberg* we required a full-fledged trial-type hearing, and in *Mathews* we declined to require any pretermination process other than those required by the statute. At times this balancing process may look as if it were undertaken with a thumb on the scale, depending upon the result the Court desired. For example, in *Mathews* we minimized the importance of the benefit to the recipient, stating that after termination he could always go on welfare to survive. 424 U.S., at 340–343, 96 S.Ct., at 905–907; see also *id.*, at 350, 96 S.Ct., at 910 (BRENNAN, J., dissenting). Today, however, the Court exalts the recipient's interest in retaining employment; not a word is said about going on welfare. Conversely, in *Mathews* we stressed the interests of the State, while today, in a footnote, the Court goes so far as to denigrate the State's interest in firing a school security guard who had lied about a prior felony conviction. *Ante*, at 1495, n. 10.

Today the Court purports to describe the State's interest, *ante*, at 1495, but does so in a way that is contrary to what petitioner Boards of Education have asserted in their briefs. The description of the State's interests looks more like a make-weight to support the Court's result. The decision whom to train and employ is strictly a decision for the State. The Court attempts to ameliorate its ruling by stating that a State may always suspend an employee with pay, in lieu of a predischarge hearing, if it determines that he poses a threat. *Ante*, at 1495. This does less than justice to the State's interest in its financial integrity and its interest in promptly terminating an employee who has violated the conditions of his tenure, and ignores Ohio's current practice of paying back wages to wrongfully-discharged employees.

470 U.S. 564, 84 L.Ed.2d 518

[1564] **Phyllis A. ANDERSON**

v.

CITY OF BESSEMER CITY, NORTH CAROLINA.

No. 83–1623.

Argued Dec. 3, 1984.

Decided March 19, 1985.

Unsuccessful applicant for position of city recreation director brought suit charging city with sex discrimination in its hiring of male applicant. The United States District Court for the Western District of North Carolina, 557 F.Supp. 412, James B. McMillan, J., found in favor of plaintiff, and city appealed. The United States Court of Appeals for the Fourth Circuit, 717 F.2d 149, reversed, and certiorari was granted. The Supreme Court, Justice White, held that: (1) Court of Appeals misapprehended and misapplied clearly erroneous standard, and (2) district court's finding that female applicant was discriminated against on account of her sex was not clearly erroneous.

Reversed.

Justice Powell filed concurring opinion.

Justice Blackmun filed opinion concurring in judgment.

Order on remand, 762 F.2d 347.

1. Federal Civil Procedure ⇐2280
Federal Courts ⇐848

There was no reason to doubt that findings issued by district court represented judge's own considered conclusions or to subject those findings to more stringent appellate review than was called for by applicable rules, where district court did not appear to have uncritically accepted findings prepared without judicial guidance by prevailing party and court itself provided framework for proposed findings when it issued its preliminary memorandum, which set forth its essential findings and directed petitioner's counsel to submit more detailed set of findings consistent with them.

2. Federal Courts ⇐858

Finding of intentional discrimination is not set aside unless clearly erroneous, and due regard is given to opportunity of trial court to judge credibility of witnesses. Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

3. Federal Courts ⇐853

Finding is "clearly erroneous" when, although there is evidence to support it, reviewing court on entire evidence is left with definite and firm conviction that mistake has been committed; this standard plainly does not entitle reviewing court to reverse finding of trier of fact simply because it is convinced that it would have decided case differently. Fed.Rules Civ. Proc.Rule 52(a), 28 U.S.C.A.

4. Federal Courts ⇐850

Reviewing court oversteps bounds of its duty under Federal Rule of Civil Procedures setting forth clearly erroneous standard of review for findings of fact, if it undertakes to duplicate rule of lower court. Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

5. Federal Courts ⇐776

In applying clearly erroneous standard to findings of district court sitting without jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.

6. Federal Courts ⇐848

If district court's account of evidence is plausible in light of record viewed in its entirety, Court of Appeals may not reverse it even though convinced that had it been sitting as trier of fact, it would have weighed evidence differently.

7. Federal Courts ⇐851

Where there are two permissible views of evidence, fact finder's choice between them cannot be clearly erroneous.

8. Federal Courts ⇐844

When findings are based on determinations regarding credibility of witnesses, Federal Rule of Civil Procedure setting forth "clearly erroneous" standard of review for findings of fact demands even greater deference to trial court's finding; for only trial judge can be aware of variations in demeanor and tone of voice that bears so heavily on listener's understanding of and belief in what is said. Fed. Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

9. Federal Courts ⇐852

Where documents or objective evidence contradict witness' story or story itself is so internally inconsistent or implausible on its face that reasonable fact finder would not credit it, Court of Appeals may well find clear error even in finding purportedly based on credibility determination. Fed. Rules Civ.Proc.Rule 52, 28 U.S.C.A.

10. Federal Courts ⇐851

When trial judge's finding is based on his decision to credit testimony of one of two or more witnesses, each of whom has told coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. Fed.Rules Civ.Proc.Rule 52, 28 U.S.C.A.

11. Federal Courts ⇐776

In detecting clear error in district court's finding that female applicant was better qualified than male applicant who was offered position of city recreation director, Court of Appeals improperly conducted what amounted to de novo weighing

of evidence in the record. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ. Proc.Rule 52, 28 U.S.C.A.

12. **Federal Courts** ⇐850

Question which Supreme Court must answer is not whether interpretation of facts by Court of Appeals was clearly erroneous, but whether district court's finding was clearly erroneous. Fed.Rules Civ. Proc.Rule 52, 28 U.S.C.A.

13. **Federal Courts** ⇐858

District court's conclusion that female applicant was more qualified for position of city recreation director than male applicant who was offered the position was not clearly erroneous. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 52, 28 U.S.C.A.

14. **Federal Courts** ⇐858

Trial court's finding that comment made by chairperson of committee responsible for choosing city recreation director to male applicant about feelings of his wife was "facetious" was not clearly erroneous. Fed.Rules Civ.Proc.Rule 52, 28 U.S.C.A.

15. **Federal Courts** ⇐858

Trial court's finding that male candidates for position of city recreation director were not seriously questioned about feelings of their wives was not clearly erroneous; given that finding, the finding that committee members were biased against hiring a woman was not erroneous. Fed. Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

16. **Federal Courts** ⇐858

District court's finding that female applicant for position of city recreation director was discriminated against on account of her sex was not clearly erroneous, since findings that she was more qualified than male applicant who was offered the position and that selection committee was biased were sufficient to support inference that applicant was denied position on account of her sex. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 52, 28 U.S.C.A.

Syllabus *

In 1975, respondent city set about to hire a new Recreation Director to manage the city's recreational facilities and to develop recreational programs. A committee, consisting of four men and one woman, was responsible for choosing the Director. Eight persons applied for the position, including petitioner, the only woman applicant. At the time, petitioner was a 39-year-old schoolteacher with college degrees in social studies and education. The committee offered the position to a 24-year-old male applicant, who had recently graduated from college with a degree in physical education. The four men on the committee voted to offer the job to him, and only the woman voted for petitioner. Petitioner then filed discrimination charges with the Equal Employment Opportunity Commission (EEOC), which, upon finding that there was reasonable cause to believe that petitioner's charges were true, invited the parties to engage in conciliation proceedings. When these efforts proved unsuccessful, the EEOC issued petitioner a right-to-sue letter, and she filed an action in Federal District Court under Title VII of the Civil Rights Act of 1964. After a trial in which testimony from petitioner, the applicant who was hired, and members of the selection committee was heard, the court issued a memorandum announcing its finding that petitioner was entitled to judgment because she had been denied the position on account of her sex. The memorandum requested petitioner to submit proposed findings of fact and conclusions of law expanding upon those set forth in the memorandum. When petitioner complied with this request, the court requested and received a response setting forth respon-

* 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 (1906).

dent's objections to the proposed findings. The court then issued its own findings of fact and conclusions of law. The court's finding that petitioner had been denied employment because of her sex was based on findings of fact that she was the most qualified candidate, that she had been asked questions during her interview regarding her spouse's feelings about her application for the position that other applicants were not asked, and that the male committee members were biased against hiring a woman. The Court of Appeals reversed, holding that the District Court's findings were clearly erroneous and that the court had therefore erred in finding that petitioner had been discriminated against on account of sex.

1565 *Held:* The Court of Appeals misapprehended and misapplied the clearly-erroneous standard and accordingly erred in denying petitioner relief under Title VII. Pp. 1510–1515.

(a) Where the District Court did not simply adopt petitioner's proposed findings but provided respondent with an opportunity to respond to those findings and the findings ultimately issued varied considerably from those proposed by petitioner, there is no reason to doubt that the ultimate findings represented the court's own considered conclusions or to subject those findings to a more stringent appellate review than is called for by the applicable rules. Pp. 1510–1511.

(b) Under Federal Rule of Civil Procedure 52(a)—which provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness"—"[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 394–395, 68 S.Ct. 525, 541–542, 92 L.Ed. 746. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. This is so even when the district court's findings do not rest on credibility determinations, but are based on physical or documentary evidence or inferences from other facts. When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's finding. Pp. 1511–1513.

(c) Application of the above principles to the facts of this case discloses that the Court of Appeals erred in its employment of the clearly-erroneous standard. The District Court's finding that petitioner was better qualified was entitled to deference notwithstanding it was not based on credibility determinations, and the record contains nothing that mandates a holding that the finding was clearly erroneous. As to the District Court's finding that petitioner was the only applicant asked questions regarding her spouse's feelings about her application for the position, the Court of Appeals erred in failing to give due regard to the District Court's ability to interpret and discern the credibility of oral testimony, especially that of the woman member of the selection committee, whose testimony the District Court felt supported the finding. Given that that finding was not clearly erroneous, the District Court's finding of bias cannot be termed erroneous. It is supported not only by the treatment of petitioner in her interview but also by the testimony of one committee member that he believed it would have been difficult for a woman to perform the job and by evidence that another member solicited applications only from men. Because the findings on which the 1566 District Court based its finding of sex discrimination were not clearly erroneous, its finding of discrimination was also not clearly erroneous. Pp. 1513–1515.

717 F.2d 149, reversed.

Jonathan Wallas, Charlotte, N.C., for petitioner.

Carolyn F. Corwin, Washington, D.C., for the United States and the Equal Employment Opportunity Commission as amici curiae supporting petitioner, by special leave of Court.

Philip M. Van Hoy, Charlotte, N.C., for the respondent.

Justice WHITE delivered the opinion of the Court.

In *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), we held that a District Court's finding of discriminatory intent in an action brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, is a factual finding that may be overturned on appeal only if it is clearly erroneous. In this case, the Court of Appeals for the Fourth Circuit concluded that there was clear error in a District Court's finding of discrimination and reversed. Because our reading of the record convinces us that the Court of Appeals misapprehended and misapplied the clearly-erroneous standard, we reverse.

[567] I

Early in 1975, officials of respondent Bessemer City, North Carolina, set about to hire a new Recreation Director for the city. Although the duties that went with the position were not precisely delineated, the new Recreation Director was to be responsible for managing all of the city's recreational facilities and for developing recreational programs—athletic and otherwise—to serve the needs of the city's residents. A five-member committee selected by the Mayor was responsible for choosing the Recreation Director. Of the five members, four were men; the one woman on the committee, Mrs. Auddie Boone, served as the chairperson.

Eight persons applied for the position of Recreation Director. Petitioner, at the time a 39-year-old schoolteacher with college degrees in social studies and education, was the only woman among the eight. The selection committee reviewed the resumés submitted by the applicants and briefly interviewed each of the jobseekers. Following the interviews, the committee offered the position to Mr. Donald Kincaid, a 24-year-old who had recently graduated from college with a degree in physical education. All four men on the committee voted to offer the job to Mr. Kincaid; Mrs. Boone voted for petitioner.

Believing that the committee had passed over her in favor of a less qualified candidate solely because she was a woman, petitioner filed discrimination charges with the Charlotte District Office of the Equal Employment Opportunity Commission. In July 1980 (five years after petitioner filed the charges), the EEOC's District Director found that there was reasonable cause to believe that petitioner's charges were true and invited the parties to attempt a resolution of petitioner's grievance through conciliation proceedings. The EEOC's efforts proved unsuccessful, and in due course, petitioner received a right-to-sue letter.

Petitioner then filed this Title VII action in the United States District Court for the Western District of North [568] Carolina. After a 2-day trial during which the court heard testimony from petitioner, Mr. Kincaid, and the five members of the selection committee, the court issued a brief memorandum of decision setting forth its finding that petitioner was entitled to judgment because she had been denied the position of Recreation Director on account of her sex. In addition to laying out the rationale for this finding, the memorandum requested that petitioner's counsel submit proposed findings of fact and conclusions of law expanding upon those set forth in the memorandum. Petitioner's counsel complied with this request by submitting a lengthy set of proposed findings (App. 11a–34a); the court then requested and received a response setting forth in detail respondent's objections to the proposed findings (*id.*, at 36a–47a)—objections that were, in turn, answered by petitioner's counsel in a somewhat less lengthy reply (*id.*, at 48a–54a). After receiving these submissions, the court issued its own findings of fact

and conclusions of law. 557 F.Supp. 412, 413–419 (1983).

As set forth in the formal findings of fact and conclusions of law, the court's finding that petitioner had been denied employment by respondent because of her sex rested on a number of subsidiary findings. First, the court found that at the time the selection committee made its choice, petitioner had been better qualified than Mr. Kincaid to perform the range of duties demanded by the position. The court based this finding on petitioner's experience as a classroom teacher responsible for supervising schoolchildren in recreational and athletic activities, her employment as a hospital recreation director in the late 1950's, her extensive involvement in a variety of civic organizations, her knowledge of sports acquired both as a high school athlete and as a mother of children involved in organized athletics, her skills as a public speaker, her experience in handling money (gained in the course of her community activities and in her work as a bookkeeper for a group of physicians), and her knowledge of [569] music, dance, and crafts. The court found that Mr. Kincaid's principal qualifications were his experience as a student teacher and as a coach in a local youth basketball league, his extensive knowledge of team and individual sports, acquired as a result of his lifelong involvement in athletics, and his formal training as a physical education major in college. Noting that the position of Recreation Director involved more than the management of athletic programs, the court concluded that petitioner's greater breadth of experience made her better qualified for the position.

Second, the court found that the male committee members had in fact been biased against petitioner because she was a woman. The court based this finding in part on the testimony of one of the committee members that he believed it would have been "real hard" for a woman to handle the job and that he would not want his wife to have to perform the duties of the Recreation Director. The finding of bias found additional support in evidence that another male committee member had told Mr. Kincaid, the successful applicant, of the vacancy and had also solicited applications from three other men, but had not attempted to recruit any women for the job.

Also critical to the court's inference of bias was its finding that petitioner, alone among the applicants for the job, had been asked whether she realized the job would involve night work and travel and whether her husband approved of her applying for the job. The court's finding that the committee had pursued this line of inquiry only with petitioner was based on the testimony of petitioner that these questions had been asked of her and the testimony of Mrs. Boone that similar questions had not been asked of the other applicants. Although Mrs. Boone also testified that during Mr. Kincaid's interview, she had made a "comment" to him regarding the reaction of his new bride to his taking the position of Recreation Director, the court concluded that this comment was not a serious inquiry, but merely a "facetious" remark prompted by Mrs. Boone's annoyance that only petitioner [570] had been questioned about her spouse's reaction. The court also declined to credit the testimony of one of the male committee members that Mr. Kincaid had been asked about his wife's feelings "in a way" and the testimony of another committeeman that all applicants had been questioned regarding their willingness to work at night and their families' reaction to night work. The court concluded that the finding that only petitioner had been seriously questioned about her family's reaction suggested that the male committee members believed women had special family responsibilities that made certain forms of employment inappropriate.

Finally, the court found that the reasons offered by the male committee members for their choice of Mr. Kincaid were pretextual. The court rejected the proposition that Mr. Kincaid's degree in physical education justified his choice, as the evidence suggested that where male candidates were concerned, the committee valued ex-

perience more highly than formal training in physical education.[1] The court also rejected the claim of one of the committeemen that Mr. Kincaid had been hired because of the superiority of the recreational programs he planned to implement if selected for the job. The court credited the testimony of one of the other committeemen who had voted for Mr. Kincaid that the programs outlined by petitioner and Mr. Kincaid were substantially identical.

On the basis of its findings that petitioner was the most qualified candidate, that the committee had been biased against hiring a woman, and that the committee's explanations for its choice of Mr. Kincaid were pretextual, the court [571] concluded that petitioner had met her burden of establishing that she had been denied the position of Recreation Director because of her sex. Petitioner having conceded that ordering the city to hire her would be an inappropriate remedy under the circumstances, the court awarded petitioner backpay in the amount of $30,397 and attorney's fees of $16,971.59.

The Fourth Circuit reversed the District Court's finding of discrimination. 717 F.2d 149 (1983). In the view of the Court of Appeals, three of the District Court's crucial findings were clearly erroneous: the finding that petitioner was the most qualified candidate, the finding that petitioner had been asked questions that other applicants were spared, and the finding that the male committee members were biased against hiring a woman. Having rejected these findings, the Court of Appeals concluded that the District Court had erred in finding that petitioner had been discriminated against on account of her sex.

II

We must deal at the outset with the Fourth Circuit's suggestion that "close scrutiny of the record in this case [was] justified by the manner in which the opinion was prepared," *id.*, at 156—that is, by the District Court's adoption of petitioner's proposed findings of fact and conclusions of law. The court recalled that the Fourth Circuit had on many occasions condemned the practice of announcing a decision and leaving it to the prevailing party to write the findings of fact and conclusions of law. See, *e.g.*, *Cuthbertson v. Biggers Bros., Inc.*, 702 F.2d 454 (1983); *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633 (1983); *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719 (1961). The court rejected petitioner's contention that the procedure followed by the trial judge in this case was proper because the judge had given respondent an opportunity to object to the proposed findings and had not adopted petitioner's findings verbatim.[572] According to the court, the vice of the procedure lay in the trial court's solicitation of findings after it had already announced its decision and in the court's adoption of the "substance" of petitioner's proposed findings.

We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record. See, *e.g.*, *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656–657, 84 S.Ct. 1044, 1047–1048, 12 L.Ed.2d 12 (1964); *United States v. Marine Bancorporation*, 418 U.S. 602, 615, n. 13, 94 S.Ct. 2856, 2866, n. 13, 41 L.Ed.2d 978 (1974). We are also aware of the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge has decided in their favor. See J. Wright, The Nonjury Trial—Preparing Findings of Fact, Conclusions of Law, and Opinions, Seminars for Newly Appointed United States District Judges 159, 166 (1962). Nonetheless, our previous discussions of the subject suggest

1. The evidence established that the committee members had initially favored a third candidate, Bert Broadway, and had decided not to hire him only because he stated that he was unwilling to move to Bessemer City. Mr. Broadway had two years of experience as a community recreation director; but like petitioner, he lacked a college degree in physical education.

that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. *United States v. Marine Bancorporation, supra,* at 615, n. 13, 94 S.Ct., at 2866, n. 13; *United States v. El Paso Natural Gas Co., supra,* 376 U.S., at 656–657, 84 S.Ct., at 1047–1048.

[1] In any event, the District Court in this case does not appear to have uncritically accepted findings prepared without judicial guidance by the prevailing party. The court itself provided the framework for the proposed findings when it issued its preliminary memorandum, which set forth its essential findings and directed petitioner's counsel to submit a more detailed set of findings consistent with them. Further, respondent was provided and availed itself of the opportunity to respond at length to the proposed findings. Nor did the District Court simply adopt petitioner's proposed findings: the findings it ultimately issued—and particularly the crucial findings regarding petitioner's qualifications, the questioning to which petitioner was subjected, and bias on the part of the committeemen—vary considerably in organization 573 and content from those submitted by petitioner's counsel. Under these circumstances, we see no reason to doubt that the findings issued by the District Court represent the judge's own considered conclusions. There is no reason to subject those findings to a more stringent appellate review than is called for by the applicable rules.

III

[2] Because a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court's finding of discrimination is that set forth in Federal Rule of Civil Procedure 52(a): "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The question before us, then, is whether the Court of Appeals erred in holding the District Court's finding of discrimination to be clearly erroneous.

[3–7] Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized, is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*" *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969). If the 574 district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co.,* 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949); see also *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982).

This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical

or documentary evidence or inferences from other facts. To be sure, various Courts of Appeals have on occasion asserted the theory that an appellate court may exercise *de novo* review over findings not based on credibility determinations. See, *e.g., Orvis v. Higgins*, 180 F.2d 537 (CA2 1950); *Lydle v. United States*, 635 F.2d 763, 765, n. 1 (CA6 1981); *Swanson v. Baker Industries, Inc.*, 615 F.2d 479, 483 (CA8 1980). This theory has an impressive genealogy, having first been articulated in an opinion written by Judge Frank and subscribed to by Judge Augustus Hand, see *Orvis v. Higgins, supra*, but it is impossible to trace the theory's lineage back to the text of Rule 52(a), which states straightforwardly that "findings of fact shall not be set aside unless clearly erroneous." That the Rule goes on to emphasize the special deference to be paid credibility determinations does not alter its clear command: Rule 52(a) "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S., at 287, 102 S.Ct., at 1789.

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial [575]judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.'" *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977). For these reasons, review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception.

[8–10] When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. See *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. See, *e.g., United States v. United States Gypsum Co., supra*, 333 U.S., at 396, 68 S.Ct., at 542. But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. [576]Cf. *United States v. Aluminum Co. of America*, 148 F.2d 416, 433 (CA2 1945); *Orvis v. Higgins, supra*, at 539–540.

IV

[11] Application of the foregoing principles to the facts of the case lays bare the errors committed by the Fourth Circuit in its employment of the clearly-erroneous standard. In detecting clear error in the District Court's finding that petitioner was

better qualified than Mr. Kincaid, the Fourth Circuit improperly conducted what amounted to a *de novo* weighing of the evidence in the record. The District Court's finding was based on essentially undisputed evidence regarding the respective backgrounds of petitioner and Mr. Kincaid and the duties that went with the position of Recreation Director. The District Court, after considering the evidence, concluded that the position of Recreation Director in Bessemer City carried with it broad responsibilities for creating and managing a recreation program involving not only athletics, but also other activities for citizens of all ages and interests. The court determined that petitioner's more varied educational and employment background and her extensive involvement in a variety of civic activities left her better qualified to implement such a rounded program than Mr. Kincaid, whose background was more narrowly focused on athletics.

The Fourth Circuit, reading the same record, concluded that the basic duty of the Recreation Director was to implement an athletic program, and that the essential qualification for a successful applicant would be either education or experience specifically related to athletics.[2] Accordingly, it [1577]seemed evident to the Court of Appeals that Mr. Kincaid was in fact better qualified than petitioner.

[12, 13] Based on our own reading of the record, we cannot say that either interpretation of the facts is illogical or implausible. Each has support in inferences that may be drawn from the facts in the record; and if either interpretation had been drawn by a district court on the record before us, we would not be inclined to find it clearly erroneous. The question we must answer, however, is not whether the Fourth Circuit's interpretation of the facts was clearly erroneous, but whether the District Court's finding was clearly erroneous. See *McAllister v. United States*, 348 U.S. 19, 20–21, 75 S.Ct. 6, 7–8, 99 L.Ed. 20 (1954). The District Court determined that petitioner was better qualified, and, as we have stated above, such a finding is entitled to deference notwithstanding that it is not based on credibility determinations. When the record is examined in light of the appropriately deferential standard, it is apparent that it contains nothing that mandates a finding that the District Court's conclusion was clearly erroneous.

Somewhat different concerns are raised by the Fourth Circuit's treatment of the District Court's finding that petitioner, alone among the applicants for the position of Recreation Director, was asked questions regarding her spouse's feelings about her application for the position. Here the error of the Court of Appeals was its failure to give due regard to the ability of the District Court to interpret and discern the credibility of oral testimony. The Court of Appeals rested its rejection of the District Court's finding of differential treatment on its own interpretation of testimony by Mrs. Boone—the very witness whose testimony, in the view of the District Court, supported the finding. In the eyes of the Fourth Circuit, Mrs. Boone's testimony that she had made a "comment" to Mr. Kincaid about the feelings of his wife (a comment judged "facetious" by the District Court) conclusively established that Mr. Kincaid, and perhaps other male applicants as well, had been questioned about the feelings of his spouse.

[14] [1578]Mrs. Boone's testimony on this point, which is set forth in the margin,[3] is

2. The Fourth Circuit thus saw no inconsistency between the statement of the male committee members that they preferred Bert Broadway because of his experience and their claim that they had selected Mr. Kincaid over petitioner because of his formal training. See n. 1, *supra*. In the view of the Court of Appeals, this demonstrated only that Mr. Broadway had relevant experience and Mr. Kincaid had relevant education, while petitioner had neither.

3. "Q: Did the committee members ask that same kind of question of the other applicants?
"A: Not that I recall.
"Q: Do you deny that the other applicants, aside from the plaintiff, were asked about the prospect of working at night in that position?

certainly not free from ambiguity. But Mrs. Boone several times stated that other candidates had not been questioned about the reaction of their wives—at least, "not in the same context" as had petitioner. And even after recalling and calling to the attention of the court that she had made a comment on the subject to Mr. Kincaid, Mrs. Boone denied that she had "asked" Mr. Kincaid about his wife's reaction. Mrs. Boone's testimony on these matters is not 1579 inconsistent with the theory that her remark was not a serious inquiry into whether Mr. Kincaid's wife approved of his applying for the position. Whether the judge's interpretation is actually correct is impossible to tell from the paper record, but it is easy to imagine that the tone of voice in which the witness related her comment, coupled with her immediate denial that she had questioned Mr. Kincaid on the subject, might have conclusively established that the remark was a facetious one. We therefore cannot agree that the judge's conclusion that the remark was facetious was clearly erroneous.

[15] Once the trial court's characterization of Mrs. Boone's remark is accepted, it is apparent that the finding that the male candidates were not seriously questioned about the feelings of their wives cannot be deemed clearly erroneous. The trial judge was faced with the testimony of three witnesses, one of whom (Mrs. Boone) stated that none of the other candidates had been so questioned, one of whom (a male committee member) testified that Mr. Kincaid had been asked such a question "in a way," and one of whom (another committeeman) testified that all the candidates had been subjected to similar questioning. None of these accounts is implausible on its face, and none is contradicted by any reliable extrinsic evidence. Under these circumstances, the trial court's decision to credit Mrs. Boone was not clearly erroneous.

The Fourth Circuit's refusal to accept the District Court's finding that the committee members were biased against hiring a woman was based to a large extent on its rejection of the finding that petitioner had been subjected to questioning that the other applicants were spared. Given that that finding was not clearly erroneous, the finding of bias cannot be termed erroneous: it finds support not only in the treatment of petitioner in her interview, but also in the testimony of one committee member that he believed it would have been difficult for a woman to perform the job and in the evidence 1580 that another member solicited applications for the position only from men.[4]

"A: Not to my knowledge.
"Q: Are you saying they were not asked that?
"A: They were not asked, not in the context that they were asked of Phyllis. I don't know whether they were worried because Jim wasn't going to get his supper or what. You know, that goes both ways.
"Q: Did you tell Phyllis Anderson that Donnie Kincaid was not asked about night work?
"A: He wasn't asked about night work.
"Q: That answers one question. Now, let's answer the other one. Did you tell Phyllis Anderson that, that Donnie Kincaid was not asked about night work?
"A: Yes, after the interviews—I think the next day or sometime, and I know—may I answer something?
"Q: If it's a question that has been asked; otherwise, no. It's up to the Judge to say.
"A: You asked if there was any question asked about—I think Donnie was just married, and I think I made the comment to him personally—and your new bride won't mind.
"Q: So, you asked him yourself about his own wife's reaction?
"A: No, no.
"Q: That is what you just said.
"Mr. Gibson: Objection, Your Honor.
"[The] Court: Sustained. You don't have to rephrase the answer."
App. 108a, 120a–121a.

4. The Fourth Circuit's suggestion that any inference of bias was dispelled by the fact that each of the male committee members was married to a woman who had worked at some point in the marriage is insufficient to establish that the finding of bias was clearly erroneous. Although we decline to hold that a man's attitude toward his wife's employment is irrelevant to the question whether he may be found to have a bias against working women, any relevance he factor may have in a particular case is a matter for the district court to weigh in its consideration of bias, not the court of appeals.

[16] Our determination that the findings of the District Court regarding petitioner's qualifications, the conduct of her interview, and the bias of the male committee members were not clearly erroneous leads us to conclude that the court's finding that petitioner was discriminated against on account of her sex was also not clearly erroneous. The District Court's findings regarding petitioner's superior qualifications and the bias of the selection committee are sufficient to support the inference that petitioner was denied the position of Recreation Director on account of her sex. Accordingly, we hold that the Fourth Circuit erred in denying petitioner relief under Title VII.

In so holding, we do not assert that our knowledge of what happened 10 years ago in Bessemer City is superior to that of the Court of Appeals; nor do we claim to have greater insight than the Court of Appeals into the state of mind of the men on the selection committee who rejected petitioner for the position of Recreation Director. Even the trial judge, who has heard the witnesses directly and who is more closely in touch than the appeals court with the milieu out of which the controversy before him arises, cannot always be confident that he "knows" what happened. Often, he can only determine whether the plaintiff has succeeded in presenting an account of the facts that is more likely to be true than not. Our task—and the task of appellate tribunals generally—is more limited still: we must determine whether the trial |581 judge's conclusions are clearly erroneous. On the record before us, we cannot say that they are. Accordingly, the judgment of the Court of Appeals is

Reversed.

Justice POWELL, concurring.

I do not dissent from the judgment that the Court of Appeals misapplied Rule 52(a) in this case. I write separately, however, because I am concerned that one may read the Court's opinion as implying criticism of the Court of Appeals for the very fact that it engaged in a comprehensive review of the entire record of this case. Such a reading may encourage overburdened Courts of Appeals simply to apply Rule 52(a) in a conclusory fashion, rather than to undertake the type of burdensome review that may be appropriate in some cases.

In this case, the Court of Appeals made no arbitrary judgment that the action of the District Court was clearly erroneous. On the contrary, the court meticulously reviewed the entire record and reached the conclusion that the District Court was in error. One easily could agree with the Court of Appeals that the District Court committed a mistake in its finding of sex discrimination, based, as it was, on fragmentary statements made years before * in informal exchanges between members of the selection committee and the applicants for the position to be filled. On the record before us, however, the factual issue fairly could be decided for either party. Therefore, as the Court holds, the District Court's decision was not clearly erroneous within the meaning of Rule 52(a).

Justice BLACKMUN, concurring in the judgment.

I would like to join the Court's opinion, for I think its judgment is correct, and I agree with most of what the Court |582 says. I, however, do not join the broad dictum, *ante,* at 1511–1512, to the effect that the same result is to be reached when the district court's findings are based wholly on documentary evidence and do not rest at all on credibility determinations. In the past, I have joined at least one opinion that, generally, is to the opposite effect. See *United States v. Mississippi Valley Barge Line Co.,* 285 F.2d 381, 388 (CA8 1960). See also *Ralston Purina Co. v. General Foods Corp.,* 442 F.2d 389, 391 (CA8 1971); *Frito-Lay, Inc. v. So Good Potato Chip Co.,* 540 F.2d 927, 930 (CA8 1976); *Swan-*

* The Charlotte branch of the EEOC, with whom petitioner filed a complaint, took no action for five years. The testimony at trial, therefore, was based on stale recollections.

son v. Baker Industries, Inc., 615 F.2d 479, 483 (CA8 1980).

While the Court may be correct in its dictum today, certainly this case does not require us to decide the question. The record contains far more than documentary evidence, as the Court's opinion so adequately discloses. In a case that requires resolution of the question, I might eventually be persuaded that the Court's approach is wise. I prefer, however, to wait for a case where the issue must be resolved and where it has been briefed and argued by the parties, rather than to address the issue by edict without these customary safeguards.

I therefore join the Court only in its judgment and not in its opinion.



470 U.S. 583, 84 L.Ed.2d 535

1583 **FIRST NATIONAL BANK OF ATLANTA, etc., Appellant**

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS et al.

No. 83–1620.

Argued Oct. 30, 1984.

Decided March 19, 1985.

Appeals were taken from judgment of the Bartow Superior Court, R. Thomas Pope, J., upholding constitutionality of Georgia's bank share tax in determining that banks in question were not entitled to deduct value of federal securities in determining net worth for imposition of share tax. The Supreme Court, 248 Ga. 703, 285 S.E.2d 920, affirmed, and the United States Supreme Court, 103 S.Ct. 3563, vacated and remanded. On remand, the Georgia Supreme Court, Hill, C.J., 251 Ga. 831, 312 S.E.2d 102, reversed and remanded and one bank appealed. The Supreme Court, 104 S.Ct. 2654, noted probable jurisdiction, and Justice Blackmun, held that Georgia statute imposing property tax on fair market value of shares of bank stockholders, as construed by Georgia Supreme Court, did not violate revenue statute providing for exemption from state or local taxation of obligations of the United States.

Judgment of Supreme Court of Georgia affirmed.

1. Taxation ⇐7

Tax exemption for government obligations that is required by Constitution is not a total exclusion, but, instead, may be limited by charging obligations and their interest fair share of related expenses or burdens.

2. Taxation ⇐7

Revenue statute providing for exemption from state or local taxation of obligations of United States, as amended in 1959, provided exemption no broader in scope than that which Constitution requires for tax exemption for government obligations. 31 U.S.C.A. § 3124(a).

3. Taxation ⇐7, 365

Georgia statute imposing property tax on fair market value of shares of bank stockholders, as construed by Georgia Supreme Court, to allow bank to deduct from net worth not full value of United States obligations it held but, rather, only percentage of fair obligations attributable to assets, did not violate revenue statute providing for exemption from state or local taxation of obligations of United States. 31 U.S.C.A. §§ 3124, 3124(a); O.C.G.A. § 48–6–90(a)(1, 2).

4. Taxation ⇐7

Federal obligations may be acquired, in part, by liabilities, and when they are, pro rata method of allocating fair share of obligations to liabilities does not infringe upon constitutional or statutory immunities United States obligations enjoy.

APPENDIX UU

reau informant. The basis of their defense at trial was that although they had met with the informant, as the Government claimed, their intent at the meeting was to buy marijuana rather than to sell it. The prosecutor attempted to impeach this theory by asking the defendants why, if they had not been selling marijuana, they had failed to explain this fact to the officer who arrested them. The defendants' attorney objected to this line of questioning, contending that, since the defendants had been given *Miranda* warnings upon being arrested, no inference could be drawn from their silence. The defendants were convicted by a jury.

The Supreme Court reversed the convictions, holding that it was a violation of due process for the state to first advise the defendants that they had the right to remain silent and then attempt to use that silence to impeach the defendants' testimony at trial. The Court stated that postarrest silence is "insolubly ambiguous" because it might be nothing more than an arrestee's exercise of *Miranda* rights. The Court further pointed out that "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." 426 U.S. at 618, 96 S.Ct. at 2245.

The grand jury testimony issue in this case is controlled by *Doyle*. Kopel was advised that he had the right to leave the grand jury room and consult his attorney before answering any questions. He exercised that right in reliance on this advice, and the Government should not be permitted to "sandbag" him by using the fact that he consulted his attorney against him. Like the postarrest silence of the defendants in *Doyle*, Kopel's conduct is "insolubly ambiguous." He may have wanted to check with his attorney to refresh his memory as to whether he had received money from tavern owners or liquor distributors for noncriminal purposes which nonetheless fell outside the categories enumerated by the United States Attorney. Alternatively, he may have decided before the questioning began that he would automatically consult his attorney as a precaution before answering any potentially incriminating questions.

The majority reasons that Kopel's argument must fail because the fact that he left the room to consult with his attorney was relevant to the issue of whether he committed perjury. I agree that this fact is relevant and tends to show that Kopel was guilty. If it were not, the action of the trial judge in permitting it to go to the jury could be no more than harmless error. But this does not end the analysis. The postarrest silence of the defendants in *Doyle* was certainly relevant to whether their theory of the case was true. The prosecutor was correct in suggesting that the typical person who was arrested and charged with a crime he did not commit would be likely to immediately protest his innocence. Thus, the defendants' silence after arrest was probative evidence that their story at trial was a fabrication. What the Court held in *Doyle*—and what should be dispositive in this case—is that it is unfair to advise a criminal defendant that he has certain rights and then use the exercise of those rights against him, even if that fact is relevant to the outcome at trial.



Robert FLOWERS, Plaintiff-Appellant,

v.

CROUCH-WALKER CORPORATION, Defendant-Appellee.

No. 76-1625.

United States Court of Appeals, Seventh Circuit.

Argued Dec. 10, 1976.

Decided April 19, 1977.

Action was brought by former employee alleging that employer discharged him from bricklaying job on account of his race. The United States District Court for the

Northern District of Illinois, Richard W. McLaren, J., entered judgment for employer, and employee appealed. The Court of Appeals, 507 F.2d 1378, vacated and remanded. On remand, the District Court, William J. Lynch, J., granted employer's motion to dismiss action at close of employee's presentation of evidence, and employee appealed. The Court of Appeals, Castle, Senior Circuit Judge, held that former employee was not procedurally prejudiced by granting of motion for dismissal at close of his case, that employee met his initial burden of establishing prima facie case of racial discrimination, and that evidence did not establish employer's articulated reason for discharging employee.

Reversed and remanded.

1. **Civil Rights** ⇐43

If plaintiff establishes prima facie case of racial discrimination, burden shifts to employer to articulate some legitimate, nondiscriminatory reason for his action and, if employer meets its burden of proof in response to prima facie case, plaintiff must be afforded opportunity to show that employer's stated reason for his action was in fact pretext. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

2. **Civil Rights** ⇐9.10, 44(1)

Relative inferiority of plaintiff employee's work at site in course of work slowdown would constitute nondiscriminatory reason for discharge sufficient to rebut plaintiff's charge of racial discrimination in connection with his discharge, and there was nothing to preclude defendant employer's reliance on evidence appearing in plaintiff's case to establish nondiscriminatory reason for its action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981; Fed.Rules Civ. Proc. rule 41(b), 28 U.S.C.A.

3. **Federal Civil Procedure** ⇐1827

Where plaintiff employee was informed of defendant employer's asserted justification for discharging him by opening statement of defendant's counsel, and he was alerted then to fact that defendant hoped to establish justification by plaintiff's own testimony, opportunity to show that defendant's asserted reason for discharge was pretext was available to plaintiff in his case in chief and thus plaintiff was not procedurally prejudiced by granting of motion to dismiss at close of his case in chief in his racial discrimination action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981; Fed.Rules Civ. Proc. rule 41(b), 28 U.S.C.A.

4. **Civil Rights** ⇐45

Findings that plaintiff was member of racial minority, that he was qualified for job he was performing, that he was satisfying normal requirements in his work, that he was discharged and that after his discharge employer assigned white employees to perform the same work created inference of racial discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

5. **Civil Rights** ⇐9.10

Reducing number of black employees in favor of white employees is no less unlawful than eliminating all black employees from a work force.

6. **Civil Rights** ⇐41

Defendant employer was liable as principal for any civil rights violation by new supervisor, to whom defendant employee had been assigned, in his authorized capacity as supervisor. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

7. **Civil Rights** ⇐43

Some showing of satisfactory performance is necessary to raise inference of discrimination in discharge of a racial minority member but plaintiff need not and indeed cannot disprove as cause of his discharge a source of dissatisfaction of which he is unaware and, accordingly, employer's acceptance of work without express reservation is sufficient to show that plaintiff was performing satisfactorily for purpose of shifting burden of proof. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

8. Civil Rights ⇐43

Plaintiff in his action for alleged racial discrimination in his discharge did not have to show perfect performance or even average performance to show that he was satisfying normal requirements in his work but only had to show that his performance was of sufficient quality to merit continued employment, thereby raising inference that some other factor was involved in decision to discharge him. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

9. Civil Rights ⇐43, 44(1)

Where plaintiff's alleged errors were quickly corrected, plaintiff continued to work for defendant for three more days without criticism, and apprentice was assigned to plaintiff for that period, inference arose that some factor other than performance was involved in decision to discharge him and, because of his testimony that white bricklayers were assigned to replace him, inference arose that racial discrimination was a factor, and thus plaintiff, whose credibility was not challenged at trial, met his initial burden of establishing prima facie case of racial discrimination and burden shifted to defendant employer to establish nondiscriminatory reason for discharge. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

10. Civil Rights ⇐44(1)

In racial discrimination context, a "prima facie case" does not signify that plaintiff has merely fulfilled his duty of producing some evidence in order to be allowed to have jury consider case but instead it signifies that plaintiff has produced sufficient evidence to be entitled to judgment if defendant fails to meet his burden in response. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981.

11. Federal Courts ⇐850

Where evidence at trial in racial discrimination action consisted almost entirely of testimony of single witness, whose credibility was not challenged, basic facts of case were not in dispute, and the district court adopted without change findings of fact and conclusions of law prepared by defendant after action was dismissed, broad scope of review was justified within limits of "clearly erroneous" standard. Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

12. Federal Courts ⇐848

Critical view of challenged finding of district court is appropriate where findings of fact and conclusions of law of which it is a part were not original product of a disinterested mind. Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

13. Civil Rights ⇐43

Rebuttal of prima facie case of racial discrimination must rest on more solid footing than a presumption that favored employees were free of fault.

14. Civil Rights ⇐44(1)

Evidence in action alleging that plaintiff was discharged from bricklaying job on account of his race did not establish that plaintiff was laid off in face of work slowdown because his work was inferior as alleged by employer in support of its motion for involuntary dismissal at close of plaintiff's case in chief, and thus plaintiff's prima facie case of racial discrimination remained unrebutted. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981; Fed.Rules Civ. Proc. rule 41(b), 28 U.S.C.A.

15. Federal Courts ⇐955

Ordinarily, on remand after reversal of involuntary dismissal at close of plaintiff's case, it is unnecessary for plaintiff to offer his evidence a second time and case may proceed with defendant's presentation of evidence, but where judge had died since trial and because of possibility that plaintiff's credibility as witness might be challenged by defendant on remand, full retrial was appropriate to afford new trial judge opportunity to hear plaintiff testify. Fed. Rules Civ.Proc. rule 41(b), 28 U.S.C.A.

Harold M. Brody, Chicago, Ill., for plaintiff-appellant.

John J. Henely, Chicago, Ill., for defendant-appellee.

Before CASTLE, Senior Circuit Judge, and TONE and WOOD, Circuit Judges.

CASTLE, Senior Circuit Judge.

Plaintiff brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1870, 42 U.S.C. § 1981, alleging that the defendant Crouch-Walker Corporation ("Crouch-Walker") discharged him from a bricklaying job in February, 1972, on account of his race. The district court granted the defendant's motion to dismiss the action at the close of the plaintiff's presentation of evidence. Plaintiff appeals,[1] asserting *inter alia* that the court's holding that he was discharged solely for a nondiscriminatory reason was unsupported by the evidence. We reverse.

I.

The evidence introduced at trial, apart from a joint exhibit, consisted entirely of the plaintiff's testimony. The evidence may be summarized briefly. Plaintiff, a black bricklayer, was first employed by Crouch-Walker as an apprentice bricklayer in 1968 while attending trade school. He worked steadily for the defendant from that time until his discharge on February 24, 1972. In that period, he worked on five construction projects for Crouch-Walker and received compliments on the quality of his work by the defendant's supervisory personnel. He became a journeyman bricklayer in May, 1971.

Plaintiff was transferred by Crouch-Walker to the construction site of the Standard Oil Building in Chicago on Monday, February 21, 1972, where he was assigned work by Paul Kolkau, a foreman for whom the plaintiff had never worked previously. About 20 minutes after plaintiff had begun work, Kolkau told plaintiff that two rows of blocks he had laid were high in relation to previous work and ordered him to take them down. Plaintiff redid the work. Later that morning, Kolkau examined plaintiff's tools and told plaintiff that one of them, a sledge jointer,[2] was slightly worn. Plaintiff borrowed a jointer from a friend to use for the rest of the day and purchased a new one that evening. Plaintiff was assigned an apprentice on his first day at the Standard Oil Building site, the only apprentice at the site. Plaintiff was responsible for supervising the apprentice's work, and the apprentice remained with him until his discharge.

Plaintiff continued working at the project without notable incident for three more days and was discharged at the end of the day Thursday. Kolkau told plaintiff there was a shortage of brick work on the job. Plaintiff later called John Crouch, whom he identified as president of Crouch-Walker, to ask why he had been laid off. After asking for and receiving some time to look into the matter, Crouch told plaintiff that the owners of the Standard Oil Building had not been satisfied with his work. Plaintiff was called back to work by Crouch-Walker in June, 1972, and worked for the defendant for another year and a half.

On cross-examination, plaintiff admitted that layoffs are normal and customary in the bricklaying trade, because the amount of work sometimes fluctuates over the period of a construction project. Plaintiff also admitted that at least three other bricklayers who worked at the Standard Oil Building site were black. However, plaintiff testified on redirect examination that he saw two new white bricklayers at the site on Friday, the day after he was discharged.

The trial record also included a joint exhibit which was identified as a record of the persons who worked at the Standard Oil Building site. The exhibit indicates that

1. This case was before us previously on appeal from a judgment in favor of the defendant. *Flowers v. Crouch-Walker Corp.*, 507 F.2d 1378 (7th Cir. 1974). In that decision, we reversed the judgment of the district court because the case had been assigned for trial before a magistrate in violation of sections 706(f)(4) and (5) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–5(f)(4), (5).

2. According to plaintiff's testimony, a sledge jointer is a device for giving the mortar between blocks or bricks a smooth finish.

the two men whom plaintiff identified as having been transferred to the site the day after his discharge did work at the site sometime during the week when plaintiff was there. The exhibit also indicates that 12 persons worked at the site during that week, 13 persons worked there the following week, and 14 persons worked at the site the next week.

Crouch-Walker moved to dismiss the action at the close of plaintiff's presentation of evidence on the ground that the plaintiff had failed to establish a case of discrimination. The court granted the motion and asked the defendant to submit proposed findings of fact and conclusions of law. Defendant's proposed findings and conclusions stated that the available brick work at the Standard Oil Building site was reduced at the time plaintiff was discharged, that the plaintiff's work at the site was unsatisfactory and not of the quality of the work of the other bricklayers there, and that he was laid off in the face of the work slowdown solely because his performance had been unworkmanlike. The district court adopted the proposed findings and conclusions without change.

II.

[1] Plaintiff asserts on appeal that the evidence introduced below established a prima facie case of racial discrimination and that he has been denied a fair hearing on his claim under the standards set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In *McDonnell Douglas*, the Supreme Court established a specific order and allocation of proof in private non-class actions challenging employment discrimination.[3] If the plaintiff establishes a prima facie case of racial discrimination, the burden must shift to the employer "to articulate some legitimate, nondiscriminatory reason" for his action. *Id.* at 802, 93 S.Ct. at 1824. If the employer meets its burden of proof in response to the prima facie case, the plaintiff must be afforded a fair opportunity to show that the employer's stated reason for his action was in fact pretext. Plaintiff submits that the defendant has not articulated a nondiscriminatory reason for his discharge and that, even if the defendant has done so, plaintiff has not been afforded a fair opportunity to show that the reason was pretext.

[2] Putting aside for the moment the question of adequacy of proof, we cannot agree that the defendant has failed to articulate a nondiscriminatory reason for plaintiff's discharge. As discussed more fully hereinafter, plaintiff rests his charge of discrimination on the theory that he was discharged as a black to permit one or more white bricklayers to perform the same job. In his opening statement, defendant's counsel stated that plaintiff's own testimony would show that he was discharged in the course of a work slowdown because his work had been unsatisfactory at the Standard Oil Building site. The same reason for the discharge was set forth in the findings of fact and conclusions of law proposed by the defendant and adopted by the court. We hold that a relative inferiority of plaintiff's work at the Standard Oil Building site in the course of a work slowdown would constitute a nondiscriminatory reason for discharge sufficient to rebut the plaintiff's charge of discrimination. Moreover, there is nothing to preclude the defendant's reliance on evidence appearing in the plaintiff's case to establish a nondiscriminatory reason for his action. As the Ninth Circuit recognized in *Sime v. Trustees of California State University and Colleges*, 526 F.2d 1112 (9th Cir. 1975), *McDonnell Douglas* does not require a three-step "judicial minuet" of procedure under which the defendant must come forward with evidence if certain facts in plaintiff's case establish a

3. Although *McDonnell Douglas* specifically involved a Title VII action challenging an employer's refusal to hire, its principles have been applied to discharge cases, *Garrett v. Mobil Oil Corp.*, 531 F.2d 892 (8th Cir. 1976); *Potter v. Goodwill Industries*, 518 F.2d 864 (6th Cir. 1975), and to actions arising under section 1981, *Sabol v. Snyder*, 524 F.2d 1009 (10th Cir. 1975); *Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974). *But see Stevens v. Junior College District*, 548 F.2d 779 (8th Cir. 1977).

prima facie case of discrimination. *Id.* at 1114. The court held that, even if the plaintiff has met his initial burden, a motion for dismissal may be granted at the close of plaintiff's case under Fed.R.Civ.P. 41(b) if the defendant in turn has met its burden out of the mouths of the plaintiff's witnesses.

[3] Plaintiff argues that the granting of a Rule 41(b) motion under such circumstances deprives the plaintiff of his opportunity to show that the reason assigned for the action taken was pretextual. In some cases, that may be so. However, in *Sime*, the defendants articulated nondiscriminatory reasons for their action in argument on the Rule 41(b) motion, and the plaintiff did not then or at any other time assert to the trial court that she was entitled to show that those reasons were pretextual. The Ninth Circuit held that plaintiff was not entitled to reversal because she had not presented the procedural claim to the trial court in the first instance. In the instant case, plaintiff was informed of defendant's asserted justification for discharging him by the opening statement of defendant's counsel, and he was alerted then to the fact that defendant hoped to establish this justification by plaintiff's own testimony. The opportunity to show that defendant's asserted reason for discharging him was pretext therefore was available to the plaintiff in his case in chief. By failing to offer any proof on this point, he created a risk that his own evidence would establish the defendant's justification and would leave the burden of proof on himself at the close of his presentation of evidence. We therefore hold that plaintiff was not procedurally prejudiced by the granting of the Rule 41(b) motion.

In disposing of plaintiff's procedural claim, we have assumed that the evidence presented established a prima facie case of discrimination. We have thus anticipated the procedural question to permit an uninterrupted analysis of the evidence and to establish a framework for that analysis. Under our procedural holding, we are not limited in this appeal to the question of whether plaintiff's evidence created a prima facie case but must determine whether that evidence supported the defendant's justification.

III.

[4–6] Plaintiff asserts that a prima facie case of racial discrimination was established by the following facts appearing in the record: (1) that the plaintiff was a member of a racial minority; (2) that he was qualified for the job he was performing; (3) that he was satisfying the normal requirements in his work; (4) that he was discharged; and (5) that after his discharge the employer assigned white employees to perform the same work. There is sufficient evidence in the record to support a finding with respect to each of these facts, and we agree that they create an inference of racial discrimination. The inference is not vitiated by evidence that certain other bricklayers at the site were black. Reducing the number of black employees in favor of white employees is no less unlawful than eliminating all black employees from a work force. *See Wallace v. Debron Corp.*, 494 F.2d 674 (8th Cir. 1974). Nor is the inference precluded by plaintiff's longterm work history with the corporate defendant. Plaintiff was discharged shortly after having been assigned to a new supervisor, Paul Kolkau, on whom the primary weight of suspicion falls in plaintiff's case. The defendant is liable as principal for any violation of Title VII or section 1981 by Kolkau in his authorized capacity as supervisor. *Ostapowicz v. Johnson Bronze Co.*, 369 F.Supp. 522 (W.D.Pa. 1973), *modified*, 541 F.2d 394 (3d Cir. 1976); *Tidwell v. American Oil Co.*, 332 F.Supp. 424 (D.Utah 1971).

[7] Crouch-Walker challenges the existence of the third fact on which the plaintiff bases his prima facie case, namely, that plaintiff was satisfying the normal requirements of his job. Some showing of satisfactory performance is necessary to raise an inference of discrimination in discharge of a racial minority member. *See Franklin v. Crosby Typesetting Co.*, 411 F.Supp. 1167, 1171 (N.D.Tex.1976). Attributing a dis-

charge to racial discrimination without any evidence that plaintiff was meeting normal job requirements would be unwarranted and unfair. Satisfactory performance is an ordinary prerequisite of continued employment, just as job qualification is an ordinary prerequisite to hiring. *Cf. McDonnell Douglas Corp. v. Green, supra.* However, the plaintiff need not, and indeed cannot, disprove as a cause of his discharge a source of dissatisfaction of which he is unaware. Accordingly, the employer's acceptance of his work without express reservation is sufficient to show that the plaintiff was performing satisfactorily for the purpose of shifting the burden of proof. Evidence as to the actual quality of his work would be necessary only if the employer rejected his work or accepted it, for example, under express condition that the quality be improved. In the instant case, although plaintiff's supervisor did criticize plaintiff's work on the morning of his first day at the site, his work as corrected and his work thereafter for three more days were accepted without express reservation. Until it is rebutted, this evidence supports a finding that plaintiff was meeting normal job requirements.

The defendant relies on the finding of the district court that plaintiff's performance was "unsatisfactory" and "unworkmanlike." First, we do not believe the court's finding actually reaches the question of whether the plaintiff established the third element of his prima facie case. The plaintiff need not show perfect performance or even average performance to satisfy this element. He need only show that his performance was of sufficient quality to merit continued employment, thereby raising an inference that some other factor was involved in the decision to discharge him. The district court did not find that plaintiff's performance was so poor as to warrant his discharge in the absence of other factors. Instead, the court found that plaintiff's performance was inferior to the work of the other bricklayers at the site and that it consequently made him the prime candidate for discharge on the occasion of a work slowdown. This finding is not inconsistent with a determination that plaintiff's performance, taken by itself, was sufficient for the job. Second, even if we were to construe the court's finding as a determination that plaintiff was not meeting normal job requirements, we would be constrained to hold it clearly erroneous. The only competent evidence to support the finding is the fact that plaintiff had laid two rows of blocks improperly in his first 20 minutes at the site and the fact that he had carried a slightly worn sledge jointer on the first day. These errors were quickly corrected. A holding that, because of them, plaintiff's work was of insufficient quality to merit continued employment is inconsistent with the fact that the plaintiff continued to work for the defendant for three more days without criticism. It is also inconsistent with the fact that the defendant assigned an apprentice to the plaintiff for that period.

[8–10] We therefore find in plaintiff's case an inference that some factor other than poor performance was involved in the decision to discharge him and, because of his testimony that white bricklayers were assigned to replace him, an inference that racial discrimination was a factor. Plaintiff's credibility was not challenged at trial. Accordingly, we hold that plaintiff met his initial burden of establishing a prima facie case of racial discrimination and that the burden was shifted to the defendant to establish a nondiscriminatory reason for the discharge.[4]

4. In the *McDonnell Douglas* setting, a "prima facie case" does not signify—as it does in some settings—that the plaintiff has merely fulfilled his duty of producing some evidence in order to be allowed by the judge to have a jury consider his case. *See Rehm v. United States,* 183 F.Supp. 157, 159 (E.D.N.Y.1960); *Jefferson Standard Life Ins. Co. v. Boogher,* 224 N.C. 563, 31 S.E.2d 771, 773 (1944); 9 J. Wigmore, Evidence § 2494(2), at 293–94 (3d ed. 1940). Instead, it signifies that the plaintiff has produced sufficient evidence to be entitled to judgment if the defendant fails to meet his burden in response. *See Stewart v. General Motors Corp.,* 542 F.2d 445, 450 (7th Cir. 1976); *East v. Romine, Inc.,* 518 F.2d 332, 342 (5th Cir. 1975); Wigmore, *supra,* § 2494(1), at 293. In this sense, the prima facie case is "equivalent to the notion of a presumption." *Id.*

[11, 12] Crouch-Walker contends that plaintiff's evidence disclosed such a reason. It relies on the district court's finding that plaintiff was laid off in the face of a work slowdown because his performance had been unworkmanlike and not of the quality of the work of the other bricklayers at the site. In reviewing this finding we are bound by the "clearly erroneous" standard of Fed.R.Civ.P. 52(a). However, two factors in the case justify a broad scope of review within the limits of that standard. First, the evidence at trial consisted almost entirely of the testimony of a single witness, whose credibility was not challenged. The basic facts of the case were not in dispute.

> [W]hen the factual determination is primarily a matter of drawing inferences from undisputed facts or determining their legal implications, appellate review is much broader than where disputed evidence and questions of credibility are involved.

Yorke v. Thomas Iseri Produce Co., 418 F.2d 811, 814 (7th Cir. 1969), quoting *Mayo v. Pioneer Bank & Trust Co.*, 297 F.2d 392, 395 (5th Cir. 1961). *Accord, Apolskis v. Concord Life Insurance Co.*, 445 F.2d 31 (7th Cir. 1971). Second, the district court adopted without change findings of fact and conclusions of law prepared by the defendant after the action was dismissed. A critical view of a challenged finding is appropriate where, as here, the findings of fact and conclusions of law of which it is a part were not the original product of a disinterested mind. *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, 497 F.2d 285 (10th Cir. 1974), *cert. denied*, 419 U.S. 1120, 95 S.Ct. 801, 42 L.Ed.2d 819 (1975); *In re Las Colinas, Inc.*, 426 F.2d 1005 (1st Cir. 1970); *Roberts v. Ross*, 344 F.2d 747 (3d Cir. 1965); *Louis Dreyfus et Cie. v. Panama Canal Co.*, 298 F.2d 733 (5th Cir. 1962). *See United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964).

[13] On the basis of the evidence introduced by the plaintiff, the court's finding that plaintiff's work was not of the quality of the work of other bricklayers at the site cannot be sustained. The record is barren of any evidence indicating how plaintiff's work compared to the work of the others. "[C]omparative evidence lies at the heart of a rebuttal of a prima facie case of employment discrimination." *East v. Romine, Inc.*, 518 F.2d 332, 339 (5th Cir. 1975). The court's finding presumes that the other bricklayers did not commit errors of the same degree of seriousness as those admitted by the plaintiff. Rebuttal of a prima facie case of racial discrimination must rest on a more solid footing than a presumption that the favored employees were free of fault. *Id.*

The record also does not support the court's finding that a work slowdown occurred at the time of plaintiff's discharge. Plaintiff did admit that fluctuations in available work sometimes occurred over the course of a construction project. Plaintiff also testified that Kolkau cited a work slowdown as the reason for his discharging plaintiff. However, the finding of a work slowdown is inconsistent with plaintiff's testimony that he saw two new white bricklayers at the site the next day, and that testimony remains unrebutted. The joint exhibit appears to corroborate plaintiff's testimony, and it suggests that the workload if anything was increasing at the time of his discharge. We are therefore left with a "definite and firm conviction" that a mistake was committed in this finding. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

[14, 15] Because the evidence does not establish that plaintiff was laid off in the face of a work slowdown because his work was inferior, Crouch-Walker's articulated reason for discharging the plaintiff has not been proved. Plaintiff's prima facie case of racial discrimination therefore remains unrebutted. The district court found as an ultimate fact[5] that plaintiff was not dis-

5. Our review of this finding is not bound by the "clearly erroneous" standard of Rule 52(a), because it is "as much a conclusion of law as a finding of fact." *Stewart v. General Motors Corp.*, 542 F.2d 445, 449 (7th Cir. 1976).

charged because of his race. In light of our analysis, this finding clearly cannot be sustained. We therefore reverse the judgment of the district court and remand for further proceedings. Ordinarily, on remand after reversal of an involuntary dismissal under Rule 41(b), it is unnecessary for the plaintiff to offer his evidence a second time, and the case may proceed with the defendant's presentation of evidence. *See United States v. Gypsum Co.*, 333 U.S. 364, 402 n.20, 68 S.Ct. 525, 92 L.Ed. 746 (1948); *White v. Rimrock Tidelands, Inc.*, 414 F.2d 1336 (5th Cir. 1969); 5 J. Moore, Federal Practice ¶ 41.13[2], at 1152 (1976). However, because of the death of Judge Lynch since trial and because of the possibility that the plaintiff's credibility as a witness may be challenged by the defendant on remand, we believe a full retrial is appropriate here to afford the new trial judge an opportunity to hear the plaintiff testify. Accordingly, the case is remanded for a new trial.

REVERSED and REMANDED.



JAMESTOWN FARMERS ELEVATOR, INC., formerly Mutschler Grain Company, Appellant,

v.

GENERAL MILLS, INC., Appellee.

No. 76-1434.

United States Court of Appeals, Eighth Circuit.

Submitted Jan. 12, 1977.

Decided April 4, 1977.

Rehearing Denied April 29, 1977.

Seller of grain brought action to recover difference between the market price at time of delivery and the contract price claiming it was compelled to deliver under contract because of economic duress. The United States District Court for the District of North Dakota, Paul Benson, Chief Judge, entered judgment, in accordance with jury verdict, dismissing complaint and in 413 F.Supp. 764, denied motions for new trial and appeal was taken. The Court of Appeals, Bright, Circuit Judge, held that testimony of negotiations for delivery of balance due under old contract after both parties had repudiated obligations thereunder presented jury issue as to whether seller delivered grain under duress which would entitle seller to difference between old contract price and market price at time of deliveries.

Affirmed in part, reversed in part and remanded for new trial.

1. Contracts ⇐100

Whether particular facts are sufficient to constitute defense of economic duress or business compulsion is a matter of law for court, while question of whether facts alleged actually exist is a matter for jury.

2. Contracts ⇐95(1)

Party claiming duress must show that it involuntarily accepted terms of another, that circumstances permitted no other alternative and that the circumstances were the result of wrongful coercive acts of other party.

3. Sales ⇐84

Where after expiration of deadline for delivery of barley under contract without delivery of all the grain called for buyer gave a "buy-in" notice and the contract was repudiated by the seller, both parties had acted to terminate any obligations to deliver or accept grain, and thereafter buyer could not validly claim right to receive additional barley shipments under contract although it did possess right to claim damages for breach of contract.

4. Contracts ⇐95(1)

Good-faith insistence upon legal right which one believes he has usually is not duress even if it turns out that party is mistaken and has no such right.

5. Contracts ⇐95(3, 5)

Threats to put another out of business or to deprive another of his livelihood or