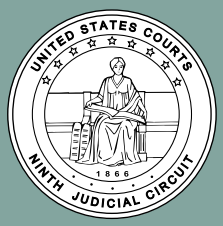
2006 CAPITAL PUNISHMENT HANDBOOK



Judicial Council
of the Ninth Circuit

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In re Reed, 33 Cal. 3d, 914, 663 P.2d 216, 191 Cal. Rptr. 658 (1983) . . . . . CA

In re Reismiller, 101 Wash. 2d 291, 678 P.2d 323 (1984) . . . . . WA

In re Robbins, 18 Cal. 4th 770, 959 P.2d 311, 77 Cal. Rptr. 2d 153 (1998) . . . . . CA

In re Ross, 10 Cal. 4th 184, 892 P.2d 1287, 40 Cal. Rptr. 2d 544 (1995),
cert. denied, 516 U.S. 1051 (1996) . . . . . CA

In re Sakarias, 35 Cal. 4th 140, 106 P.3d 931, 25 Cal. Rptr. 3d 265 (2005) . . . . . CA

In re Sanders, 21 Cal. 4th 697, 981 P.2d 1038, 87 Cal. Rptr. 2d 899 (1999) . . . . . CA

In re Sassounian, 9 Cal. 4th 535, 887 P.2d 527, 38 Cal. Rptr. 2d 665 (1995) . . . . . CA

In re Stankewitz, 40 Cal. 3d 391, 708 P.2d 1260, 220 Cal. Rptr. 382 (1985) . . . . . CA

In re Sterling, 63 Cal. 2d 486, 407 P.2d 5, 47 Cal. Rptr. 205 (1965) . . . . . CA

In re the Personal Restraint Petition of Lord, 123 Wash. 2d 737, 870 P.2d 964 (1994) . . . . . WA

In re Waltreus, 62 Cal. 2d 218, 397 P.2d 1001, 42 Cal. Rptr. 9,
cert. denied, 382 U.S. 853 (1965) . . . . . CA

In re Woods, 154 Wash. 2d 400, 114 P.3d 607 (2005) . . . . . WA

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Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002) (en banc) . . . . . NV

Johnson v. State, 904 So.2d 400 (Fla. 2005) 4.6.1.2

Kills on Top v. State, 273 Mont. 32, 901 P.2d 1368 (1995),
cert. denied, 516 U.S. 1177 (1996) . . . . . MT

King v. Moore, 831 So.2d 143 (Fla) (per curiam),
cert. denied, 537 U.S. 1067 (2002) 4.6.1.2

Kirksey v. State, 107 Nev. 499, 814 P.2d 1008,
cert. denied, 502 U.S. 989 (1991) . . . . . NV

Lane v. State, 114 Nev. 299, 956 P.2d 88 (1998) . . . . . NV

Langford v. State, 287 Mont. 107, 951 P.2d 1357 (1997) . . . . . MT

Leonard v. State, 117 Nev. 53, 17 P.3d 397 (2001) (en banc) . . . . . NV

Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002) (en banc) . . . . . NV

Libby v. State, 113 Nev. 251, 934 P.2d 220 (1997) . . . . . NV

Lisle v. State, 113 Nev. 679, 941 P.2d 459,
cert. denied, 525 U.S. 830 (1998) . . . . . NV

Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991) . . . . . NV

Lynn v. Reinstein, 205 Ariz. 186, 68 P.3d 412 (2003) . . . . . AZ

Mack v. State, 119 Nev. 421, 75 P.3d 803 (2003) . . . . . NV

Manley v. State, 115 Nev. 114, 979 P.2d 703 (1999) . . . . . NV

Marks v. Superior Court, 27 Cal. 4th 176, 38 P.3d 512, 115 Cal. Rptr. 2d 674 (2002) . . . . . CA

Mason v. State, 118 Nev. 554, 51 P.3d 521 (2002) . . . . . NV

Mazzan v. Warden, Ely State Prison, 116 Nev. 48, 993 P.2d 25 (2000) (en banc) . . . . . NV

McConnell v. State, 102 P.3d 606 (Nev. 2004) (en banc) (per curiam) . . . . . NV

McCracken v. Teets, 41 Cal. 2d 648, 262 P.2d 561 (1953) . . . . . CA

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cert. denied, 474 U.S. 1093 (1986) . . . . . NV

McKinney v. State, 133 Idaho 695, 992 P.2d 144 (1999) . . . . . ID

McNelton v. State, 111 Nev. 900, 900 P.2d 934 (1995),
cert. denied, 517 U.S. 1212 (1996) . . . . . NV

McNelton v. State, 115 Nev. 396, 990 P.2d 1263 (2000) (en banc) . . . . . NV

Meller v. State, 94 Nev. 408, 581 P.2d 3 (1978) . . . . . NV

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329 Or. 115, 988 P.2d 359 (1999) . . . . . OR, 1.15

Ortiz v. State, 869 A.2d 285 (Del. 2005) 4.6.1.2

Page v. Cupp, 78 Or. App. 520, 717 P.2d 1183,
review denied, 301 Or. 338, 722 P.2d 737 (1986) . . . . . OR

Paine v. State, 107 Nev. 998, 823 P.2d 281 (1991),
cert. denied, 514 U.S. 1038 (1995) . . . . . NV

Paradis v. State, 128 Idaho 223, 912 P.2d 110 (1996) . . . . . ID

Paz v. State, 123 Idaho 758, 852 P.2d 1355 (1993) . . . . . ID

Pellegrini v. State, 104 Nev. 625, 764 P.2d 484 (1988) . . . . . NV

Pelligrini v. State, 107 Nev. 860, 34 P.3d 519 (2001) (en banc) . . . . . NV

People v. Adcox, 47 Cal. 3d 207, 763 P.2d 906, 253 Cal. Rptr. 55 (1988), *cert. denied*, 494 U.S. 1038 (1990) . . . . . CA

People v. Alvarez, 14 Cal. 4th 155, 926 P.2d 365, 58 Cal. Rptr. 2d 385 (1996), *cert. denied*, 522 U.S. 829 (1997) . . . . . CA

People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972) . . . . . CA

People v. Anderson, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987) . . . . . CA

People v. Anderson, 25 Cal. 4th 543, 22 P.3d 347, 106 Cal. Rptr. 2d 575 (2001) *cert. denied*, 534 U.S. 1136 (2002) . . . . . CA

People v. Andrews, 49 Cal. 3d 200, 776 P.2d 285, 260 Cal. Rptr. 583 (1988), *cert. denied*, 494 U.S. 1060 (1990) . . . . . CA

People v. Ashmus, 54 Cal. 3d 932, 820 P.2d 214, 2 Cal. Rptr. 112 (1991), *cert. denied*, 506 U.S. 841 (1992) . . . . . CA

People v. Avena, 13 Cal. 4th 394, 916 P.2d 1000, 53 Cal. Rptr. 2d 301 (1996) . . . . . CA

People v. Bacigalupo, 6 Cal. 4th 457, 862 P.2d 808, 24 Cal. Rptr. 2d 808 (1993), *cert. denied*, 512 U.S. 1253 (1994) . . . . . CA

People v. Balderas, 41 Cal. 3d 144, 711 P.2d 480, 222 Cal. Rptr. 184 (1985) . . . . . CA

People v. Bell, 49 Cal. 3d 502, 778 P.2d 129, 262 Cal. Rptr. 1, *cert. denied*, 495 U.S. 963 (1990) . . . . . CA

People v. Benson, 52 Cal. 3d 754, 802 P.2d 330, 276 Cal. Rptr. 827 (1990), *cert. denied*, 502 U.S. 924 (1991) . . . . . CA

People v. Bittaker, 48 Cal. 3d 1046, 774 P.2d 659, 259 Cal. Rptr. 630 (1989), *cert. denied*, 496 U.S. 931 (1990) . . . . . CA

People v. Boyd, 38 Cal. 3d 762, 700 P.2d 782, 215 Cal. Rptr. 1 (1985) . . . . . CA

People v. Bradford, 14 Cal. 4th 1005, 929 P.2d 544, 60 Cal. Rptr. 2d 225 (1997) . . . . . CA

People v. Brown, 40 Cal. 3d 512, 709 P.2d 440, 220 Cal. Rptr. 637 (1985), *rev'd on other grounds*, 479 U.S. 538 (1987) . . . . . CA

People v. Brown, 46 Cal. 3d 432, 758 P.2d 1135, 250 Cal. Rptr. 604 (1988), *cert. denied*, 489 U.S. 1059 (1989) . . . . . CA

People v. Bunyard, 45 Cal. 3d 1189, 756 P.2d 795, 249 Cal. Rptr. 71 (1988) . . . . . CA

People v. Burgener, 29 Cal. 4th 833, 62 P.3d 1, 129 Cal. Rptr. 2d. 747, *cert. denied*, 540 U.S. 855 (2003) . . . . . CA

People v. Burgener, 223 Cal. App. 3d 427, 272 Cal. Rptr. 830 (1990) . . . . . CA

People v. Burton, 48 Cal. 3d 843, 862, 771 P.2d 1270, 258 Cal. Rptr. 184 (1989) . . . . . CA

People v. Cain, 10 Cal. 4th 1, 892 P.2d 1224, 40 Cal. Rptr. 2d 482 (1995) . . . . . CA

People v. Carpenter, 15 Cal. 4th 312, 935 P.2d 708, 63 Cal. Rptr. 2d 1 (1997), *cert. denied*, 522 U.S. 1078 (1998) . . . . . CA

People v. Cash, 28 Cal.4th 703, 50 P.3d 332, 122 Cal.Rptr.2d 545 (2002) . . . . . CA

People v. Catlin, 26 Cal. 4th 81, 26 P.3d 475, 109 Cal. Rptr. 2d 31 (2001), *cert. denied*, 535 U.S. 976 (2002) . . . . . CA

People v. Champion, 9 Cal. 4th 879, 891 P.2d 93, 39 Cal. Rptr. 2d 547 (1995), *cert. denied*, 516 U.S. 105 (1996) . . . . . CA

People v. Clair, 2 Cal. 4th 629, 828 P.2d 705, 7 Cal. Rptr. 2d (1992), *cert. denied*, 506 U.S. 1063 (1993) . . . . . CA

People v. Coleman, 48 Cal. 3d 112, 148, 768 P.2d 32, 255 Cal. Rptr. 813 (1989) . . . . . CA

People v. Coleman, 71 Cal. 2d 1159, 459 P.2d 248, 80 Cal. Rptr. 920 (1969) . . . . . CA

People v. Crew, 1 Cal. App. 4th 1591, 2 Cal. Rptr. 2d 755 (1991) . . . . . CA

People v. Crittenden, 9 Cal. 4th 83, 885 P.2d 887, 36 Cal. Rptr. 2d 474 (1994) . . . . . CA

People v. Daniels, 52 Cal. 3d 815, 802 P.2d 906, 277 Cal. Rptr. 122 (1991) . . . . . CA

People v. Davenport, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985) . . . . . CA

People v. Dennis, 17 Cal. 4th 468, 950 P.2d 1035, 71 Cal. Rptr. 2d 680, *cert. denied*, 525 U.S. 912 (1998) . . . . . CA

People v. Dent, 30 Cal. 4th 213, 65 P. 3d. 1286, 132 Cal. Rptr. 2d 527 (2003) . . . . . CA

People v. Dillon, 34 Cal. 3d 442, 668 P. 2d. 697, 194 Cal. Rptr. 390 (1983) . . . . . CA

People v. Duncan, 53 Cal. 3d 955, 979, 810 P.2d 131, 281 Cal. Rptr. 273 (1991) . . . . . CA

People v. Earp, 20 Cal. 4th 826, 978 P.2d 15, 85 Cal. Rptr. 2d 857 (1999), *cert. denied*, 529 U.S. 1005 (2000) . . . . . CA

People v. Easley, 34 Cal. 3d 858, 679 P.2d 813, 196 Cal. Rptr. 309 (1983) . . . . . CA

People v. Edelbacher, 47 Cal. 3d 983, 1035, 766 P.2d 1, 254 Cal. Rptr. 586 (1989) . . . . . CA

People v. Estrada, 11 Cal. 4th 568, 904 P.2d 1197, 46 Cal. Rptr. 2d 586 (1995) . . . . . CA

People v. Fitzpatrick, 2 Cal. App. 4th 1285, 3 Cal. Rptr. 2d 808 (1992) . . . . . CA

People v. Frierson, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979) . . . . . CA

People v. Frye, 18 Cal. 4th 894, 959 P.2d 183, 77 Cal. Rptr. 2d 25 (1998), *cert. denied*, 526 U.S. 1023 (1999) . . . . . CA

People v. Ghent, 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987), *cert. denied*, 485 U.S. 929 (1988) . . . . . CA

People v. Gonzalez, 51 Cal. 3d 1179, 1232, 800 P.2d 1159, 275 Cal. Rptr. 729 (1990), *cert. denied*, 502 U.S. 835 (1991) . . . . . CA

People v. Grant, 45 Cal. 3d 829, 755 P.2d 894, 248 Cal. Rptr. 444 (1988), *cert. denied*, 488 U.S. 1050 (1989) . . . . . CA

People v. Griggs, 67 Cal. 2d 314, 431 P.2d 225, 61 Cal. Rptr. 641 (1967) . . . . . CA

People v. Hart, 20 Cal. 4th 546, 976 P.2d 683, 85 Cal. Rptr. 2d 132 (1999), *cert. denied*, 528 U.S. 1085 (2000) . . . . . CA

People v. Hawkins, 10 Cal. 4th 920, 897 P.2d 574, 42 Cal. Rptr. 2d 636 (1995), *cert. denied*, 517 U.S. 1193 (1996) . . . . . CA

People v. Hawthorne, 4 Cal. 4th 43, 841 P.2d 118, 14 Cal. Rptr. 2d 133 (1992), *cert. denied*, 510 U.S. 1013 (1993) . . . . . CA

People v. Heard, 31 Cal. 4th 946, 753 P.2d 629, 246 Cal. Rptr. 673 (2003), *cert. denied,* 541 U.S. 910 (2004) . . . . . CA, 2.6.1

People v. Heishman, 45 Cal. 3d 147, 753 P.2d 629, 246 Cal. Rptr. 673, *cert. denied*, 488 U.S. 948 (1988) . . . . . CA

People v. Hendricks, 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66 (1987) . . . . . CA

People v. Hines, 15 Cal. 4th 997, 938 P.2d 388, 64 Cal. Rptr. 2d 594 (1997) . . . . . CA

People v. Howard, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842, *cert. denied*, 488 U.S. 871 (1988) . . . . . CA

People v. Jackson, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980), *cert. denied*, 450 U.S. 1035 (1981) . . . . . CA

People v. Jackson, 49 Cal. 3d 1170, 783 P.2d 279, 264 Cal. Rptr. 852 (1989), *cert. denied*, 498 U.S. 881 (1990) . . . . . CA

People v. Keenan, 46 Cal. 3d 478, 758 P.2d 1081, 6 Cal. 4th 215 (1988), *cert. denied*, 490 U.S. 1012 (1989) . . . . . CA

People v. Kelly, 1 Cal. 4th 495, 822 P.2d 385, 3 Cal. Rptr. 677, *cert. denied*, 506 U.S. 881 (1992) . . . . . CA

People v. Kirkpatrick, 7 Cal. 4th 988, 874 P.2d 248, 30 Cal. Rptr. 248 (1994), *cert. denied*, 514 U.S. 1015 (1995) . . . . . CA

People v. Lawson, 163 Ill. 2d 187, 644 N.E.2d 1172, 206 Ill. Dec. 119 (1994) 1.13.2.1

People v. Lewis, 50 Cal. 3d 262, 786 P.2d 892, 266 Cal. Rptr. 834 (1990) . . . . . CA

People v. Lewis, 26 Cal. 4th 334, 28 P.3d 34, 110 Cal. Rptr. 2d 272 (2001), *cert. denied*, 535 U.S. 1019 (2002) . . . . . CA

People v. Livatidis, 2 Cal. 4th 759, 831 P.2d 297, 9 Cal. Rptr. 2d 72 (1992), *cert. denied*, 507 U.S. 975 (1993) . . . . . CA

People v. Lucky, 45 Cal. 3d 259, 753 P.2d 1052, 247 Cal. Rptr. 1 (1988) . . . . . CA

People v. Marshall, 15 Cal. 4th 1, 931 P.2d 262, 61 Cal. Rptr. 2d 84 (1997) . . . . . CA, 2.2

People v. McLain, 46 Cal. 3d 97, 115, 757 P.2d 569, 249 Cal. Rptr. 630 (1988) . . . . . CA

People v. Melton, 44 Cal. 3d 713, 750 P.2d 741, 244 Cal. Rptr. 867, *cert. denied*, 488 U.S. 934 (1988) . . . . . CA

People v. Mickey, 54 Cal. 3d 612, 818 P.2d 84, 286 Cal. Rptr. 801, *cert. denied*, 506 U.S. 819 (1992) . . . . . CA

People v. Miranda, 44 Cal. 3d 57, 744 P.2d 1127, 243 Cal. Rptr. 842, *cert. denied*, 486 U.S. 1038 (1988) . . . . . CA

People v. Morales, 48 Cal. 3d 527, 770 P.2d 244, 257 Cal. Rptr. 64, *cert. denied*, 493 U.S. 984 (1989) . . . . . CA

People v. Murtishaw, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981), *cert. denied*, 455 U.S. 922 (1982) . . . . . CA, 4.2

People v. Musselwhite, 17 Cal. 4th 1216, 954 P.2d 475, 74 Cal. Rptr. 2d 212 (1998), *cert. denied*, 525 U.S. 1073 (1999) . . . . . CA

People v. Ochoa, 19 Cal. 4th 353, 966 P.2d 442, 79 Cal. Rptr. 2d 408 (1998), *cert. denied*, 528 U.S. 862 (1999) . . . . . CA, 4.8

People v. Ochoa, 26 Cal. 4th 398, 28 P. 3d 78, 110 Cal. Rptr. 2d 324 (2001), *cert. denied*, 535 U.S. 1040 (2002) . . . . . CA, 1.9

People v. Phillips, 41 Cal. 3d 29, 711 P.2d 423, 222 Cal. Rptr. 127 (1985) . . . . . CA

People v. Prieto, 30 Cal. 4th 226, 66 P.3d 1123, 133 Cal. Rptr. 2d 18, *cert. denied*, 540 U S. 1008 (2003) . . . . . CA

People v. Proby, 60 Cal. App. 4th 922, 70 Cal. Rptr. 2d 706 (1998) . . . . . CA

People v. Ramirez, 50 Cal. 3d 1158, 1193, 791 P.2d 965, 270 Cal. Rptr. 286 (1990) . . . . . CA

People v. Ramos, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984), *cert. denied*, 471 U.S. 1119 (1985) . . . . . CA

People v. Robertson, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982) . . . . . CA

People v. Rodrigues, 8 Cal. 4th 1060, 885 P.2d 1, 36 Cal. Rptr. 2d 235 (1994), *cert. denied*, 516 U.S. 851 (1995) . . . . . CA

People v. Rodriguez, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986) . . . . . CA

People v. Rodriguez, 66 Cal. App. 4th, 77 Cal. Rptr. 2d 676 (1998) . . . . . CA

People v. Samayoa, 15 Cal. 4th 795, 938 P.2d 2, 64 Cal. Rptr. 2d 400 (1997) . . . . . CA

People v. Sanders, 51 Cal. 3d 471, 797 P.2d 561, 273 Cal. Rptr. 537 (1990) . . . . . CA

People v. Sanders, 11 Cal. 4th 475, 905 P. 2d 420, 46 Cal. Rptr. 2d 751 (1995), *cert. denied*, 519 U.S. 838 (1996) . . . . . CA

People v. Sheldon, 48 Cal. 3d 935, 771 P.2d 1330, 258 Cal. Rptr. 242 (1989) . . . . . CA

People v. Sims, 5 Cal. 4th 405, 853 P.2d 992, 20 Cal. Rptr. 537 (1993) . . . . . CA

People v. Smithey, 20 Cal. 4th 936, 978 P.2d 1171, 86 Cal. Rptr. 2d 243 (1999), *cert. denied*, 529 U.S. 1026 (2000) . . . . . CA

People v. Snow, 30 Cal. 4th 43, 65 P.3d 749, 132 Cal. Rptr. 2d 271, *cert. denied*, 540 U.S. 1076 (2003) 1.13.2.3

People v. Stanley, 10 Cal. 4th 764, 897 P.2d 481, 42 Cal. Rptr. 2d 543 (1995) . . . . . CA

People v. Stanworth, 71 Cal. 2d 820, 457 P.2d 889, 80 Cal. Rptr. 49 (1969) . . . . . CA

People v. Superior Court, ex rel. Engert, 31 Cal. 3d 797, 647 P. 2d 76, 183 Cal. Rptr. 800 (1982) . . . . . CA

People v. Terry, 61 Cal. 2d 137, 390 P.2d 381, 37 Cal. Rptr. 605 (1964) . . . . . CA

People v. Thompson, 45 Cal. 3d 86, 753 P.2d 37, 246 Cal. Rptr. 245, *cert. denied*, 488 U.S. 960 (1988) . . . . . CA

People v. Trevino, 26 Cal. 4th 237, 27 P.3d 283, 109 Cal. Rptr. 2d 567 (2001) . . . . . CA

People v. Tuilaepa, 4 Cal. 4th 569, 842 P.2d 1142, 15 Cal. Rptr. 2d 382 (1992), *aff'd*, *Tuilaepa v. California*, 512 U.S. 967 (1994) . . . . . CA

People v. Turner, 37 Cal. 3d 302, 690 P.2d 669, 208 Cal. Rptr. 196 (1984) . . . . . CA

People v. Turner, 8 Cal. 4th 137, 878 P.2d 521, 32 Cal. Rptr. 2d 762, (1994), *cert. denied*, 514 U.S. 1068 (1995) . . . . . CA

People v. Visciotti, 2 Cal. 4th 1, 825 P. 2d 388, 5 Cal. Rptr. 2d 495, *cert. denied*, 506 U.S. 893 (1992) . . . . . CA

People v. Wader, 5 Cal. 4th 610, 854 P.2d 80, 20 Cal. Rptr. 2d 788 (1993), *cert. denied*, 512 U.S. 1253 (1994) . . . . . CA

People v. Weaver, 26 Cal. 4th 876, 29 P.3d 103, 111 Cal. Rptr. 2d 2 (2001), *cert. denied*, 535 U.S. 1058 (2002) . . . . . CA

People v. Welch, 20 Cal. 4th 701, 976 P.2d 754, 85 Cal. Rptr. 2d 203 (1999) . . . . . CA

People v. Williams, 16 Cal. 4th 153, 940 P.2d 710, 66 Cal. Rptr. 2d 123 (1997), *cert. denied*, 522 U.S. 1150 (1998) . . . . . CA

People v. Williams, 16 Cal. 4th 635, 941 P.2d 752, 66 Cal. Rptr. 2d 573 (1997), *cert. denied*, 523 U.S. 1027 (1998) . . . . . CA

People v. Williams, 45 Cal. 3d 1268, 756 P. 2d 221, 248 Cal. Rptr. 834 (1988), *cert. denied*, 488 U.S. 1050 (1989) . . . . . CA

People v. Windham, 19 Cal. 3d 121, 560 P.2d 1187, 137 Cal. Rptr. 8 (1997) . . . . . CA

People v. Wright, 52 Cal. 3d 367, 802 P.2d 221, 276 Cal. Rptr. 731 (1990), *cert. denied*, 502 U.S. 834 (1991) . . . . . CA

Pertgen v. State, 110 Nev. 554, 875 P.2d 361 (1994) . . . . . NV

Petition of Runyan, 121 Wash. 2d 432, 853 P.2d 424 (1993) . . . . . WA

Phelps v. Director, Nevada Dep't of Prisons, 104 Nev. 656, 764 P.2d 1303 (1988) . . . . . NV

Pizzuto v. State, 127 Idaho 469, 903 P.2d 58 (1995) . . . . . ID

Pizzuto v. State, 134 Idaho 793, 10 P.3d 742 (2000) . . . . . ID

Porter v. State, 139 Idaho 420, 80 P.3d 1021 (2003) . . . . . ID

Porter v. State, 140 Idaho 780, 102 P.3d 1099 (2004),
cert. denied, 125 S. Ct. 2967 (2005) . . . . . ID

Porter v. State, 136 Idaho 257, 32 P.3d 151 (2001) . . . . . ID

Randolph v. State, 117 Nev.970, 36 P.3d 424 (2001) (en banc),
cert. denied, 537 U.S. 845 (2002). . . . . NV

Raven v. Deukmejian, 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990) . . . . . CA

Redmen v. State, 108 Nev. 227, 828 P.2d 395 (1992),
cert. denied, 506 U.S. 880 (1992),
overruled on other grounds, Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995) . . . . . NV

Rhoades v. State, 135 Idaho 299, 17 P.3d 243 (2000),
rehearing denied, 135 Idaho 299, 17 P.3d 243 (2001) . . . . . ID

Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991),
cert. denied, 514 U.S. 1052 (1995) . . . . . NV

Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997),
cert. denied, 525 U.S. 841 (1998) . . . . . NV

Rockwell v. Superior Court, 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976) . . . . . CA

Row v. State, 135 Idaho 573, 21 P.3d 895 (2001) . . . . . ID

Servin v. State, 117 Nev. 775, 32 P.3d 1277 (2001) (en banc) . . . . . NV

Shaw v. State, 104 Nev. 100, 753 P.2d 888 (1988) . . . . . NV

Sherman v. State, 114 Nev. 998, 965 P.2d 903 (1998),
cert. denied, 526 U. S. 1122 (1999) . . . . . NV

Sivak v. State, 112 Idaho 197, 731 P.2d 192,
cert. denied, 516 U.S. 1095 (1996) . . . . . ID

Sivak v. State, 134 Idaho 641, 8 P.3d 636 (2000) . . . . . ID

Smith v. State, 303 Mont. 47, 15 P.3d 395 (2000),
cert. denied, 533 U.S. 917 (2001) . . . . . MT

Smith v. State, 93 Nev. 82, 560 P.2d 158 (1977) . . . . . NV

Sonner v. State, 114 Nev. 321, 955 P.2d 673 (1998) . . . . . NV

State ex rel. Carlile v. Frost, 326 Or. 607, 956 P.2d 202,
remand after reversal, 155 Or. App. 260, 958 P.2d 909 (1998) . . . . . OR

State ex rel. Napolitano v. Brown, 194 Ariz. 340, 982 P.2d 815 (1999) . . . . . AZ

State v. Anderson, 197 Ariz. 314, 4 P.3d 369 (2000) (en banc) . . . . . AZ

State v. Arnett, 158 Ariz. 15, 760 P.2d 1064 (1988) (en banc) . . . . . AZ

State v. Baker, 81 Wash. 2d 281, 501 P.2d 284 (1972) . . . . . WA

State v. Barone, 328 Or. 68, 969 P.2d 1013 (1998),
cert. denied, 528 U.S. 1135 (2000). . . . . OR

State v. Barrett, 153 Or. App. 621, 958 P.2d 215,
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ARIZONA

History

In response to the U.S. Supreme Court's decision in *Furman v. Georgia,* 408 U.S. 238 (1972), Arizona's legislature enacted a new death penalty statute (1973 Ariz. Sess. Laws ch. 138, § 5, at 968–70; current version at Arizona Revised Statutes Annotated § 13-703) eliminating the trial court's broad discretion in imposing capital punishment. The statute enumerated aggravating and mitigating factors and permitted imposition of the death penalty only when the court found at least one aggravating factor and no mitigating factors to warrant leniency.

Shortly after the Arizona Supreme Court in *State v. Bishop*, 118 Ariz. 263, 576 P.2d 122 (1978), construed the list of mitigating factors to be exclusive, the U.S. Supreme Court in *Lockett v. Ohio*, 438 U.S. 586 (1978), held unconstitutional any limitation of mitigating circumstances in capital sentencing. Consequently, the Arizona Supreme Court in *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), severed the portion of the statute limiting mitigating circumstances and reinterpreted the statute to allow consideration of any mitigating circumstance. The 1979 legislature amended the applicable statute, and the court resentenced all death row inmates accordingly.

In response to the decision in *Ring v. Arizona*, 536 U.S. 584 (2002), Arizona's legislature amended the death penalty statute, effective August 1, 2002, to provide for jury determination of aggravating and mitigating factors and jury sentencing, except in those cases in which both the state and the defendant waive a jury trial. See "Trial of Capital Offenses" and "Capital Sentencing," below.

United States Supreme Court:

Ring v. Arizona, 536 U.S. 584 (2002) (holding that capital defendants are entitled to jury determination of any fact on which legislature conditions increase in their maximum punishment).

Lockett v. Ohio, 438 U.S. 586 (1978) (holding unconstitutional Ohio death penalty statute limiting mitigating circumstances).

Furman v. Georgia, 408 U.S. 238 (1972) (holding unguided discretionary sentencing unconstitutional).

Arizona Supreme Court*:*

State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978) (en banc) (reinterpreting capital statute to allow consideration of any mitigating circumstance), *cert. denied*, 440 U.S. 924 (1979).

State v. Bishop, 118 Ariz. 263, 576 P.2d 122 (1978) (en banc) (construing list of mitigating factors in first death penalty statute after *Furman* to be exclusive), *vacated and remanded in light of Lockett*, 439 U.S. 810 (1978).

Arizona Statutes:

Ariz. Rev. Stat. Ann. § 13-703(A) (Supp. 2005) (providing sentence for first degree murder).

Ariz. Rev. Stat. Ann. § 13-703(E) (Supp. 2005) (requiring trier of fact to take aggravating and mitigating circumstances into account in determining sentence of death or life imprisonment and authorizing death sentence if trier of fact finds one or more aggravating circumstances enumerated in subsection (F) and no sufficient mitigating circumstances to call for leniency).

Ariz. Rev. Stat. Ann. § 13-703(F) (Supp. 2005) (codifying *Watson* interpretation of mitigating circumstances: providing that mitigating factors are any factors proffered by defendant or state relevant to determining whether to impose sentence less than death and enumerating non-exclusive list of mitigating factors).

Ariz. Rev. Stat. Ann. § 13-703.02 (Supp. 2005), (providing for I.Q. screening of capital defendants; prohibiting imposition of death penalty on person suffering from mental retardation).

Ariz. Rev. Stat. Ann. § 13-703.03 (Supp. 2005) (providing for prescreening of capital defendant for competency to stand trial and sanity at time of offense).

Capital Offenses

First degree murder, which is a capital offense, is defined as knowingly or intentionally causing the death of another with premeditation or causing the death of another while

in the process of committing a delineated felony. First degree murder is punishable by death, life imprisonment without the possibility of parole, or life imprisonment with the possibility of parole.

In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court held that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on those who were under the age of 18 at the time their crimes were committed. Previously, Arizona law did not prohibit the imposition of the death penalty on those under age 18, although the defendant's age could be considered as a mitigating circumstance.

United States Supreme Court:

Roper v. Simmons, 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed).

Arizona Statutes:

Ariz. Rev. Stat. Ann. § 13-703(A) (Supp. 2005) (providing sentence of death or life with the possibility of parole or life without the possibility of parole for first degree murder).

Ariz. Rev. Stat. Ann. § 13-1105 (Supp. 2005) (defining first degree murder).

Prescreening to Determine Whether Defendant is Mentally Retarded

Under Ariz. Rev. Stat. Ann. § 13-703.02, if the state files a notice of intent to seek the death penalty, the court must appoint a prescreening psychological expert in order to determine the defendant's I.Q. using current community, nationally, and culturally accepted intelligence testing procedures. The prescreening psychological expert must submit a written report of the I.Q. determination to the court within 10 days of the testing. If the prescreening psychological expert determines that the defendant's I.Q. is 75 or less, the trial court will appoint one or more additional psychological experts to independently determine whether the defendant has mental retardation. "Mental retardation" is defined in § 13-703.02(K)(2) as a condition based on a mental deficit

that involves significantly subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of these conditions occurred before the defendant reached the age of 18. Under § 13-703.02(G) a determination by the trial court that the defendant's I.Q. is 65 or less establishes a rebuttable presumption that the defendant has mental retardation, but that does not preclude a defendant with an I.Q. of 70 or below from proving mental retardation by clear and convincing evidence. If the trial court finds that the defendant has mental retardation, the trial court must dismiss the intent to seek the death penalty and not impose a sentence of death on the defendant if the defendant is convicted of first degree murder.

If the prescreening psychological expert determines that the defendant's I.Q. is higher than 75: (1) the notice of intent to seek the death penalty will not be dismissed on the ground that the defendant has mental retardation, and (2) the report will be sealed by the court and be available only to the defendant. A prescreening determination that the defendant's I.Q. is higher than 75 does not prevent the defendant from introducing evidence of the defendant's mental retardation or diminished mental capacity as a mitigating factor at the penalty phase of the sentencing proceeding.

The United States Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the execution of the mentally retarded constitutes cruel and unusual punishment prohibited by the Eighth Amendment. *See* § 1.6.

United States Supreme Court:

Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executing the mentally retarded violates the Eighth Amendment's prohibition against cruel and unusual punishment).

Arizona Statutes:

Ariz. Rev. Stat. Ann. § 13-703.02 (Supp. 2005) (providing for evaluation of capital defendant for mental retardation).

Representation in Capital Cases

In addition to an indigent defendant having a right to counsel during the trial and direct appeal of a capital case, an indigent prisoner under capital sentence has a statutory right to counsel in state postconviction proceedings. The Arizona legislature has adopted representation and compensation standards for counsel who represent capital defendants in state postconviction proceedings. *See* Ariz. Rev. Stat. Ann. § 13-4041. Additionally, the Arizona Supreme Court has adopted representation standards for trial, appellate, and postconviction counsel in death penalty cases and has provided for the appointment of lead and co-counsel throughout all stages of capital litigation. *See* Ariz. R. Crim. P. 6.8.

After appointing qualified counsel, the court may also appoint investigators and experts "reasonably necessary" to adequately present an indigent defendant's defense at trial and any subsequent proceeding. The court orders "reasonable" compensation for appointed investigators and experts.

The Ninth Circuit ruled in *Spears v. Stewart*, 267 F.3d 1026 (9th Cir. 2001), *amended and superseded by* 283 F.3d 992 (9th Cir.), *cert. denied,* 537 U.S. 977 (2002), and *cert. denied* 537 U.S. 995 (2002), that Arizona had in place as of July 17, 1998 (the relevant date as to the petitioner), a mechanism for the appointment and compensation of counsel for indigent capital defendants in state postconviction proceedings that met the requirements of Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and therefore qualified for opt-in status as of that date, but that Arizona was not entitled to enforce the expedited procedures of Chapter 154 because it had not complied with the timeliness requirements of its own system as to the petitioner. Arizona's timeliness requirement codified in Rule of Criminal Procedure 32.4(c) was amended in 2000 and no longer requires that counsel be appointed within 15 days if an indigent capital defendant requests the appointment. Rule 32.4 now provides that counsel must be appointed pursuant to Ariz. Rev. Stat. Ann. § 13-4041 (requiring that counsel must be appointed "[a]fter the supreme court has affirmed a defendant's conviction and sentence in a capital case") and Ariz. R. Crim. P. 6.8 (attorney competency standards). In 2002, Rule 32.4(c) was amended to provide for appointment of postconviction relief counsel after issuance of the decision affirming

the defendant's conviction and sentence but prior to completion of certiorari proceedings or issuance of the mandate.

Ninth Circuit:

Spears v. Stewart, 267 F.3d 1026 (9th Cir. 2001), *amended and superseded by* 283 F.3d 992 (9th Cir.), *cert. denied*, 537 U.S. 977 (2002), and *cert. denied,* 537 U.S. 995 (2002) (holding that Arizona had in place as of July 17, 1998 (the relevant date as to the petitioner), a mechanism for appointment and compensation of counsel for indigent capital defendants in state postconviction proceedings that met requirements of Chapter 154 of AEDPA and therefore qualified for opt-in status as of that date, but that Arizona was not entitled to enforce expedited procedures of Chapter 154 because it had not complied with timeliness requirements of its own system as to the petitioner).

Arizona Statutes:

Ariz. Rev. Stat. Ann. § 13-4013(B) (2001) (providing for appointment of investigators and expert witnesses reasonably necessary to adequately present defense at trial and any subsequent proceeding and providing compensation rate as what court deems appropriate).

Ariz. Rev. Stat. Ann. § 13-4041 (2001) (detailing the appointment of postconviction counsel in a capital case, the required qualifications, and the compensation).

Ariz. Rev. Stat. Ann. § 13-4234(D) (2001) (providing for indigent right to counsel in postconviction proceedings).

Arizona Rules:

Ariz. R. Crim. P. 6.1(b) (providing for indigent right to representation).

Ariz. R. Crim. P. 6.2 (setting procedure for appointment of dual trial counsel).

Ariz. R. Crim. P. 6.4 (providing for determination of indigency).

Ariz. R. Crim. P. 6.5(b) (providing for public defender as counsel).

Ariz. R. Crim. P. 6.8 (requiring standards for appointment of counsel in capital cases).

Ariz. R. Crim. P. 15.9 (governing appointment of investigators, expert witnesses for

indigent defendants).

Ariz. R. Crim. P. 32.4(c) (setting time frame for appointment of counsel in postconviction proceedings).

Trial of Capital Offenses

Arizona's county superior courts are the state trial courts of general jurisdiction. These courts have original jurisdiction over all criminal cases, including petitions for postconviction relief and habeas corpus.

In *Ring v. Arizona*, 536 U.S. 584 (2002), reversing the decision of the Arizona Supreme Court, the U.S. Supreme Court held that *Walton v. Arizona*, 497 U.S. 639 (1990), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), are irreconcilable and overruled *Walton* to the extent that it allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. The Court reasoned that because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense" (*Apprendi*, 530 U.S. at 494 n. 19), the Sixth Amendment requires that they be found by a jury. The Court held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. The Court pointed out that 29 of 38 states in which there is a death penalty generally commit sentencing decisions to juries, and that other than Arizona, only four States commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges: Colorado (Colo. Rev. Stat §16-11-103 (2001) (three-judge panel); Idaho (Idaho Code §19-2515 (Supp. 2001)); Montana (Mont. Code §46-18-301 (1997)); and Nebraska (Neb. Rev. Stat. §29-2520 (1995)). The Court observed that the right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. Subsequently, in *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Supreme Court ruled that *Ring* does not apply retroactively to cases already final on direct review

In response to *Ring v. Arizona*, the 2002 Arizona Legislature enacted new capital jury sentencing procedures. The legislative intent of the statute provides those

persons who were previously sentenced to death in Arizona are not entitled to a new sentencing proceeding if they have already exhausted direct appeals of their sentences. 2002 Ariz. Sess. Laws, ch. 1, § 9 (5th special session). The statute retains the bifurcated adjudication process for capital cases. However, unlike the former procedure in which the judge conducted the penalty phase and determined the sentence, Ariz. Rev. Stat. Ann. § 13-703.01, provides that if a defendant is found guilty of first degree murder at trial, the "trier of fact" then immediately determines whether the aggravating circumstances have been proved (aggravation phase of sentencing proceeding). If the trier of fact determines that at least one of the aggravating circumstances was proved, the trier then proceeds to determine whether a death sentence should be imposed (penalty phase of sentencing proceeding). "Trier of fact" is defined in § 13-703.01(S)(1) as meaning a jury unless the defendant and the state waive a jury, in which case the trier of fact is a judge. The statute applies to all sentencing or resentencing proceedings held after August 1, 2002 (2002 Ariz. Sess. Laws, ch. 1, § 7).

The defendant is entitled to notice of the state's intent to seek the death penalty; however, the basic procedures for the trial of a capital case are the same as those for the trial of other felonies. The prosecution is entitled to "death-qualify" the jury. *See State v. LaGrand*, 153 Ariz. 21, 33, 734 P.2d 563, 575 (1987).

The Arizona Supreme Court has held that "an accused is not entitled to a unanimous jury verdict on the precise manner in which the defendant committed the crime," *State v. Smith*, 136 Ariz. 273, 665 P.2d 995 (1983) (en banc), but is entitled to a unanimous jury verdict on whether the defendant in fact committed first degree murder. *See State v. Arnett*, 158 Ariz. 15, 760 P.2d 1064 (1988) (en banc).

United States Supreme Court:

Schriro v. Summerlin, 542 U.S. 348 (2004) (holding that *Ring v. Arizona* did not apply retroactively to cases already final on direct review).

Ring v. Arizona, 536 U.S. 584 (2002) (holding that capital defendants are entitled to jury determination of any fact on which legislature conditions increase in their maximum punishment; also holding that *Walton* and *Apprendi* are irreconcilable and overruling *Walton* to extent that it allowed sentencing judge, sitting without jury, to find aggravating circumstance necessary for imposition of death penalty).

Arizona Supreme Court:

State v. Anderson, 197 Ariz. 314, 4 P.3d 369 (2000) (en banc) (finding structural error where court removed for cause prospective jurors who indicated a general objection to the death penalty in their questionnaires without allowing voir dire to possibly rehabilitate).

Holmberg v. DeLeon, 189 Ariz. 109, 938 P.2d 1110 (1997) (en banc) (holding death penalty precluded when state filed its notice of intent to seek death penalty one year and three months after defendant's arraignment, notwithstanding lack of prejudice argument).

State v. Arnett, 158 Ariz. 15, 760 P.2d 1064 (1988) (en banc) (holding defendant entitled to unanimous jury verdict on whether defendant committed first degree murder).

State v. LaGrand, 153 Ariz. 21, 33, 734 P.2d 563, 575 (1987) (discussing death-qualifying guilt jury).

State v. Smith, 136 Ariz. 273, 665 P.2d 995 (1983) (en banc) (holding defendant not entitled to unanimous verdict on manner in which defendant committed crime).

Arizona Statutes:

Ariz. Const. art. II, § 23 (requiring twelve jurors and unanimous verdict for capital trial).

Ariz. Rev. Stat. Ann. § 13-703 (Supp. 2005) (detailing capital case sentencing).

Ariz. Rev. Stat. Ann. § 13-703.01 (Supp. 2005) (providing procedures for capital cases including sentencing proceedings composed of aggravation phase and penalty phase).

Ariz. Rev. Stat. Ann. §§ 13-3981–3990 (2001) and (Supp. 2005) (detailing trial procedures).

Ariz. Rev. Stat. Ann. § 13-4031 (2001) (providing supreme court exclusive appellate jurisdiction over capital cases).

Ariz. Rev. Stat. Ann. § 21-102 (2002) (setting capital jury at twelve persons and unanimous verdict).

Arizona Rules:

Ariz. R. Crim. P. 15.1(i) (requiring notice of intent to seek death penalty).

Capital Sentencing

Penalty Hearing

As discussed in "Trial of Capital Offenses," above, the 2002 Arizona Legislature enacted new capital jury sentencing procedures in response to the decision in *Ring v. Arizona*. These procedures apply to all sentencing or resentencing proceedings held after August 1, 2002, pursuant to 2002 Ariz. Sess. Laws, ch. 1, § 7 (5th special session). The amended death penalty statute employs the term "trier of fact," defined as a jury unless the defendant and the state waive a jury, in which case the trier of fact is a judge. In the discussion below, "jury" is also used where it is appropriate in context.

Before trial, the state must provide the defendant with notice of the aggravating factors it intends to prove at the sentencing hearing. Before the defendant is eligible for the death penalty for first degree murder, the state must prove at least one enumerated aggravating circumstance beyond a reasonable doubt. If the defendant is death-eligible pursuant to a felony murder conviction, the state must also show that the defendant killed, attempted to kill or intended to kill, or was a major participant in the underlying felony and acted with reckless disregard for human life. *See Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982). In *State v. Ring*, 204 Ariz. 534, 65 P.3d 915 (2003) (en banc), the Arizona Supreme Court held that the Sixth Amendment principles of *Apprendi/Ring* do not require that *Enmund-Tison* findings be made by a jury.

The defendant must prove the existence of mitigating circumstances by a preponderance of the evidence and must show that the mitigating circumstances are sufficiently substantial to call for leniency. If the trier of fact is a jury, the jurors do not have to agree unanimously that a mitigating circumstance has been found to exist; each juror may consider any mitigating circumstance found by that juror in determining the appropriate penalty. In the sentencing proceeding, the state or defendant may present

any information relevant to mitigating circumstances regardless of its admissibility under the rules of evidence that govern trial proceedings. Information relevant to aggravating circumstances, however, is admissible only in accordance with the rules of evidence. If there is the same trier of fact at any subsequent phase of the trial as there was at a prior phase, any evidence presented at the prior phase is deemed admitted in the subsequent phase, including evidence admitted at the trial as to aggravating or mitigating factors.

After a guilty verdict of first degree murder, the trier of fact immediately determines whether aggravating circumstances have been proved and must make a special finding on whether each aggravator has been proved. If the trier of fact is a jury, the decision on aggravators must be unanimous. Ariz. Rev. Stat. Ann. § 13-703.01(E). The penalty phase is then held if the trier finds at least one aggravator to have been proved. Under § 13-703.01(H), the determination whether death is the appropriate sentence must be unanimous. If the jury determines unanimously that the death penalty is not appropriate, the court will determine whether to impose a sentence of life with or without the possibility of parole.

If the jury is unable to reach a verdict on any of the alleged aggravating circumstances and the jury does not find that at least one of the alleged aggravators has been proved, the court must dismiss the jury and impanel a new one. The new jury does not retry the issue of guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by a unanimous verdict. If the second jury does not reach a unanimous verdict, the court must then impose a sentence of life with or without the possibility of parole. Ariz. Rev. Stat. Ann. § 13-703.01(J). Likewise, under § 13-703.01(K), if the jury at the penalty phase is unable to reach a verdict, the judge must impanel a new jury, which does not retry the issue of guilt or any aggravators found to be proved or not proved unanimously by the first jury. If the second jury is unable to reach a unanimous verdict, the court must impose a life sentence with or without the possibility of parole.

Under § 13-703.01(R), a victim (defined as a person's spouse, parent, child or other lawful representative, unless such person is in custody for an offense or is the accused) has a right to be present at the aggravation phase and to present any information that is relevant. A victim also has the right to be present at the penalty

phase and to be heard. The right to be heard includes presentation of evidence, information, and opinions that concern the criminal offense, the defendant, and the sentence. In 2003 the Arizona legislature conditionally amended § 13-703.01(R) to provide that victims in capital cases have the right to make recommendations regarding the appropriate sentence in the same manner as defendants. The conditional amendment is to become effective if on or before June 30, 2013, the Arizona Supreme Court or United States Supreme Court rules that it is constitutional for a crime victim in a case to make a sentencing recommendation.

In *State v. Ring,* 204 Ariz. 534, 65 P.3d 915 (2003) (en banc), consolidated cases involving all defendants sentenced to death who had matters pending on direct appeal at the time of the U.S. Supreme Court decision in *Ring*, the Arizona Supreme Court held that changes in the state's capital sentencing statutes were procedural in nature and that resentencing these defendants under the new statutes would not violate the ex post facto clauses of the state or federal constitutions, nor did double jeopardy principles preclude resentencing them. The court also held that the failure to submit capital aggravating factors to a jury was not a structural error mandating reversal.

United States Supreme Court:

Schriro v. Summerlin, 542 U.S. 348 (2004) (holding that *Ring v. Arizona* did not apply retroactively to cases already final on direct review; also holding that (1) that the *Ring* decision is properly classified as procedural, rather than substantive; and (2) the *Ring* rule does not fall under the second exception under *Teague* for watershed rules of criminal procedure).

Ring v. Arizona, 536 U.S. 584 (2002) (holding that capital defendants are entitled to jury determination of any fact on which legislature conditions increase in their maximum punishment).

Tison v. Arizona, 481 U.S. 137 (1987) (holding that to qualify for death sentence, felony murder defendant must have been a major participant in the underlying felony and acted with reckless disregard for human life).

Enmund v. Florida, 458 U.S. 782 (1982) (holding that to qualify for death sentence, felony murder defendant must have actually killed, attempted to kill, or intended to kill the victim).

Ninth Circuit:

Ortiz v. Stewart, 149 F.3d 923 (9th Cir. 1998) (finding that amended notice of aggravating factors given to defendant 13 days before sentencing hearing did not violate due process), *cert. denied*, 526 U.S. 1123 (1999).

Arizona Supreme Court:

State v. Carreon, 210 Ariz. 54, 107 P.3d 900 (2005) (en banc) (holding that because *Ring v. Arizona,* 536 U.S.584 (2002) (*Ring II*), announced a new procedural rule, rather than a substantive one, the retroactive application of Arizona's new death penalty statute enacted in response to *Ring II* did not violate the Ex Post Facto Clauses of the state and federal constitutions or the statutory prohibition against retroactive application of statutes).

State v. Davolt, 207 Ariz. 191, 84 P.3d 456 (2004) (en banc) (holding that in a capital murder prosecution of a juvenile defendant, in which the death penalty was imposed but the trial court had failed to make individualized assessment of defendant's maturity before trial, the proper remedy was remand for the trial court to determine, if possible, the extent of defendant's maturity and moral responsibility at the time he committed the murders).

Lynn v. Reinstein, 205 Ariz. 186, 68 P.3d 412 (2003) (en banc) (holding that the Eighth Amendment prohibits a victim from making a sentence recommendation to a jury in a capital case, although a victim's statement as to the harm caused by the defendant's criminal acts are no longer barred).

State v. Ring, 204 Ariz. 534, 65 P.3d 915 (2003) (en banc) (holding in consolidated cases involving all defendants sentenced to death who had matters pending on direct appeal at the time of *Ring*, that changes in state's capital sentencing statutes were procedural in nature and that resentencing these defendants under new statutes would not violate the ex post facto clauses of state or federal constitutions, nor did double jeopardy principles preclude resentencing them; also holding that Sixth Amendment principles of *Apprendi/Ring* do not require that *Enmund-Tison* findings be made by jury; ruling that failure to submit capital aggravating factors to jury was not structural error mandating reversal).

State v. Towery, 204 Ariz. 386, 64 P.3d 828 (en banc) (holding that *Ring v. Arizona* does not apply retroactively to those defendants whose cases have become final; holding that new rule announced in *Ring* did not meet either of two exceptions to *Teague*'s general rule that new rules do not apply to cases that have become final; also

holding under an *Allen v. Hardy* analysis the rule did not apply retroactively where (1) the rule was not designed to improve the accuracy of criminal trials; (2) the Arizona justice system acted in good faith in applying the rule in *Walton*; and (3) applying the rule would greatly disrupt the administration of justice and noting that Arizona has approximately 90 prisoners on death row whose cases are final), *cert. dismissed*, 539 U.S. 986 (2003).

State v. Lacy, 187 Ariz. 340, 929 P.2d 1288 (1996) (en banc) (finding that evidence of reckless indifference to human life in felony-murder death sentence was insufficient when record unclear whether defendant knew codefendant had a gun or whether defendant should have anticipated violence).

State v. Thornton, 187 Ariz. 325, 335, 929 P.2d 676, 686 (1996) (en banc) (rejecting argument that death penalty unconstitutional because sentencer not required to find that aggravators outweigh mitigators beyond a reasonable doubt).

State v. Landrigan, 176 Ariz. 1, 859 P.2d 111 (holding nonjury sentencing does not violate equal protection), *cert. denied,* 510 U.S. 927 (1993).

State v. Bible, 175 Ariz. 549, 858 P.2d 1152 (1993) (en banc) (holding capital sentencing scheme must perform genuine narrowing function, narrowing class of death-eligible defendants), *cert. denied*, 511 U.S. 1046 (1994).

State v. McCall, 160 Ariz. 119, 770 P.2d 1165 (1989) (en banc) (holding detailed findings regarding aggravating and mitigating circumstances not required in state trial record; holding defendant must show mitigating circumstances are sufficiently substantial to call for leniency), *cert. denied*, 497 U.S. 1031 (1990).

State v. Leslie, 147 Ariz. 38, 708 P.2d 719 (1985) (en banc) (finding that trial court must show in record that it considered all relevant mitigating factors in sentencing defendant).

State v. McMurtrey, 143 Ariz. 71, 691 P.2d 1099 (1984) (en banc) (holding defendant must prove mitigating circumstances by preponderance of evidence).

State v. Jordan, 126 Ariz. 283, 614 P.2d 825 (en banc) (holding eligibility for death penalty requires state to prove at least one enumerated aggravating circumstance beyond reasonable doubt), *cert. denied*, 449 U.S. 986 (1980).

Arizona Statutes:

Ariz. Rev. Stat. Ann. § 13-703(B) and (C) (Supp. 2005) (providing for admissibility of evidence of aggravating or mitigating circumstances).

Ariz. Rev. Stat. Ann. § 13-703.01(B) (Supp. 2005) (providing for notice by prosecution of aggravating circumstances).

Ariz. Rev. Stat. Ann. § 13-703.01(C) - (F) (Supp. 2005) (providing for aggravation and penalty phases of sentencing proceeding).

Ariz. Rev. Stat. Ann. § 13-703.01(G) (Supp. 2005) (providing for presentation of mitigating evidence at penalty phase).

Ariz. Rev. Stat. Ann. § 13-703.01(H) (Supp. 2005) (providing that jury determination of whether to impose death sentence must be unanimous).

Ariz. Rev. Stat. Ann. § 13-703.01(I) (Supp. 2005) (providing for admissibility of evidence admitted trial).

Ariz. Rev. Stat. Ann. § 13-703.01(J)-(L) (Supp. 2005) (providing for procedures where jury is unable to reach unanimous verdict at aggravation phase or penalty phase).

Ariz. Rev. Stat. Ann. § 13-703.01(N) and (O) (Supp. 2005) (providing for procedures for sentencing and resentencing where death sentence is overturned).

Ariz. Rev. Stat. Ann. § 13-703.01(R) (Supp. 2005)(providing for victim impact statement and right of victim to be present at sentencing proceeding).

Ariz. Rev. Stat. Ann. § 13-703.01(S) (defining "trier of fact" and "victim").

Arizona Rules:

Ariz. R. Crim. P. 15.1(i)(2), (i)(3) and (i)(5) (requiring state to disclose proof of aggravation).

Ariz. R. Crim. P. 15.2(i)(3)(d) (requiring defendant to disclose proof of mitigation).

Aggravating Circumstances

Under Ariz. Rev. Stat. Ann. § 13-703(E), the trier of fact must impose a death sentence

if the trier finds one or more of the enumerated aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency.

The aggravating circumstances enumerated in § 13-703(F) are:

(1) a previous felony conviction for which under Arizona law a sentence of life imprisonment or death may be imposed;

(2) a previous conviction of a serious offense, whether preparatory or completed (convictions for serious offenses committed on the same occasion as the homicide or not committed on the same occasion as the homicide but consolidated for trial with the homicide are treated as serious offenses);

(3) knowing creation of a grave risk of death to other persons in the commission of the offense;

(4) procurement of the commission of the crime by payment to another;

(5) commission of the offense as consideration for or in expectation of the receipt of anything of pecuniary value;

(6) commission of the offense in an especially heinous, cruel, or depraved manner;

(7) commission of the offense while in the custody of or on release, authorized or not, from a correctional facility or jail or on probation for a felony offense;

(8) conviction of one or more other homicides committed during the commission of the offense;

(9) the defendant was an adult or was tried as an adult and the victim was under 15 years of age or was 70 years of age or older; or

(10) the victim was an on-duty peace officer killed in the course of his or her official duties and defendant knew or should have known the victim was a peace officer.

Under § 13-703.01(R) and (S) , a victim (defined as a person's spouse, parent, child or other lawful representative, unless such person is in custody for an offense or is the accused) has a right to be present at the aggravation phase and to present any information that is relevant.

United States Supreme Court:

Walton v. Arizona, 497 U.S. 639 (1990) (upholding the "heinous, cruel or depraved" aggravating factor, as construed by the Arizona Supreme Court in *Gretzler*, 159 Ariz. 42, 659 P.2d 11 (1983)), *overruled on other grounds in Ring v. Arizona*, above.

Ninth Circuit:

Woratzeck v. Stewart, 97 F.3d 329 (9th Cir. 1996) (holding pecuniary gain aggravating factor constitutional as applied to robbery felony-murder death-eligible defendants).

Arizona Supreme Court:

State v. Carreon, 210 Ariz. 54, 107 P.3d 900 (2005) (en banc) (holding that aggravators need not be alleged in the indictment, and that Arizona's method of providing notice to defendants of the aggravating factors that the state will seek to prove at sentencing violates neither the state nor federal constitutional right to a jury trial).

State v. Moody, 208 Ariz. 424, 94 P.3d 1119 (2004) (en banc) (affirming convictions for the first degree murder but vacating a death sentence and remanding for resentencing, the supreme court held that it could not find harmless error in having the trial judge, rather than the jury, find the aggravating circumstance of expectation of pecuniary gain, where the jury could have differently assessed evidence that (1) defendant suffered from brain dysfunction, psychosis, and dissociative identity disorder at the time of the murders; (2) defendant had used massive amounts of cocaine at some time before the murders and that heavy cocaine use could lead to violent behavior; and (3) a small television, microwave, jewelry, and cocaine were left behind at one of the murder scenes).

State v. Phillips, 205 Ariz. 145, 67 P.3d 1228 (2003) (en banc) (holding on appeal in case that was pending at time decision was issued in *Ring v. Arizona* that because pecuniary gain aggravating circumstance is so fact-intensive, supreme court would not affirm judge's finding of pecuniary gain unless supreme court was convinced beyond a reasonable doubt that no jury could find that state failed to prove pecuniary gain beyond a reasonable doubt), *cert. denied*, 540 U.S. 1000 (2003).

State v. Ring, 204 Ariz. 534, 65 P.3d 915 (2003) (en banc) (holding in consolidated cases involving all defendants sentenced to death who had matters pending on direct appeal at time of U.S. Supreme Court decision in *Ring v. Arizona*, that Sixth Amendment did not require resentencing on (F)(1) and (F)(2) aggravating factors since

prior conviction aggravating circumstances set it apart from other circumstances; also holding that age of victim aggravating circumstance (F)(9) can logically inhere in verdict where jury also convicted defendant of age-dependent crime and other circumstances of harmless error include instances where defendant stipulated to victim's age or there was overwhelming evidence of victim's age).

State v. Harrod, 204 Ariz. 567, 65 P.3d 948 (2003) (en banc) (holding that trial court's finding that state had proven pecuniary gain statutory aggravating factor was not harmless error and remanding for resentencing under Arizona's new statutory scheme following decision in *Ring v. Arizona*).

State v. Canez, 202 Ariz. 133, 42 P.3d 564 (2002) (upholding as permissible (F)(9) aggravating factor of victim's age as having rational basis to protect the young and elderly as particularly vulnerable; using age as aggravating factor did not result in double counting since judge explicitly made heinous, cruel, and depraved finding without regard to murder victim's age), *reconsideration denied (May 21, 2002)*.

State v. Lehr, 201 Ariz. 509, 38 P.3d 1172 (2002) (en banc) (although (F)(6) aggravating factor was not established beyond a reasonable doubt, the (F)(1) and (2) aggravating factors that were established were sufficient to warrant death penalty absent sufficient mitigation; mitigating factors were weak and insufficient to warrant leniency).

State v. Sansing, 200 Ariz. 347, 26 P.3d 1118 (2001) (en banc) (holding existence of economic motive at some point during events surrounding murder is not enough to establish pecuniary gain as motive; holding there must be connection between economic motive and killing), *cert. granted*, 536 U.S. 954 (2002), vacated and remanded in light of *Ring*.

State v. Ring, 200 Ariz 267, 25 P.3d 1139 (2001) (en banc) (finding evidence supported trial court's finding of pecuniary gain as an aggravating circumstance but did not support a finding of heinousness and depravity), *rev'd on other grounds,* 536 U.S. 584 (2002).

State v. Hoskins, 199 Ariz. 127, 14 P.3d 997 (2000) (en banc) (affirming death sentence with pecuniary gain as only aggravating factor; finding pecuniary gain where defendant car-jacked vehicle and killed driver; distinguishing pecuniary gain from felony murder), *cert. denied,* 534 U.S. 970 (2001).

State v. Martinez, 196 Ariz. 451, 999 P.2d 795 (en banc) (holding conviction of dangerous and deadly assault by a prisoner qualifies as a "serious offense" even though

§ 13-703H(1)(d) (now (H)(4)) does not contain the word "prisoner."), *cert. denied,* 531 U.S. 934 (2000).

State v. Henry, 189 Ariz. 542, 944 P.2d 57 (1997) (en banc) (holding that twenty-five-year-old armed robbery conviction supports (F)(2) aggravation factor), *cert. denied* 523 U.S. 1028 (1998).

State v. Mann, 188 Ariz. 220, 934 P.2d 784 (en banc) (finding (F)(6) and (8) factors do not constitute double punishment), *cert. denied,* 522 U.S. 895 (1997).

State v. Soto-Fong, 187 Ariz. 186, 928 P.2d 610 (1996) (en banc) (holding trial court's alternative (F)(6) findings of physical cruelty or gratuitous violence unconstitutional) *cert. denied,* 520 U.S. 1231 (1997).

State v. Murray, 184 Ariz. 9, 906 P.2d 542 (1995) (en banc) (holding that only one (F)(6) element must be proved to establish aggravating factor since list is disjunctive).

State v. Gallegos, 178 Ariz. 1, 870 P.2d 1097 (en banc) (finding (F)(9) aggravating factor applies when defendant tried as an adult and victim was younger than 15), *cert. denied*, 513 U.S. 934 (1994).

State v. Spencer, 176 Ariz. 36, 43, 859 P.2d 146 (1993) (holding (F)(5) aggravation factor requires expectation of pecuniary gain be a motive, cause, or impetus for the murder, not merely a result of the murder), *cert. denied*, 510 U.S. 1050 (1994).

State v. Greenway, 170 Ariz. 155, 823 P.2d 22 (1991) (en banc) (holding (F)(5) consideration of pecuniary gain as aggravating factor constitutional).

State v. Romanosky, 162 Ariz. 217, 782 P.2d 693 (1989) (en banc) (finding extrinsic evidence of circumstances of defendant's prior felonies was not required for felony convictions to be considered as (F)(2) statutory aggravating circumstances).

State v. Gillies, 135 Ariz. 500, 662 P.2d 1007 (1983) (en banc) (finding statutory definition of prior crime governs (F)(2) qualification; extrinsic evidence inadmissible), *cert. denied*, 470 U.S. 1059 (1985).

State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983) (listing factors constituting heinousness or deprivation to establish (F)(6) aggravation), *cert. denied*, 461 U.S. 971 (1983).

Arizona Statutes:

Ariz. Rev. Stat. Ann. § 13-703(E) (Supp. 2005) (requiring court to take aggravating and mitigating circumstances into account in determining sentence of death or life imprisonment and authorizing death sentence if court finds one or more aggravating circumstances enumerated in subsection (F) and no sufficient mitigating circumstances to call for leniency).

Ariz. Rev. Stat. Ann. § 13-703(F) (Supp. 2005) (enumerating aggravating circumstances).

Ariz. Rev. Stat. Ann. § 13-703.01(R) and (S) (Supp. 2005) (providing for victim impact statement and right of victim to be present at aggravation and penalty phases of sentencing proceeding; defining victim).

Mitigating Circumstances

In presenting evidence of mitigating circumstances, the defendant may proffer any factors relevant to the determination of whether to impose a sentence less than death. These circumstances include, but are not limited to, the following: (1) significant impairment to defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law; (2) unusual and substantial duress; (3) relatively minor participation; (4) death not reasonably foreseeable; and (5) defendant's age.

The defendant must prove the existence of the mitigating circumstances by a preponderance of the evidence. If the trier of fact is a jury, the jurors do not have to agree unanimously that a mitigating circumstance has been proved to exist. Each juror may consider any mitigating circumstance found by that juror in determining the appropriate penalty.

Ninth Circuit:

Jeffers v. Lewis, 38 F.3d 411 (9th Cir. 1994) (holding that sentencing court not required to specifically discuss each item of mitigation as long as it appears that it considered all relevant evidence), *cert. denied*, 514 U.S. 1071 (1995).

Arizona Supreme Court:

State v. Lehr, 205 Ariz. 107, 67 P.3d 703 (2003) (en banc) (holding that reversible error occurred where judge sentenced defendant to death under procedure invalidated in *Ring* where two of defendant's three murder convictions had been reversed on appeal and therefore jury may have according less weight to (F)(1) aggravating factor, and reasonable jury might have accepted mitigating factors rejected by trial judge).

State v. Grell, 205 Ariz. 57, 66 P.3d 1234 (2003) (en banc) (holding that remand was required in capital case in order to conduct a hearing to determine whether defendant was mentally retarded where trial judge had viewed issue of defendant's mental retardation as a possible mitigating circumstance rather than as a factor that would preclude imposition of the death penalty, as required in the later-decided case of *Atkins v. Virginia*).

State v. Pandeli, 204 Ariz. 569, 65 P.3d 950 (en banc) (holding that trial court's finding that there were no mitigating circumstances was not harmless error where defense had presented expert who diagnosed defendant as suffering from paranoid schizophrenia and post traumatic stress disorder, and remanding for resentencing under Arizona's new statutory scheme following decision in *Ring v. Arizona*) *cert. denied*, 124 S. Ct. 386 (2003).

State v. Bocharski, 200 Ariz. 50, 22 P.3d 43 (2001) (en banc) (finding capital mitigation investigation lacked adequate funding; remanding for resentencing).

State v. Kayer, 194 Ariz. 423, 984 P.2d 31 (1999) (en banc) (finding defendant competent to waive cooperation with court-appointed mitigation specialist; finding trial court did not err in proceeding to sentencing under circumstances), *cert. denied*, 528 U.S. 1196 (2000).

State v. Clabourne, 194 Ariz. 379, 983 P.2d 748 (1999) (en banc) (holding economic cost of death sentence not mitigating evidence; holding mental illness alone insufficient to support finding of impairment mitigator), *cert. denied*, 529 U.S. 1028 (2000).

State v. White, 194 Ariz. 344, 982 P.2d 819 (1999) (en banc) (declining to adopt "aberrant behavior" as a mitigating factor; discussing "model inmate" mitigating evidence), *cert. denied*, 529 U.S. 1005 (2000).

State v. Lacy, 187 Ariz. 340, 929 P.2d 1288 (1996) (en banc) (finding that victim's opposition to death penalty not relevant mitigation evidence).

State v. Jones, 185 Ariz. 471, 917 P.2d 200 (1996) (en banc) (finding that sentencing judge must consider any aspect of defendant's character, circumstance, or record relevant to imposing sentence; court has discretion to determine how much weight to give each mitigating circumstance).

State v. Stokley, 182 Ariz. 505, 898 P.2d 454 (1995) (en banc) (holding that unexplained disparity in sentencing of codefendant may be mitigation factor; nonstatutory mitigation weight given where defendant had documented mental disorders), *cert. denied*, 516 U.S. 1078 (1996).

Arizona Statutes:

Ariz. Rev. Stat. Ann. § 13-703(C) (Supp. 2005) (providing for presentation of mitigating evidence and placing burden of proof on defendant).

Ariz. Rev. Stat. Ann. § 13-703(G) (Supp. 2005) (stating that mitigating factors are any factors proffered by defendant or state relevant to determining whether to impose sentence less than death and enumerating non-exclusive list of mitigating factors).

Ariz. Rev. Stat. Ann. § 13-1105 (Supp. 2005) (defining first degree murder).

Appellate Review of Capital Sentences

When a court sentences a defendant to death, the superior court clerk files a notice of appeal on the defendant's behalf at the time of entry of judgment and sentence. The Arizona Supreme Court has exclusive jurisdiction over all direct appeals of death penalty cases. In 2002 Arizona's legislature rewrote the statutory scheme as to the scope of the supreme court's review. As to cases in which a murder was committed before August 1, 2002, the state supreme court must independently review the trial court's findings of aggravation and mitigation and the propriety of the sentence. Ariz. Rev. Stat. Ann. § 13-703.04. As to any sentencing or resentencing proceeding on any first degree murder case in which the offense was committed after August 1, 2002, there is no longer an independent review by the supreme court of the findings of the trier of fact of aggravation and mitigation and the propriety of the death sentence. Instead, newly enacted § 13-703.05 provides that the supreme court must review all death sentences to determine whether the trier of fact abused its discretion in finding aggravating circumstances and imposing a death sentence. If the supreme court

determines that an error occurred, the court must determine whether the error was harmless beyond a reasonable doubt. If the court cannot determine whether the error was harmless, the court must remand for a new sentencing proceeding.

Arizona Supreme Court:

State v. Trostle, 191 Ariz. 4, 951 P.2d 869 (1997) (en banc) (holding that if supreme court finds error in trial court's findings, court independently reweighs evidence to determine whether leniency appropriate).

State v. Lacy, 187 Ariz. 340, 929 P.2d 1288 (1996) (en banc) (finding that although the appellate court is charged with the duty of reviewing, and, when appropriate, reweighing various factors, the court will not engage in *de novo* application of statutory aggravating factors on appeal; § 13-703.01 (now 13-703.04) of the Arizona Code reflects strong legislative preference for supreme court not to remand for resentencing).

State v. Bible, 175 Ariz. 549, 858 P.2d 1152 (1993) (en banc) (holding that supreme court will remand for resentencing where trial judge has erred in the sentencing process and there is mitigating evidence of more than *de minimis* weight), *cert. denied*, 511 U.S. 1046 (1994).

State v. Salazar, 173 Ariz. 399, 844 P.2d 566 (1992) (en banc) (holding appellate proportionality review not constitutionally required and discontinued), *cert. denied,* 509 U.S. 912 (1993).

State v. Nash, 143 Ariz. 392, 694 P.2d 222 (en banc) (holding state supreme court must independently review record to determine aggravating and mitigating circumstances), *cert. denied*, 471 U.S. 1143 (1985).

Arizona Statutes:

Ariz. Rev. Stat. Ann. § 12-120.21 (1992) (providing that court of appeals does not have jurisdiction over appeal of criminal actions in which sentence of death imposed).

Ariz. Rev. Stat. Ann. § 13-703.04 (formerly 13-703.01) (Supp. 2005) (applicable in first degree murder cases where murder occurred before August 1, 2002 and providing that supreme court must review all death sentences and must independently review trial court's finding of aggravating and mitigating circumstances and propriety of death sentence and providing that review required does not prevent remand to trial court for further action in cases of error).

Ariz. Rev. Stat. Ann. § 13-703.05 (Supp. 2005) (providing that supreme court reviews findings of trier of fact as to finding aggravating circumstances and imposing death sentence for abuse of discretion and providing that if court determines there was error, whether it was harmless beyond a reasonable doubt; also providing that if court cannot determine whether error was harmless, court must remand for new sentencing proceeding)

Ariz. Rev. Stat. Ann. § 13-4031 (2001) (providing exclusive appellate jurisdiction to supreme court over capital cases).

Ariz. Rev. Stat. Ann. § 13-4037 (2001) (providing power of the supreme court to correct sentences).

Ariz. Rev. Stat. Ann. § 13-4040 (2001) (providing jurisdiction on remittitur).

Arizona Rules:

Ariz. R. Crim. P. 6.6 (providing for appointment of appellate counsel).

Ariz. R. Crim. P. 26.15 (setting special procedure for capital cases; filing notice of appeal).

Ariz. R. Crim. P. 31.2(b) (providing for automatic appeal of death sentence).

Ariz. R. Crim. P. 31.9 (providing that after filing of notice of appeal in capital case, notice be sent to all court reporters directing them to submit their portion of record to supreme court).

Ariz. R. Crim. P. 31.17(c) (fixing date of execution after the death sentence has been affirmed).

Collateral Remedies

A defendant may seek postconviction relief through Arizona Code § 13-4231, *et seq.* (postconviction relief) or Arizona Code § 13-4121, *et seq.* (habeas corpus). Relief is generally governed by Rule 32 of the Arizona Rules of Criminal Procedure. If a petition for writ of habeas corpus attacks the validity of the petitioner's conviction or sentence, it is treated as a postconviction relief petition.

Arizona Statutes:

Ariz. Rev. Stat. Ann. §§ 13-4121–4145, 4147 (2001) (providing for habeas corpus relief).

Ariz. Rev. Stat. Ann. §§ 13-4231–4239 (2001) (providing for postconviction relief).

Arizona Rules:

Ariz. R. Crim. P. 32.1–32.9 (providing for postconviction relief).

Postconviction Relief

In capital cases, a postconviction relief proceeding commences with the clerk of the supreme court filing a notice of postconviction relief with the trial court upon issuance of a supreme court mandate affirming the defendant's conviction and sentence on direct appeal. The petitioner has 120 days from the date of notice to file a postconviction relief petition. An untimely filed petition can be dismissed with prejudice. On May 23, 2002, Rule 32.4(c) was amended to provide for appointment by the Arizona Supreme Court of postconviction relief counsel after issuance of the decision on direct appeal affirming the defendant's conviction and sentence but prior to completion of certiorari proceedings in the U.S. Supreme Court or issuance of the Arizona Supreme Court's mandate.

The petition must include all known challenges to the defendant's conviction and sentence. The defendant is precluded from relief if the court finds by a preponderance of the evidence that the issue (1) remains appealable on direct appeal or post-trial motion; (2) was previously adjudicated on the merits; or (3) was waived in a previous proceeding. In *State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002), the Arizona Supreme Court clarified that claims of ineffective assistance *must* be raised in the postconviction relief petition and not on direct appeal.

The state has forty-five days to respond to defendant's petition. The court may dismiss the petition summarily if it finds that the petition raises no material issues of law or fact. If the court holds a hearing on the merits, the defendant must prove the allegations by a preponderance of the evidence. The state must then prove the defect

harmless beyond a reasonable doubt. Although the rules of evidence apply in these proceedings, the defendant has no privilege against self-incrimination.

Arizona Supreme Court:

State v. Spreitz, 202 Ariz. 1, 39 P.3d 525 (2002) (en banc) (holding that ineffective assistance of counsel claims are to be brought only in postconviction petition, not direct appeal).

State ex rel. Napolitano v. Brown, 194 Ariz. 340, 982 P.2d 815 (1999) (en banc) (holding the part of Arizona Code § 13-4234 that allowed defendant only sixty days to file postconviction relief petition was unconstitutional under separation of powers doctrine because it conflicted with the court rules allowing 120 days).

State v. Bejarano, 158 Ariz. 253, 762 P.2d 540, 541 (1988) (en banc) (holding unconstitutional one-year limitation period for filing state habeas petition under former Arizona Code § 13-4232).

Arizona Statutes:

Ariz. Rev. Stat. Ann. §§ 13-4231–4239 (2001) (providing for postconviction relief).

Arizona Rules:

Ariz. R. Crim. P. 32.1–32.9 (providing for postconviction relief).

Habeas Corpus

Collateral relief is also available in the form of a writ of habeas corpus. However, if a prisoner challenges the validity of a sentence or conviction, the petition will be transferred to the court where the prisoner was convicted and will be treated as a petition for postconviction relief pursuant to Criminal Procedure Rule 32.

Arizona Court of Appeals:

White v. State, 8 Ariz. App. 46, 442 P.2d 869 (1968) (holding summary denial proper if record refutes allegations of petition).

Arizona Statutes:

Ariz. Rev. Stat. Ann. §§ 13-4121-4145, 13-4147 (2001) (providing for habeas corpus relief).

Ariz. Rev. Stat. Ann. § 13-4233 (2001) (providing that habeas corpus writ treated as petition for postconviction relief).

Arizona Rules:

Ariz. R. Crim. P. 31.23(b) (detailing timing of issuance of mandate in capital cases affirming death sentence).

Ariz. R. Crim. P. 32.3 (providing that habeas corpus writ treated as petition for postconviction relief).

Ariz. R. Sup. Ct. 1 (providing rules governing original filing of habeas petition in supreme court).

Appellate Review of Collateral Proceedings

Any aggrieved party may move the court for rehearing and/or petition the supreme court for review of the trial court's ruling. The supreme court may summarily grant or deny review or rule after oral argument on the petition.

Arizona Statutes:

Ariz. Rev. Stat. Ann. § 13-4239 (2001) (providing rehearing and appellate review).

Arizona Rules:

Ariz. R. Crim. P. 32.9 (providing for rehearing and appellate review).

Procedural Bar/Waiver/Exhaustion

Pursuant to statute, a defendant is precluded from state postconviction relief if: (a) the issue is still presentable on direct appeal or by a post-trial motion; (b) the issue was

finally adjudicated on the merits on appeal or in any previous collateral proceeding; or (c) the issue was waived at trial, on appeal, or in any previous collateral proceeding.

Exceptions to these procedural bars are claims based on: (a) newly discovered material facts, (b) a significant change in the law which, if applied retroactively, would probably overturn petitioner's conviction or sentence, (c) the defendant's failure to appeal within the prescribed time without fault on defendant's part, (d) the defendant being held after his or her sentence has expired, or (e) the defendant can show by clear and convincing evidence that no reasonable factfinder would have found the defendant guilty of the underlying offense beyond a reasonable doubt or that the court would not have imposed the death penalty. The state has the burden of proving by a preponderance of the evidence any ground of preclusion asserted.

The U.S. Supreme Court, in *Stewart v. Smith*, 536 U.S. 856 (2002) (per curiam) held that because a state court's finding of preclusion by waiver under Ariz. R. Crim. P. Rule 32.2(a)(3) does not require an examination of the merits of the claim, it is independent of federal law. In addition, Rule 32.2(a)(3) has been found by the Ninth Circuit to be regularly and consistently applied (see *Ortiz v. Stewart*, 149 F.3d 923, 931-32 (9th Cir 1998)). Thus Rule 32.2(a)(3) is to be distinguished from preclusion under Rule 32.2(a)(2) (any ground finally adjudicated on the merits on appeal or in any previous collateral proceeding), which is not a bar to federal relief, as explained in *Poland v. Stewart*, 169 F.3d 573, 578 (9th Cir 1999).

United States Supreme Court:

Stewart v. Smith, 536 U.S. 856 (2002) (per curiam) (holding, following answering of certified question by Arizona Supreme Court, that because finding of waiver under Rule 32.2(a)(3) does not require examination of merits of claim, it is independent of federal law).

Stewart v. Smith, 534 U.S. 157 (2001) (per curiam) (as to Ninth Circuit decision holding petitioner's ineffective assistance of counsel claim not to be procedurally defaulted because Arizona's Rule 32.2 requires that state court consider nature of claim before finding it procedurally defaulted, U.S. Supreme Court certified question to Arizona Supreme Court as follows: at time of respondent's Rule 32 petition in 1995, did question whether asserted claim was of "sufficient constitutional magnitude" to

require a knowing, voluntary, and intelligent waiver for purposes of Rule 32.2(a)(3) depend on the merits of the particular claim or merely on the particular right alleged to be violated; question answered by Arizona Supreme Court in *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002), discussed below).

Arizona Supreme Court:

Stewart v. Smith, 202 Ariz. 446, 46 P.3d 1067 (2002) (answering question certified by U.S. Supreme Court in *Stewart v. Smith*, 534 U.S. 157 (2001), above, and holding that at time of respondent's third Rule 32 petition in 1995, question whether asserted claim was of "sufficient constitutional magnitude" to require a knowing, voluntary, and intelligent waiver for purposes of Rule 32.2(a)(3), depended not on merits of particular claim, but rather merely on particular right alleged to be violated).

State v. White, 194 Ariz. 344, 982 P.2d 819 (1999) (en banc) (stating defendant waived claim on appeal by not raising it in earlier proceeding), *cert. denied*, 529 U.S. 1005 (2000).

Arizona Statutes:

Ariz. Rev. Stat. Ann. § 13-4231 (2001) (providing scope of postconviction relief).

Ariz. Rev. Stat. Ann. § 13-4232 (2001) (precluding postconviction relief for certain barred claims).

Arizona Rules:

Ariz. R. Crim. P. 32.2 (precluding remedy).

Execution

After the state supreme court affirms a death sentence and the first postconviction relief proceeding is concluded, or the period to file a postconviction relief petition has expired, the supreme court issues an execution warrant to the director of the department of corrections. The warrant designates a 24-hour period for execution of the sentence between 35 and 60 days following its issuance.

If any court stays the initial warrant, the supreme court is required to issue subsequent warrants upon the state's motion. The warrant orders the director to provide 20-days' notice of the designated hour of execution. The director makes a

return on the warrant to the supreme court showing the time and manner of execution.

In 1992, Arizona voters passed a constitutional amendment changing the method of execution from lethal gas to lethal injection. However, if sentenced before November 23, 1992, the prisoner may elect execution by lethal gas. The director of the state department of corrections or a designee of the director is present at the execution. The prisoner may have two clergymen and five relatives or friends present at the execution.

Subsequent to a June 25, 1998 amendment to Rule 31.17(c) of the Arizona Rules of Criminal Procedure, the Arizona Department of Corrections changed their execution time from 12:01 a.m. to 3:00 p.m. The executions occur at the state prison in Florence.

United States Supreme Court:

Stewart v. LaGrand (Walter), 526 U.S. 115 (1999) (per curiam) (holding that petitioner waived claim that execution by lethal gas violated Eighth Amendment by choosing to be executed by lethal gas rather than lethal injection).

Ninth Circuit:

LaGrand (Karl) v. Stewart, 133 F.3d 1253, 1264 (9th Cir.) (holding that lethal gas challenge was not ripe for adjudication because petitioner would be executed by lethal gas only if he affirmatively chose that option), *cert. denied*, 525 U.S. 971 (1998).

Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997) (holding that option to choose between gas and injection by a prisoner sentenced to death before adoption of lethal injection is constitutional), *cert. denied*, 523 U.S. 1082 (1998).

Arizona Supreme Court:

Hernandez v. State, 43 Ariz. 424, 32 P.2d 18 (1934) (holding Arizona Constitution article 22, § 22 provision of execution by lethal gas not cruel and unusual punishment).

Arizona Statutes:

Ariz. Const. art. XXII, § 22 (providing for lethal injection as method of execution).

Ariz. Rev. Stat. Ann. § 13-704 (2001) (providing for lethal injection as method of execution, or, if sentenced before November 23, 1992, choice of lethal injection or lethal gas).

Ariz. Rev. Stat. Ann. § 13-705 (2001) (listing witnesses allowed to view execution).

Ariz. Rev. Stat. Ann. § 13-706 (2001) (requiring warrant for execution by supreme court and return by director of department of corrections).

Ariz. Rev. Stat. Ann. § 13-4040 (2001) (providing for supreme court jurisdiction to issue execution warrant).

Ariz. Rev. Stat. Ann. § 13-4234 (2001) (providing for stay of execution date on the filing of a second or subsequent petition).

Arizona Rules:

Ariz. R. Crim. P. 31.17(c) (fixing the date of execution after exhaustion of state court remedies).

Competency for Execution

A mentally incompetent, mentally retarded, or pregnant prisoner is not subject to execution in Arizona. If the director of the state department of corrections, the prisoner's attorney, or the state's attorney believe the prisoner may be mentally incompetent, he or she files a motion with the superior court in the county where the prisoner is located requesting the prisoner to be examined for mental competency. A separate motion must be filed with the supreme court to obtain a stay of execution.

If the superior court finds that the motion is timely and presents reasonable grounds for the requested examination, the court appoints experts to examine the prisoner. After the examinations are completed, the court may hold a hearing to determine the prisoner's competency. The prisoner is presumed to be competent and must prove incompetency by clear and convincing evidence.

If the prisoner is found incompetent, the prisoner remains in the custody of the department of corrections until the supreme court reviews the finding. If the supreme court upholds the finding of incompetency, the prisoner is transferred to a

licensed behavioral health or mental health in-patient facility operated by the department of corrections for competency restoration treatment. The sentence is suspended until such time as the prisoner is restored to competency.

Although an incompetent prisoner is housed in a facility operated by the department of corrections, the department of health services is responsible for competency restoration treatment. The chief medical officer of the state hospital files status reports with the superior court at sixty-day intervals until the prisoner's competency is restored. When the individual who supervised the prisoner's treatment determines that the prisoner is competent, he or she must submit a written report to the superior court, attorney general, and prisoner's attorney. Additionally, the chief medical officer certifies to the supreme court that the prisoner is competent to be executed. The supreme court then orders execution of the death warrant.

The 1999 Arizona Legislature substantially rewrote parts of the existing competency statutes. The superior court now may order the prisoner to submit to any evaluation or examination necessary to determine competency. If the prisoner refuses to be examined by the state's experts, the court will not consider any expert evidence offered by the prisoner. The state's expert must specifically report on whether the prisoner suffers from a mental disorder, illness, defect, or disability and whether the prisoner will benefit from competency restoration treatment. Additionally, the 1999 law provides that a motion to determine competency filed fewer than twenty days before a scheduled execution is untimely and constitutes consent by the prisoner to be evaluated by the state's mental health expert. The statute requires that the court dismiss the motion if the prisoner refuses to cooperate. Finally, when a motion to determine competency has been denied, or the superior court has determined a prisoner competent, or the chief medical officer has issued a certificate of competency, the prisoner may not file a successive competency motion without submitting an affidavit from a licensed physician or psychologist showing a substantial change of circumstances since the previous denial or competency determination.

In *Amaya-Ruiz v. Stewart*, 136 F. Supp. 2d 1014 (D. Ariz. 2001), the district court held that Arizona's statutory procedures for competency restoration did not meet due process standards. The court found that the unilateral power of the chief medical officer to decide whether a defendant had regained competency as well as the lack of

statutory provisions to provide for a judicial hearing, appointment of defense experts, or the right to appeal the chief medical officer's certification violated *Ford v. Wainwright*, 477 U.S. 399 (1986). The 2002 Arizona Legislature amended Arizona Revised Statutes Annotated §§ 13-4023 and 13-4024 to address the concerns raised in *Amaya-Ruiz v. Stewart.* See §§ 1.4 and 1.6.

If the superintendent of the state prison has reason to believe that a prisoner is pregnant, the superintendent notifies the county district attorney who seeks court determination of the pregnancy. If the court finds that the prisoner is pregnant, sentence is suspended until the prisoner is no longer pregnant.

Arizona Statutes:

Ariz. Rev. Stat. Ann. § 13-703.02 (Supp. 2005) (providing procedure to evaluate defendant for possible mental retardation).

Ariz. Rev. Stat. Ann. § 13-4022 (2001) (providing procedure for raising and determining competency after inmate receives death sentence).

Ariz. Rev. Stat. Ann. § 13-4023 (Supp. 2005) (requiring chief medical officer to submit sixty-day reports and certificate of competency).

Ariz. Rev. Stat. Ann. § 13-4024 (Supp. 2005) (providing for untimely or successive motions).

Ariz. Rev. Stat. Ann. §§ 13-4025, 4026 (2001) (providing procedures for determining pregnancy of a person under death sentence and staying execution while pregnant).

District Courts in Ninth Circuit:

Amaya-Ruiz v. Stewart, 136 F. Supp. 2d 1014 (D. Ariz. 2001) (granting evidentiary hearing to determine competency where Arizona's statutory procedures for competency restoration did not provide for a hearing upon the chief medical officer's certification of restoration to competency).

Stays of Execution

If the state supreme court has set the time for the execution, the court will not grant a stay of execution upon the filing of a second or subsequent postconviction relief

petition except upon a separate application for a stay made to the supreme court. The application must set forth with particularity the issues appropriate for subsequent postconviction relief.

The supreme court issues subsequent execution warrants in the event the initial warrant is stayed by any court beyond the time period fixed for the execution of sentence.

Arizona Statutes:

Ariz. Rev. Stat. Ann. § 13-4234(J) (2001) (providing stay pursuant to second or subsequent postconviction relief petition).

Arizona Rules:

Ariz. R. Crim. P. 31.17(c) (providing issuance of initial and subsequent execution warrants).

Clemency Procedures

Arizona has a board of executive clemency (formerly named board of pardons and paroles) that makes recommendations to the governor on all clemency applications. The governor has constitutional authority to grant a death-sentenced prisoner pardon or clemency. At least ten days before the board acts upon an application, the applicant must notify the county attorney of his or her intent to apply. A copy of the notice must be published thirty days from the first publication in a paper in the county where the conviction occurred unless imminent danger of the death of the applicant exists or when the term of imprisonment of the applicant is within ten days of execution.

The governor has great discretion in granting clemency. However, if the governor grants a commutation or pardon, the governor must publish the reasons for doing so in a newspaper of general circulation in the county of conviction.

Ninth Circuit:

Woratzeck v. Arizona Board of Executive Clemency, 117 F.3d 400 (9th Cir. 1997)

(holding that Arizona's clemency statute does not create a constitutionally protected liberty interest and applicant is entitled only to minimal due process and concluding that a procedural due process violation arising from clemency proceedings exists only if the board's procedures "shock the conscience").

Arizona Statutes:

Ariz. Const. art. V, § 5 (authorizing governor to grant reprieves, commutation, parole, or pardon).

Ariz. Rev. Stat. Ann. §§ 31-441–446 (2002) (providing clemency requirements and procedure).

Attorney General Opinion:

Ariz. Op. Att'y Gen. I80-224 (1980) (stating board of pardons and paroles has duty and authority to review all death cases and determine whether grounds for reprieve exist).

CALIFORNIA

History

In 1972, the California Supreme Court declared that the state death penalty law violated the California constitutional prohibition against "cruel or unusual punishment." *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972). That same year, California voters responded to *Anderson* by approving Proposition 17, a constitutional amendment sanctioning capital punishment. However, the U.S. Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), rendered four months after *Anderson,* blocked Proposition 17 from reviving the death penalty.

As a result of *Furman*, California adopted a mandatory death penalty scheme in 1973. The statute imposed the death sentence for first degree murder if the trier of fact found particular enumerated special circumstances. However, following the U.S. Supreme Court's decision in *Gregg v. Georgia*, 428 U.S. 153 (1976), the California Supreme Court issued a unanimous decision striking down California's mandatory death penalty law. *Rockwell v. Superior Court*, 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976).

The state legislature responded rapidly to *Rockwell.* Adopted in 1977, over a gubernatorial veto, California Senate Bill 155 endeavored to conform California's procedures to *Gregg* and its companion cases. The bill provided that a person convicted of first degree murder could be sentenced to death if the trier of fact found one of seven "special circumstances" and decided on death after weighing the aggravating and mitigating factors. One year later, the electorate approved Proposition 7, which expanded the list of special circumstances for which death could be imposed and altered procedures for weighing mitigating and aggravating circumstances in capital cases. The California Supreme Court has upheld California Senate Bill 155 and the subsequent initiative.

In the 1990 election, California voters approved Propositions 114 and 115, which enlarged the list of special circumstances for which a death sentence could be

imposed. Proposition 115 also amended the state constitution, preventing any interpretation affording greater rights to defendants than those afforded by the federal Constitution; however, the state supreme court invalidated this provision, ruling that it amounted to a qualitative constitutional revision which could not be accomplished through the initiative process. *See Raven v. Deukmejian,* 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990).

Amendments to California's death penalty law subsequent to Proposition 115 have maintained the same general framework for imposition of the death penalty. Most recently, Proposition 196, enacted by California voters in 1996, expanded the number of special circumstance qualifiers.

United States Supreme Court:

Gregg v. Georgia, 428 U.S. 153 (1976) (ruling mandatory death sentencing schemes unconstitutional).

Furman v. Georgia, 408 U.S. 238 (1972) (invalidating as unconstitutional state capital death statutes which granted juries unguided discretion to impose the death penalty).

California Supreme Court:

People v. Alvarez, 14 Cal. 4th 155, 926 P.2d 365, 58 Cal. Rptr. 2d 385 (1996) (holding California death penalty law not superseded by 1994 three strikes law (codified at California Penal Code §§ 667 and 1170), *cert. denied*, 522 U.S. 829 (1997).

Yoshisato v. Superior Court, 2 Cal. 4th 978, 831 P.2d 327, 9 Cal. Rptr. 2d 102 (1992) (holding Propositions 114 and 115 complementary and effective to extent no conflict between them).

Raven v. Deukmejian, 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990) (rejecting contention that death penalty provisions in Proposition 115 were unconstitutional; however, finding provision in Proposition 115 preventing construction of state constitution to afford greater rights than those afforded by U.S. Constitution unconstitutional as qualitative amendment of state constitution, not allowed by initiative process).

People v. Jackson, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980) (ruling

California death penalty statute weighing aggravating and mitigating circumstances constitutional), *cert. denied,* 450 U.S. 1035 (1981).

Rockwell v. Superior Court, 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976) (striking down California's mandatory death penalty sentencing scheme).

People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (ruling California's death penalty cruel and unusual punishment under California constitution), *cert. denied*, 406 U.S. 958 (1972).

California Statutes:

Cal. Const. art. I, § 17 (prohibiting cruel and unusual punishment) (formerly art. I, § 6).

Cal. Const. art. I, § 27 (stating that all death sentences in effect 2/17/1972 will not be deemed to violate constitutional prohibition of cruel and unusual punishment).

Cal. Const. art. II, § 10 (setting forth procedures for voter initiatives).

Cal. Penal Code § 190.2 (West Supp. 2006) (listing special circumstances for death eligibility).

Capital Offenses

The death penalty is statutorily authorized for first degree murder committed under special circumstances. The alternative sentence for a capital crime is life imprisonment without parole. Other capital offenses include treason, train wrecking, perjury resulting in execution of an innocent person, killing by a convict under life sentence, and sabotage causing death. There is no reported case involving a capital conviction for any of these latter crimes.

California Penal Code § 190.5 prohibits imposition of the death penalty on a person who was under 18 years old at the time of the commission of the crime. Furthermore in 2005, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court held that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on those who were under the age of 18 at the time their crimes were committed.

The United States Supreme Court held in *Atkins v. Virginia*, 536 U. S. 304 (2002), that the execution of the mentally retarded constitutes cruel and unusual

punishment prohibited by the Eighth Amendment. See § 1.6. Accordingly, in 2003, the California Legislature added Penal Code § 1376, prohibiting the execution of the mentally retarded. "Mentally retarded" is defined as the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18. Section 1376 also provides that a defendant in any case in which the prosecution seeks the death penalty may apply for an order directing that a mental retardation hearing be held and requires the court to order a hearing to determine whether a defendant is mentally retarded upon submission of a declaration by a qualified expert opining that the defendant is mentally retarded. At the request of the defendant, the court must conduct the hearing without a jury prior to the commencement of the trial, or if the defendant does not request a court hearing at that time, to conduct the hearing at the conclusion of the trial. The defense has the burden of proving by a preponderance of the evidence that the defendant is mentally retarded. The penalty for a mentally retarded defendant found guilty of murder in the first degree where special circumstances which would otherwise make him or her eligible for imposition of the death penalty have been found, is life without possibility of parole. If, after a mental retardation hearing, the court or jury finds that the defendant is not mentally retarded, the trial must proceed as in any other case in which a sentence of death is sought by the prosecution, and the criminal jury must not be informed of the prior proceedings or the findings concerning the defendant's claim of mental retardation.

United States Supreme Court:

Roper v. Simmons, 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed).

Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executing the mentally retarded violates the Eighth Amendment's prohibition against cruel and unusual punishment).

California Supreme Court:

People v. Smithey, 20 Cal. 4th 936, 978 P.2d 1171, 86 Cal. Rptr. 2d 243 (1999)

(declining to rule on constitutionality of executing the mentally retarded upon finding that defendant is not mentally retarded by other state standards; note concurring opinion of Mosk, J., stating that execution of mentally retarded now violates Eighth Amendment because of "evolving standards of decency"), *cert. denied*, 529 U.S. 1026 (2000).

California Statutes:

Cal. Mil. & Vet. Code § 1672(a) (West 1988) (defining death caused in acts hindering defense or preparation for war as capital offense).

Cal. Penal Code § 37 (West 1999) (defining treason as a capital offense).

Cal. Penal Code § 128 (West 1999) (defining perjury causing conviction and execution of innocent person as a capital offense).

Cal. Penal Code § 190 (West Supp. 2006) (providing that first degree murder is a capital offense).

Cal. Penal Code § 190.5 (West 1999) (prohibiting death penalty as to minor).

Cal. Penal Code § 219 (West 1999) (providing that train wrecking which results in death is a capital offense).

Cal. Penal Code § 1376 (West Supp. 2006) (prohibiting imposition of death penalty on defendant who is mentally retarded; providing for hearing to determine mental retardation).

Cal. Penal Code § 4500 (West 2000) (defining assault by convict under life sentence resulting in death as a capital offense).

Representation in Capital Cases

In capital cases, the trial court will appoint counsel to represent an indigent defendant at all preliminary and trial proceedings. Effective January 1, 2003, California Rule of Court 4.117 establishes qualifications for appointed trial counsel in capital cases; however, the rule provides that it is not intended to be a standard by which to measure if the defendant received effective assistance of counsel. Even if the defendant can but does not employ counsel, the court will assign counsel after a reasonable time. The

trial court may appoint capital co-counsel upon a written request by the first appointed attorney. Capital defendants are entitled to "reasonably necessary" compensation of trial expert and investigative services upon request to the court. Capital trial counsel, whether retained by the defendant or court-appointed, continue to represent the defendant until the entire record on the automatic appeal is certified.

In addition to provisions of the penal and government codes, several supreme court rules, policies, guidelines, and standards provide the current framework for post-trial capital representation. California Rule of Court 76.5 requires each appellate court to adopt procedures for appointment of counsel for indigent criminal appellants, including establishing and maintaining a list of qualified appointed counsel. California Rule of Court 76.6 provides qualification standards for counsel in death penalty appeals and habeas corpus proceedings.

With an eye on opting into chapter 154 of the Anti-Terrorism and Effective Death Penalty Act of 1996, the 1997 legislature established the California Habeas Corpus Resource Center and passed additional legislation pertaining to the appointment of capital postconviction counsel. In addition to adopting California Rule of Court 76.6 in 1998, the supreme court made substantial changes to its policies on death cases, internal procedures, fixed fee guidelines, and payment guidelines.

The 1997 legislature created the California Habeas Corpus Resource Center to provide legal representation to capital prisoners for state and federal habeas review. The legislation requires the supreme court to offer habeas counsel to an indigent capital prisoner and to document the offer or appointment by entry of an order. The legislation precludes trial or appellate counsel from representing a capital inmate in state postconviction proceedings unless the inmate and counsel expressly request continued representation. The legislation also directs the supreme court to adopt binding and mandatory competency standards for post-trial capital counsel. The minimum hourly compensation rate as of October 1, 2005 is $130 per hour.

California Rule of Court 76.6, promulgated in 1998, specifies that the State Public Defender, the California Habeas Corpus Resource Center, and the California Appellate Project (CAP) all are eligible to represent capital defendants in the supreme court; however, the entity must assign counsel who meet the competency standards outlined in this rule.

The Supreme Court Internal Operating Practices and Procedures (IOPP) XV, Appointment of Attorneys in Criminal Cases, directs the supreme court to appoint capital counsel in appellate, state habeas, executive clemency, sanity, and Supreme Court certiorari proceedings. The supreme court must appoint habeas counsel concurrently with the appointment of appellate counsel unless the inmate knowingly rejects habeas counsel. IOPP XV(C) and (D) delegates recruitment, evaluation, and recommendation of appointed capital counsel responsibility to the court's Automatic Appeals Monitor and provides for attorney compensation by either the "time and costs" or the "fixed fee and expenses" method, as provided in the corresponding supreme court payment and fixed fee guidelines. IOPP XV(E) provides that capital habeas corpus petitions are governed by the timeliness and compensation standards set forth in the Supreme Court Policies Regarding Cases Arising From Judgments of Death.

Finally, the Supreme Court Policies Regarding Cases Arising From Judgments of Death define the representation parameters for capital appellate, habeas corpus, and executive clemency counsel, and allow up to $25,000 for capital habeas investigation without prior authorization. The court's payment guidelines for appointed capital counsel provide a $130 hourly compensation rate (Guideline II.A most recently amended in 2005). The guidelines provide that the California Appellate Project (CAP) is the appointed counsel administrator that assists private counsel with automatic criminal appeals. Guideline II.I.3 lists "allowable hours" benchmarks for expected time allowance for the various stages of post-trial capital representation.

California Supreme Court:

People v. Dent, 30 Cal.4th 213, 65 P.3d 1286, 132 Cal. Rptr. 2d 527 (2003) (holding that trial court committed reversible error in denying defendant's request to represent himself because "it was a death penalty case").

People v. Marshall, 15 Cal. 4th 1, 931 P.2d 262, 61 Cal. Rptr. 2d 84 (1997) (holding that a motion for self-representation may properly be denied when made in passing anger, frustration, or ambivalence, or made for the purpose of delay or to frustrate the orderly administration of justice).

People v. Windham, 19 Cal. 3d 121, 560 P.2d 1187, 137 Cal. Rptr. 8 (1977) (holding that defendant must make an unequivocal assertion of his right to self-representation

within a reasonable time prior to the commencement of trial; if not, trial court has discretion to grant or deny motion), *cert. denied*, 434 U.S. 848 (1977).

In re Anderson, 69 Cal. 2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968) (holding counsel will be provided to indigent capital defendants in California Supreme Court postconviction review, postconviction review of state court judgments in the U.S. Supreme Court, and applications for executive clemency and sanity hearings), *cert. denied*, 406 U.S. 971 (1972).

California Statutes:

Cal. Gov't Code § 68660, *et seq*. (West Supp. 2006) (creating California Habeas Corpus Resource Center; appointing capital postconviction counsel; prohibiting postconviction counsel representation by trial or appellate counsel; providing minimum rate of $125 hourly compensation (in 2005, raised to $130).

Cal. Penal Code § 987(b) (West Supp. 2006) (providing procedures for assigning capital trial counsel).

Cal. Penal Code § 987(d) (West Supp. 2006) (providing procedures for assignment of capital trial co-counsel).

Cal. Penal Code § 987.9 (West Supp. 2006) (providing procedures for granting reasonable compensation for defense expert and investigative services for capital trial).

Cal. Penal Code § 1240(a)(4) (West 1982) (providing allowance for discretionary supreme court appointment of capital appellate counsel other than State Public Defender or trial counsel).

Cal. Penal Code § 1240.1(e)(1) (West 2004), (requiring capital counsel to continue representation of defendant until entire record on automatic appeal is certified).

Cal. Penal Code § 1241 (West 2004) (providing reasonable compensation for court-appointed appellate counsel).

California Rules:

Cal. R. Ct. 4.117 (establishing qualifications for appointment of trial counsel in capital cases, effective January 1, 2003).

Cal. R. Ct. 76.5 (establishing procedure for appointment of counsel in criminal

appeals).

Cal. R. Ct. 76.6 (establishing competency standards for capital counsel for appeals and state habeas corpus proceedings).

Sup. Ct. Policies Regarding Cases Arising from Judgments of Death (addressing withdrawal of capital counsel; timeliness and compensation standards regarding capital habeas petitions).

Sup. Ct. Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the Cal. Sup. Ct. (referencing CAP as appointed counsel administrator; provides $130 an hour compensation for capital appellate, habeas, and executive clemency counsel; providing "allowable hour" benchmarks for compensation) (as amended Oct. 1, 2005) .

Sup. Ct. Guidelines for Fixed Fee Appointments, on Optional Basis, to Automatic Appeals and Related Habeas Corpus Proceedings in the Cal. Sup. Ct. (providing optional fixed fee guidelines for capital appeal, habeas corpus, and executive clemency representation).

Sup. Ct. Internal Operating Practices & Procedures XV(A) (providing supreme court will appoint capital counsel for indigent party in automatic appeal, habeas and clemency proceedings, appeal to the U.S. Supreme Court from state appeal or postconviction proceeding, and sanity hearing).

Sup. Ct. Internal Operating Practices & Procedures XV(B) (requiring supreme court to offer counsel for habeas review when appointing appellate counsel).

Sup. Ct. Internal Operating Practices & Procedures XV(C) (charging supreme court Automatic Appeals Monitor with screening and recommending capital appellate counsel).

Sup. Ct. Internal Operating Practices & Procedures XV(D) (allowing compensation by "time and costs" or "fixed fee and expenses" methods).

Sup. Ct. Operating Internal Operating Practices & Procedures XV(E) (providing capital habeas petitions governed by Sup. Ct. Policies Reg. Cases Arising From Judgments of Death).

Trial of Capital Offense

In California, the superior court is the trial court for capital murder. California's death penalty statute provides for a bifurcated trial procedure with a jury participating in both the guilt and penalty phases. In addition to determining whether the defendant is guilty of first degree murder, the guilt phase jury also must determine beyond a reasonable doubt whether at least one statutory special circumstance exists before the defendant is eligible for the death penalty. Even if the court convicts the defendant at a bench trial or the defendant pleads guilty, a jury still determines the truth of a special circumstance unless both the defense and the state waive a jury determination. If the state alleges a special circumstance requiring proof of the commission or attempted commission of a crime, the state must charge and prove the crime.

The trier of fact must make special findings for each special circumstance, stating whether each is or is not true. The jury must find beyond a reasonable doubt that at least one special circumstance is "true" for the case to proceed to a capital penalty phase.

If a defendant is found guilty by a jury, but the jury is unable to reach a unanimous verdict as to whether one or more of the charged special circumstances is true or whether all of the special circumstances are not true, the court must impanel a new jury to retry the special circumstances. If the second jury also is unable to reach a unanimous verdict on one or more of the special circumstances, the court can either impanel a third jury to try the undetermined special circumstances or impose a twenty-five-year to life sentence.

The special circumstances enumerated in California Penal Code § 190.2(a) are:

(1) intentional murder carried out for financial gain;

(2) defendant previously convicted of murder;

(3) defendant in instant proceeding convicted of more than one murder;

(4) murder committed by destructive device, bomb, or explosive planted, hidden, or concealed;

(5) murder committed to avoid or prevent arrest or to escape from lawful custody;

(6) murder committed by destructive device, bomb, or explosive that defendant mailed or delivered;
(7) victim was a peace officer killed on duty or in retaliation for official duties;
(8) victim was a federal law enforcement officer or agent killed on duty or in retaliation for official duties;
(9) victim was a firefighter killed on duty;
(10) victim was witness to a crime, killed to prevent testimony or in retaliation for testimony;
(11) victim was a prosecutor killed in retaliation for or to prevent the performance of official duties;
(12) victim was a judge killed in retaliation for or to prevent performance of official duties;
(13) victim was public official killed in retaliation for or to prevent performance of official duties;
(14) murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity;
(15) defendant intentionally killed victim while lying in wait;
(16) victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin;
(17) murder was committed while defendant was engaged in . . . or attempting to commit one of twelve statutorily enumerated felonies;
(18) murder was intentional and involved the infliction of torture;
(19) defendant intentionally killed victim by the administration of poison;
(20) victim was a juror killed in retaliation for or to prevent performance of official duties;
(21) murder was intentional and caused by discharging a firearm from a motor vehicle;
(22) defendant intentionally killed victim while defendant was an active member of a criminal street gang and the murder was carried out to further the gang's activities.

California does not require that a defendant who personally commits a

homicide possess a specific intent to kill in order to be sentenced to death unless a particular special circumstance requires an intent to kill. Cal. Penal Code § 190.2(b); *People v. Anderson*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987) (holding that intent to kill is not an element of the felony-murder special circumstance), *overruling Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

Under §190.2(d), a felony-murder special circumstance may be applied to any individual who acted with reckless indifference to human life and, as a major participant, aided or abetted the felony. As a matter of statutory California law, such an individual may be sentenced to death. Cal. Penal Code § 190.2(d). As a matter of practice, every reported decision that has invoked § 190.2(d) to sustain a special circumstance finding has involved a non-capital sentence. *People v. Estrada*, 11 Cal. 4th 568, 904 P.2d 1197, 46 Cal. Rptr. 2d 586 (1995).

Under § 190.2(c), when a defendant's guilt of first degree murder is based on evidence that the defendant aided and abetted another in killing, rather than the defendant personally committed the killing, a special circumstance cannot be found "true" unless the prosecution also proves beyond a reasonable doubt that the defendant harbored the specific intent to kill and intentionally aided in a killing. *People v. Anderson*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987).

Ninth Circuit:

Webster v. Woodford, 369 F.3d 1062 (9th Cir.) (holding in a pre-AEDPA capital case that petitioner's due process rights were not denied by a judicial expansion of California's definition of death-qualifying special circumstances-- "immediate presence" element of robbery and what constituted "lying in wait for murder (that lying in wait could occur without physical concealment)--because the California Supreme Court's construction was readily foreseeable), *cert. denied*, 125 S. Ct. 626 (2004).

Morales v. Woodford, 388 F.3d 1159 (9th Cir. 2004) (holding in a pre-AEDPA capital case that California's special circumstance of lying in wait did not violate the Eighth Amendment on its face because it was not unconstitutionally vague and was not overly broad such that it applied to every defendant convicted of a murder; also holding that the trial court gave an improper instruction on a torture special circumstance, but the

error was harmless; but see the opinion of McKeown, J, concurring in part and dissenting in part, expressing view that the lying-in-wait special circumstance violated the Eighth Amendment because the confluence of lying-in-wait and other types of murder was virtually complete in California), *amending and superseding opinion at* 336 F.3d 1136 (9th Cir. 2003), *cert. denied,* 126 S. Ct. 420 (2005).

California Supreme Court:

In re Sakarias, 35 Cal. 4th 140, 106 P.3d 931, 25 Cal. Rptr. 3d 265 (2005) (granting a petition for a writ of habeas corpus as to one capital habeas petitioner, but denying the petition of another, the court held that a prosecutor's unjustified use of inconsistent and irreconcilable factual theories to convict two people of a crime only one could have committed, or to obtain harsher sentences for both on the basis of an act only one could have committed, violates due process because in those circumstances the state has necessarily convicted or sentenced a person on a false factual basis).

People v. Prieto, 30 Cal.4th 226, 66 P.3d 1123, 133 Cal. Rptr. 2d 18 (holding that although *Ring v. Arizona* undermines the holding in *People v. Odle* (1988) 45 Cal.3d 386, 754 P.2d 184, 247 Cal. Rptr. 137, that there is no right under the Sixth or Eighth Amendments to have a jury determine the existence of all of the elements of a special circumstance, erroneous jury instruction that omits an element of a special circumstance is still subject to harmless error analysis; holding that instructional error in felony murder special circumstance instructions was harmless), *cert. denied*, 540 U.S. 1008 (2003).

People v. Trevino, 26 Cal. 4th 237, 27 P.3d 283, 109 Cal. Rptr. 2d 567 (2001) (holding that conviction in another jurisdiction may be deemed conviction of first or second degree murder under § 190.2(a)(2) (prior-murder special circumstance) if offense involved conduct satisfying all elements of offense of murder under California law, regardless of whether defendant, when he committed that offense, was old enough to be tried as an adult in California).

People v. Catlin, 26 Cal. 4th 81, 26 P.3d 475, 109 Cal. Rptr. 2d 31 (2001) (holding the special circumstance of murder by poison does not violate the Eighth Amendment), *cert. denied*, 535 U.S. 976 (2002).

People v. Anderson, 25 Cal. 4th 543, 22 P.3d 347, 106 Cal. Rptr. 2d 575 (2001) (holding § 190.2 does not impose overbroad death eligibility, either because of number and scope of special circumstances or because it permits capital exposure for unintentional felony murder), *cert. denied*, 534 U.S. 1136 (2002).

People v. Musselwhite, 17 Cal. 4th 1216, 954 P.2d 475, 74 Cal. Rptr. 2d 212 (1998) (stating felony murder special circumstance § 190.2(a)(17) is not constitutionally limited to premeditated and deliberate murders), *cert. denied*, 525 U.S. 1073 (1999).

People v. Dennis, 17 Cal. 4th 468, 950 P.2d 1035, 71 Cal. Rptr. 2d 680 (holding California Penal Code § 12022.9 is a sentencing enhancement and not an alternative to multiple murder special circumstance), *cert. denied*, 525 U.S. 912 (1998).

People v. Williams, 16 Cal. 4th 635, 941 P.2d 752, 66 Cal. Rptr. 2d 573 (1997) (reversing trial court's special circumstance multiple murder finding because judge failed to instruct special circumstance/penalty phase jury on intent to kill where defendant was aider/abettor, even though first jury, which deadlocked on finding special circumstances, found defendant guilty as aider/abettor on four counts of first degree murder), *cert. denied*, 523 U.S. 1027 (1998).

People v. Stanley, 10 Cal. 4th 764, 897 P.2d 481, 42 Cal. Rptr. 2d 543 (1995) (stating law-of-the-case doctrine can apply to preclude California Supreme Court review of issue on automatic appeal already decided by state court of appeal in writ proceeding prior to judgment), *cert. denied* 517 U.S. 1208 (1996).

People v. Bacigalupo, 6 Cal. 4th 457, 862 P.2d 808, 24 Cal. Rptr. 2d 808 (1993) (analyzing California 1978 capital statute, stating that it follows constitutionally mandated guided discretion and narrowing of defendants eligible for death penalty), *cert. denied*, 512 U.S. 1253 (1994).

People v. Sanders, 51 Cal. 3d 471, 797 P.2d 561, 273 Cal. Rptr. 537 (1990) (finding heinous, atrocious, or cruel special circumstance unconstitutionally vague but holding error not prejudicial as to death judgment), *cert. denied*, 500 U.S. 948 (1991).

People v. Andrews, 49 Cal. 3d 200, 776 P.2d 285, 260 Cal. Rptr. 583 (1988) (addressing prior murder special circumstance), *cert. denied*, 494 U.S. 1060 (1990).

People v. Morales, 48 Cal. 3d 527, 770 P.2d 244, 257 Cal. Rptr. 64 (discussing lying-in-wait special circumstance), *cert. denied*, 493 U.S. 984 (1989).

People v. Keenan, 46 Cal. 3d 478, 758 P.2d 1081, 250 Cal. Rptr. 550 (1988) (rejecting unconstitutionality challenge on basis of prosecutor's discretion in choosing to seek death penalty), *cert. denied*, 490 U.S. 1012 (1989).

People v. Bunyard, 45 Cal. 3d 1189, 756 P.2d 795, 249 Cal. Rptr. 71 (1988) (finding no federal or state constitutional infirmity in applying the multiple-murder special

circumstance to murder of woman and unborn viable fetus).

People v. Howard, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842 (addressing purpose of financial gain special circumstance), *cert. denied*, 488 U.S. 871 (1988). *People v. Anderson*, 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987) (holding that intent to kill is not an element of the felony murder or multiple murder special circumstance, unless the defendant is the aider and abettor rather than the actual killer), *overruling Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983) and *People v. Turner*, 37 Cal. 3d 302, 690 P.2d 669, 208 Cal. Rptr. 196 (1984) .

People v. Ghent, 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987) (holding court may excuse for cause juror whose views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath, *adopting Wainwright v. Witt*, 469 U.S. 412 (1985)), *cert. denied*, 485 U.S. 929 (1988).

People v. Hendricks, 43 Cal. 3d 584, 737 P.2d 1350, 238 Cal. Rptr. 66 (1987) (holding prior murder special circumstance may be established by a conviction for a murder that occurred after the murder at issue; finding reversible error where trial court reconvened original jury five months later for sanity determination).

People v. Superior Court, ex rel. Engert, 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982) (holding subdivision (a)(14) (heinous, atrocious, or cruel murder) unconstitutionally vague and violative of the due process clause of the Fourteenth Amendment of the United States Constitution and article I, sections 7 subdivision (a) and 15 of the Constitution of the State of California).

California Court of Appeal:

People v. Rodriguez, 66 Cal. App. 4th 157, 77 Cal. Rptr. 2d 676 (1998) (holding special circumstance § 190.2(a)(21)–shooting from a motor vehicle–not facially unconstitutional).

Covarrubias v. Superior Court, 60 Cal. App. 4th 1168, 71 Cal. Rptr. 2d 91 (1998) (holding Cal. Civ. P. § 223, adopted in 1990 by Proposition 115, abrogates the holding in *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980), requiring individual sequestered voir dire in capital cases).

People v. Proby, 60 Cal. App. 4th 922, 70 Cal. Rptr. 2d 706 (1998) (holding trial court did not err in rejecting requested instruction defining “major participant” in felony-murder aider and abettor special circumstance trial, reasoning that “major participant”

is commonly understood and not used in a technical sense).

California Statutes:

Cal. Const. art. VI, § 11 (requiring exclusive appellate jurisdiction of capital cases to California Supreme Court).

Cal. Penal Code § 190.1(a) (West 1999) (providing for trier of fact to first determine guilt and then determine truth of special circumstance(s)).

Cal. Penal Code § 190.4(a) (West 1999) (requiring special finding by trier of fact of truth of each alleged special circumstance beyond reasonable doubt; requiring impaneling of new jury if jury cannot make unanimous finding; providing truth of special circumstances is to be decided by jury, unless waived).

Capital Sentencing

Penalty Hearing

If the trier of fact finds at least one special circumstance to be true, the defendant is eligible for the death penalty. Except on a showing of good cause, the same jury that determined the defendant's guilt will also determine the defendant's sentence if the prosecution seeks the death penalty. If the jury cannot reach a unanimous sentencing determination, the court impanels a second jury for the task. If the second jury cannot reach a unanimous verdict, the court may either impanel a third jury or impose a sentence of life imprisonment without parole. If the defendant was convicted without a jury, the court is required to impanel a sentencing jury unless a jury is waived by both the defense and the prosecution.

Section 190.3 of the California Penal Code lists specific factors for the sentencer to weigh, if relevant, when determining the penalty. The factors are not broken down into aggravating or mitigating circumstances. This undifferentiated approach is mirrored in California's model jury instruction. The instruction lists eleven statutory factors and directs the jurors to consider and be guided by the listed factors "if applicable." The § 190.3 factors are:

(a) circumstances of the crime and special circumstances found to be true;

(b) other violent criminal activity by the defendant;
(c) prior felony conviction;
(d) whether offense was committed while defendant was under influence of extreme mental or emotional disturbance;
(e) whether victim was a participant in defendant's homicidal conduct or consented to the homicidal act;
(f) whether offense was committed under circumstances that defendant reasonably believed to be a moral justification or extenuation for conduct;
(g) whether offense was committed while defendant was under extreme duress or under the substantial domination of another person;
(h) capacity of defendant to appreciate criminality of his or her conduct or to conform conduct to law, whether impaired from mental disease or defect, or intoxication;
(i) defendant's age at time of crime;
(j) whether defendant was accomplice to offense and level of participation relatively minor;
(k) any other circumstance which extenuates gravity of crime even though not a legal excuse for the crime.

The 1977 version of § 190.3 allowed parties to introduce "any matter relevant to aggravation, mitigation, and sentence" at the penalty phase. In 1978, the legislature amended § 190.3 to its current form, requiring the sentencer to impose a sentence of death after considering the statutorily enumerated relevant factors and determining that the aggravating circumstances outweigh the mitigating circumstances. In *People v. Boyd*, 38 Cal. 3d 762, 700 P.2d 782, 215 Cal. Rptr. 1 (1985), the court held that aggravating evidence not relevant to a listed factor is not admissible at sentencing. The court reasoned that the amended statute limits consideration of evidence to the statutorily listed relevant factors. The *Boyd* court, however, recognized that the statute did not preclude admission of any evidence weighing in favor of mitigation. *Boyd,* 38 Cal. 3d at 775, 700 P.2d at 791, 215 Cal. Rptr. at 10.

The jury may return a capital sentence only if it finds that the aggravating factors so substantially outweigh the mitigating factors that death, rather than life imprisonment, is appropriate. *People v. Tuilaepa*, 4 Cal. 4th 569, 842 P.2d 1142, 15

Cal. Rptr. 2d 382 (1992). Otherwise, the sentencer must impose a sentence of life without possibility of parole.

Section 190.3 specified that the court instruct the trier of fact at the penalty hearing that a sentence of life without possibility of parole may in the future be commuted or modified by the governor to one that includes the possibility of parole. Although it has not been found to violate the federal constitution, the California Supreme Court found this statutorily-mandated instruction in *People v. Ramos*, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984) to be so misleading as to violate the California Constitution's guarantee of due process.

United States Supreme Court:

Brown v. Sanders, 126 S. Ct. 884 (2006) (holding an invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances"; also holding that, despite the fact that the California Supreme Court invalidated two special circumstances on direct appeal, there was no constitutional error in the jury's consideration of the invalid eligibility factors in the weighing process because all the facts necessary to establish the "heinous, atrocious, or cruel" and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor).

Tuilaepa v. California, 512 U.S. 967 (1994) (stating that a capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision).

California Supreme Court:

People v. Lewis, 26 Cal. 4th 334, 28 P.3d 34, 110 Cal. Rptr. 2d 272 (2001) (holding that juries are not required to (1) make written findings regarding aggravating circumstances, (2) achieve unanimity as to aggravating circumstances, (3) find beyond a reasonable doubt that either aggravating circumstances are proved (other than other criminal conduct) and the aggravating circumstances outweigh those in mitigation, or that death is the appropriate penalty), *cert. denied*, 535 U.S. 1019 (2002).

People v. Earp, 20 Cal. 4th 826, 978 P.2d 15, 85 Cal. Rptr. 2d 857 (1999) (discussing various challenges to, and upholding constitutionality of CALJIC 8.85–instruction that enumerates sentencing factors but fails to define as aggravators or mitigators), *cert.*

denied, 529 U.S. 1005 (2000).

People v. Hart, 20 Cal. 4th 546, 976 P.2d 683, 85 Cal. Rptr. 2d 132 (1999) (holding clemency instruction not constitutionally deficient where, upon jury inquiry, court failed to instruct regarding procedure for twice-convicted felon), *cert. denied*, 528 U.S. 1085 (2000).

People v. Frye, 18 Cal. 4th 894, 959 P.2d 183, 77 Cal. Rptr. 2d 25 (1998) (holding defendant does not have the right to be absent at capital penalty hearing), *cert. denied*, 526 U.S. 1023 (1999).

People v. Carpenter, 15 Cal. 4th 312, 935 P.2d 708, 63 Cal. Rptr. 2d 1 (1997) (holding trial court did not abuse discretion selecting penalty jury before selecting guilt jury, and having penalty jury hear guilt evidence), *cert. denied*, 522 U.S. 1078 (1998).

People v. Hawkins, 10 Cal. 4th 920, 897 P.2d 574, 42 Cal. Rptr. 2d 636 (1995) (holding defendant's constitutional rights not violated by introduction of second jury on penalty phase after first jury deadlocked on question of whether death penalty should be imposed), *cert. denied*, 517 U.S. 1193 (1996).

People v. Kirkpatrick, 7 Cal. 4th 988, 874 P.2d 248, 30 Cal. Rptr. 2d 248 (1994) (stating "aggravating" and "mitigating" are commonly understood terms that trial court need not define for the jury), *cert. denied*, 514 U.S. 1015 (1995).

People v. Duncan, 53 Cal. 3d 955, 979, 810 P.2d 131, 281 Cal. Rptr. 273 (1991) (stating that "[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death").

People v. Edelbacher, 47 Cal. 3d 983, 1035, 766 P.2d 1, 254 Cal. Rptr. 586 (1989) (stating that jurors are entitled to vote for a life sentence if they believe that the death penalty is not "appropriate" under the circumstances).

People v. McLain, 46 Cal. 3d 97, 115, 757 P.2d 569, 249 Cal. Rptr. 630 (1988), *citing Brown,* 40 Cal. 3d at 540–41 (interpreting the "shall" of § 190.3 "to require jurors to make an individualized moral assessment on the basis of the character of the defendant and the circumstances of the crime, and thereby decide which penalty is appropriate in the particular case").

People v. Brown, 40 Cal. 3d 512, 709 P.2d 440, 220 Cal. Rptr. 637, (1985) (concluding 1978 amendment to § 190.3 preserves jury's constitutional discretion to decide appropriate penalty; declining to interpret "shall" and "weighing" as limiting scope of

the jury's ultimate discretion), *rev'd on other grounds*, 479 U.S. 538 (1987).

People v. Boyd, 38 Cal. 3d 762, 700 P.2d 782 , 215 Cal. Rptr. 1 (1985) (holding that aggravating evidence not relevant to a listed § 190.3 factor is not admissible at sentencing since the amended statute limits consideration of evidence to the statutorily listed relevant factors; recognizing that § 190.3 does not preclude admission of any evidence weighing in favor of mitigation).

People v. Ramos, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984) (holding mandatory jury instruction–stating that life without parole is subject to gubernatorial commutation–violates due process clause of California constitution as seriously misleading and inviting speculative and improper considerations), *cert. denied*, 471 U.S. 1119 (1985).

California Statutes:

Cal. Penal Code § 190.3 (West 1999) (enumerating relevant factors in aggravation and mitigation; requiring sentencer to consider listed factors and determine whether aggravating circumstances outweigh mitigating circumstances; requiring notice of aggravators by prosecution).

Cal. Penal Code § 190.4(a) (West 1999) (providing for penalty jury when defendant's guilt adjudicated by court).

California Jury Instructions:

CALCRIM 763 (providing model jury instructions listing factors for consideration at penalty trial, leaving aggravating and mitigating undifferentiated) (adopted 2005).

CALJIC 8.85 (providing model jury instructions listing factors for consideration at penalty trial, leaving aggravating and mitigating undifferentiated).

Aggravating Circumstances

As discussed above, a prosecutor may not introduce evidence in aggravation unless it is relevant to one of the statutory factors. However, the prosecutor may offer evidence not related to a statutory factor to rebut a defendant's mitigating evidence. The prosecution's rebuttal evidence must relate directly to the defendant's evidence in mitigation. "The scope of rebuttal must be specific, and evidence presented or argued

as rebuttal must relate directly to a particular incident of character trait defendant offers in his own behalf." However, if a defendant places his general character in issue, the prosecutor may be entitled to rebut with evidence or argument suggesting a more balanced picture of his personality. *See People v. Ramirez*, 50 Cal. 3d 1158, 1193, 791 P.2d 965, 270 Cal. Rptr. 286 (1990); *People v. Rodriguez*, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986); *People v. Boyd*, 38 Cal. 3d 762, 776–77, 700 P.2d 782, 215 Cal. Rptr. 1 (1985).

Three factors frequently relied upon as factors in aggravation are: (1) circumstances of the crime and existence of the special circumstances which were found to be true; (2) other violent criminal activity; or (3) prior felony convictions.

There are four important caveats regarding the sentencing factor relating to other violent criminal activity. First, the actions of the defendant must have involved force or violence or the threat of force or violence. *People v. Burton*, 48 Cal. 3d 843, 862, 771 P.2d 1270, 258 Cal. Rptr. 184 (1989). Second, the necessary "force or violence" must be directed toward persons. *People v. Boyd*, 38 Cal. 3d 762, 776–77, 700 P.2d 782, 215 Cal. Rptr. 1 (1985). Third, the activity must amount to conduct that violates a penal statute. *People v. Clair*, 2 Cal. 4th 629, 672, 828 P.2d 705, 7 Cal. Rptr. 2d (1992). Evidence of violent juvenile conduct that would have been a crime if committed by an adult is admissible under § 190.3, factor (b). *People v. Avena*, 13 Cal. 4th 394, 426, 916 P.2d 1000, 53 Cal. Rptr. 2d 301 (1996). And, fourth, evidence of other criminal activity involving force or violence may be admitted in aggravation only if it can support a finding by a rational trier of fact as to the existence of such activity beyond a reasonable doubt. *People v. Clair*, 2 Cal. 4th 629, 672, 828 P.2d 705, 7 Cal. Rptr. 2d 564 (1992).

The evidence of other violent crimes need not have been the subject of a prior prosecution or conviction. *People v. Coleman*, 48 Cal. 3d 112, 148, 768 P.2d 32, 255 Cal. Rptr. 813 (1989). The evidence is admissible even if it was included in a charge that was dismissed without determination of its merits. *People v. Ghent*, 43 Cal. 3d 739, 774, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987). However, evidence of prior criminal activity may not be admitted if it relates to an offense for which the defendant was prosecuted and acquitted. Cal. Penal Code § 190.3.

Although the jurors are required to find beyond a reasonable doubt that the

criminal activity occurred before they may consider the facts as evidence in aggravation, the trial court need not instruct on the elements of unadjudicated crimes admitted as evidence in aggravation. *People v. Heishman*, 45 Cal. 3d 147, 183–184, 753 P.2d 629, 246 Cal. Rptr. 673 (1988).

The California cases have repeatedly emphasized that a capital defendant's "'mere failure to confess guilt or express remorse' at a later time is not a circumstance of the crime, does not fit within any other statutory sentencing factor, and thus should not be urged as aggravating." *People v. Cain*, 10 Cal. 4th 1, 77 n.31, 892 P.2d 1224, 40 Cal. Rptr. 2d 482 (1995) (quoting *People v. Gonzalez*, 51 Cal. 3d 1179, 1232, 800 P.2d 1159, 275 Cal. Rptr. 729 (1990). When dealing with evidence of remorse, three general legal principles govern California law.

First and foremost, "a defendant's lack of remorse may not be considered by the jury as a factor in aggravation." *People v. Williams*, 16 Cal. 4th 153, 254, 940 P.2d 710, 66 Cal. Rptr. 2d 123 (1997), *cert. denied*, 522 U.S. 1150 (1998) (quoting *People v. Sims*, 5 Cal. 4th 405, 465, 853 P.2d 992, 20 Cal. Rptr. 537 (1993).

Second, the defendant may, if he or she chooses to do so, introduce evidence of remorse. The California courts recognize that the jury's obligation "to consider '[a]nything mitigating'" necessarily encompasses "evidence of . . . remorse." *People v. Ochoa*, 19 Cal. 4th 353, 459, 966 P.2d 442, 79 Cal. Rptr. 2d 408 (1998), *cert. denied*, 528 U.S. 862 (1999). As a result of this, if the defendant introduces evidence of remorse, the prosecution may, by way of rebuttal, introduce evidence of a defendant's lack of remorse. However, even though the prosecution may be allowed to introduce evidence that the defendant lacked remorse, the California courts have made manifestly clear that "lack of remorse, because it suggests the absence of a mitigating factor, is deemed a relevant factor in the jury's determination as to whether the factors in aggravation outweigh those in mitigation, and [is] thus an appropriate subject of comment by the prosecutor, so long as he or she does not argue that lack of remorse constitutes a factor in aggravation." *People v. Champion*, 9 Cal. 4th 879, 943, 891 P.2d 93, 39 Cal. Rptr. 2d 547 (1995) (quoting *People v. Crittenden*, 9 Cal. 4th 83, 150, 885 P.2d 887, 36 Cal. Rptr. 2d 474 (1994).

The third important caveat is that, in evaluating whether a defendant has expressed or exhibited remorse, "a prosecutor is not permitted to argue that the

defendant's failure to confess should be deemed evidence of lack of remorse." *People v. Frye*, 18 Cal. 4th 894, 1019, 959 P.2d 183, 77 Cal. Rptr. 2d 25 (1998) (citing *People v. Coleman*, 71 Cal. 2d 1159, 1169, 459 P.2d 248, 80 Cal. Rptr. 920 (1969). "Even after he has been found guilty, a defendant is under no obligation to confess, and he has a right to urge his possible innocence to the jury as a factor in mitigation of penalty." *People v. Coleman*, 71 Cal. 2d 1159, 1168, 459 P.2d 248, 80 Cal. Rptr. 920 (1969) (citing *People v. Terry*, 61 Cal. 2d 137, 145–47, 390 P.2d 381, 37 Cal. Rptr. 605 (1964)).

The prosecutor may introduce evidence of any prior felony conviction. The prosecution is not limited to only violent felonies. This factor does not encompass juvenile adjudications. *People v. Lucky*, 45 Cal. 3d 259, 295, 753 P.2d 1052, 247 Cal. Rptr. 1 (1988).

The prosecution must give the defendant notice of the evidence it intends to introduce in aggravation. No evidence may be presented by the prosecution in aggravation unless notice of that evidence to be introduced has been given to the defendant within a reasonable period of time prior to trial. However, evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation. As a general matter, notice should be given before the cause is called to trial or as soon thereafter as the prosecution learns the evidence exists. *People v. Daniels*, 52 Cal. 3d 815, 879, 802 P.2d 906, 277 Cal. Rptr. 122 (1991). Although individual items of evidence need not be recited in detail, the notice must be sufficient to give the defendant a reasonable opportunity to prepare a defense to the allegations. *People v. Howard*, 44 Cal. 3d 375, 424–25, 749 P.2d 279, 243 Cal. Rptr. 842 (1988).

California Supreme Court:

People v. Heard, 31 Cal. 4th 946, 75 P.3d, 4 Cal.Rptr.3d 131 (2003) (reversing a judgment as to the sentence of death and remanding for a new penalty trial before a properly selected jury because the trial court erred and was unwarranted in excusing a juror for cause, despite the juror's written response in a jury questionnaire that indicated he thought imprisonment for life without the possibility of parole represented a "worse" punishment than death where, after the trial court explained to the juror during voir dire that California law considers death the more serious punishment and that the death penalty can be imposed under California law only if the aggravating circumstances

outweigh the mitigating circumstances, the juror stated he would do "whatever the law states"; under the U.S. Supreme Court cases of *Gray v. Mississippi* and *Davis v. Minnesota*, this type of error is not subject to harmless error analysis, but must be considered reversible per se with regard to any ensuing death penalty judgment), *cert. denied,* 541 U.S. 910 (2004).

People v. Ochoa, 19 Cal. 4th 353, 966 P.2d 442, 79 Cal. Rptr. 2d 408 (1998) (recognizing the jury's obligation "to consider '[a]nything mitigating'" necessarily encompasses "evidence of . . . remorse."), *cert. denied*, 528 U.S. 862 (1999).

People v. Frye, 18 Cal. 4th 894, 1019, 959 P.2d 183, 77 Cal. Rptr. 2d 25 (1998) (citing *People v. Coleman*, 71 Cal. 2d 1159, 1169, 80 Cal. Rptr. 920 (1969) (finding that "a prosecutor is not permitted to argue that the defendant's failure to confess should be deemed evidence of lack of remorse"), *cert. denied,* 526 U.S. 1023 (1999).

People v. Williams, 16 Cal. 4th 153, 940 P.2d 710, 66 Cal. Rptr. 2d 123 (1997) (finding "a defendant's lack of remorse may not be considered by the jury as a factor in aggravation"), *cert. denied*, 522 U.S. 1150 (1998).

People v. Avena, 13 Cal. 4th 394, 916 P.2d 1000, 53 Cal. Rptr. 2d 301 (1996) (finding that evidence of violent juvenile conduct that would have been a crime if committed by an adult is admissible under § 190.3, factor (b)).

People v. Cain, 10 Cal. 4th 1, 892 P.2d 1224, 40 Cal. Rptr. 2d 481 (1995) (emphasizing that a capital defendant's "'mere failure to confess guilt or express remorse' at a later time is not a circumstance of the crime, does not fit within any other statutory sentencing factor, and thus should not be urged as aggravating."

People v. Champion, 9 Cal. 4th 879, 891 P.2d 93, 39 Cal. Rptr. 2d 547 (1995) (stating use of juvenile misconduct as aggravating factor is permissible), *cert. denied*, 516 U.S. 105 (1996).

People v. Rodrigues, 8 Cal. 4th 1060, 885 P.2d 1, 36 Cal. Rptr. 2d 235 (1994) (stating that § 190.3 allows evidence of violent criminal activity regardless of where it occurred), *cert. denied*, 516 U.S. 851 (1995).

People v. Wader, 5 Cal. 4th 610, 854 P.2d 80, 20 Cal. Rptr. 2d 788 (1993) (rejecting unconstitutionality claims based on (1) jury not having to find beyond reasonable doubt that death is the appropriate penalty; (2) jury not having to find that the aggravating circumstances were true beyond a reasonable doubt; (3) jury not having to find that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt; (4)

jury not required to unanimously find which aggravating circumstances are true or that the aggravating factors outweighed the mitigating factors, and (5) jury not required to make written findings on the aggravating factors found to be true), *cert. denied*, 512 U.S. 1253 (1994).

People v. Tuilaepa, 4 Cal. 4th 569, 842 P.2d 1142, 15 Cal. Rptr. 2d 382 (1992) (stating simple weapon possession can constitute implied threat of force as aggravation; evidence of gang affiliation may be admitted where directly relevant to material issue of otherwise admissible evidence in aggravation), *aff'd, Tuilaepa v. California,* 512 U.S. 967 (1994).

People v. Livatidis, 2 Cal. 4th 759, 831 P.2d 297, 9 Cal. Rptr. 2d 72 (1992) (stating where prior felony conviction was for non-violent offense, prosecution is limited to introducing and proving only the existence of the conviction, not the underlying facts), *cert. denied*, 507 U.S. 975 (1993).

People v. Clair, 2 Cal. 4th 629, 828 P.2d 705, 7 Cal. Rptr. 2d 564 (1992) (holding § 190.3 applies to crimes which involve implied threat of force as well as express use of force), *cert. denied*, 506 U.S. 1063 (1993).

People v. Ashmus, 54 Cal. 3d 932, 820 P.2d 214, 2 Cal. Rptr. 112 (1991) (stating that evidence of other violent criminal activity factor includes evidence of results and impact of such activity), *cert. denied*, 506 U.S. 841 (1992).

People v. Daniels, 52 Cal. 3d 815, 879, 802 P.2d 906, 277 Cal. Rptr. 122 (1991) (stating that the prosecutor must give notice of the evidence it intends to introduce in aggravation before the cause is called to trial or as soon thereafter as the prosecution learns the evidence exists).

People v. Jackson, 49 Cal. 3d 1170, 783 P.2d 279, 264 Cal. Rptr. 852 (1989) (allowing jury to consider violent crimes of which defendant was neither charged nor convicted), *cert. denied*, 498 U.S. 881 (1990).

People v. Bell, 49 Cal. 3d 502, 778 P.2d 129, 262 Cal. Rptr. 1 (declining to extend *Murtishaw*, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981) to apply to prosecutor's comments regarding potential future dangerousness), *cert. denied* 495 U.S. 963 (1990).

People v. Sheldon, 48 Cal. 3d 935, 771 P.2d 1330, 258 Cal. Rptr. 242 (1989) (holding evidence of other criminal activity for an offense of which defendant was acquitted may not be considered in aggravation).

People v. Coleman, 48 Cal. 3d 112, 768 P.2d 32, 255 Cal. Rrptr. 813 (1989) (holding that evidence of an unadjudicated crime is admissible even if the defendant was never charged with the crime).

People v. Grant, 45 Cal. 3d 829, 755 P.2d 894, 248 Cal. Rptr. 444 (1988) (stating evidence of other violent criminal activity need not be inherently violent, as long as it was perpetrated in a violent manner), *cert. denied*, 488 U.S. 1050 (1989).

People v. Lucky, 45 Cal. 3d 259, 295, 753 P.2d 1052, 247 Cal. Rptr. 1 (1988) (regarding the prior felony convictions sentencing factor, evidence of juvenile adjudications is not admissible).

People v. Heishman, 45 Cal. 3d 147, 753 P.2d 629, 246 Cal. Rptr. 673 (holding lack of remorse may be introduced by prosecution on cross-examination of defense witness in rebuttal or other testimony suggesting defendant was remorseful), *cert. denied*, 488 U.S. 948 (1988).

People v. Thompson, 45 Cal. 3d 86, 753 P.2d 37, 246 Cal. Rptr. 245 (stating that prosecutor may offer evidence not related to enumerated aggravating factor as rebuttal to defendant's mitigating evidence), *cert. denied*, 488 U.S. 960 (1988).

People v. Melton, 44 Cal. 3d 713, 750 P.2d 741, 244 Cal. Rptr. 867 (stating § 190.3(b) permits evidence surrounding violent criminal activity, provided defendant not acquitted of criminal charge based on activity), *cert. denied*, 488 U.S. 934 (1988).

People v. Howard, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842 (upholding admissibility of evidence of other crimes against charge that it violates due process; stating that the prosecution need not recite individual items of evidence it intends to introduce in aggravation but must give notice that is sufficient to give the defendant a reasonable opportunity to prepare a defense to the allegations), *cert. denied*, 488 U.S. 871 (1988).

People v. Miranda, 44 Cal. 3d 57, 744 P.2d 1127, 243 Cal. Rptr. 842 (enforcing notice requirement of § 190.3, and stating that notice need not be in writing), *cert. denied*, 486 U.S. 1038 (1988).

People v. Ghent, 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987) (stating evidence regarding prior criminal charge which was dismissed can be introduced under § 190.3 as other crimes evidence because dismissal is not equivalent to acquittal), *cert. denied*, 485 U.S. 929 (1988).

People v. Davenport, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985) (stating prosecution erred arguing that the absence of a mitigating factor may be considered as an aggravating factor but error was harmless).

People v. Balderas, 41 Cal. 3d 144, 711 P.2d 480, 222 Cal. Rptr. 184 (1985) (holding violent acts committed after the murder may be shown in aggravation of the offense; statute limits the evidence of prior convictions only to convictions before commission of the capital crime).

People v. Phillips, 41 Cal. 3d 29, 711 P.2d 423, 222 Cal. Rptr. 127 (1985) (holding the criminal activity factor must constitute an actual violation of the penal code).

People v. Robertson, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982) (holding that if prosecution presents evidence of other crimes for which defendant has not been convicted, trial judge must instruct jury that proof beyond reasonable doubt of such offenses is required).

People v. Murtishaw, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981) (holding inadmissible as aggravating factor during penalty phase expert testimony forecasting future dangerousness), *cert. denied*, 455 U.S. 922 (1982).

People v. Coleman, 71 Cal. 2d 1159, 1168, 459 P.2d 248, 80 Cal. Rptr. 920 (1969) (citing *People v. Terry*, 61 Cal. 2d 137, 145–47, 390 P.2d 381, 37 Cal. Rptr. 605 (1964) (stating "[e]ven after he has been found guilty, a defendant is under no obligation to confess, and he has a right to urge his possible innocence to the jury as a factor in mitigation of penalty").

California Statutes:

Cal. Penal Code § 190.3 (West 1999) (enumerating relevant factors in aggravation and mitigation; requiring sentencer to consider listed factors and determine whether aggravating circumstances outweigh mitigating circumstances; requiring notice of aggravators by prosecution).

Mitigating Circumstances

Section 190.3(k) allows the trier of fact to consider "any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." Consistent with *Lockett v. Ohio*, 438 U.S. 586 (1978), the California courts have interpreted this section to allow the trier to consider any mitigating evidence of the

defendant's character or record which the defendant offers. The phrase is an open-ended, catch-all provision, allowing the jury's consideration of any mitigating evidence, limited only by relevance. To avoid any misunderstandings, the sentencing court must inform the jury that it can consider as a mitigating factor any other circumstance or aspect of the defendant's character or record that the defendant proffers as a basis for sentence less than death.

In addition to the catch-all clause, § 190.3 also enumerates several non-exclusive factors the trier of fact may consider in mitigation:

(1) whether the victim was a participant in the defendant's homicidal conduct;

(2) the defendant's age at the time of the crime;

(3) whether the defendant was an accomplice to the offense and his participation was relatively minor;

(4) whether the defendant committed the offense under extreme mental or emotional disturbance;

(5) whether the defendant believed he or she had a moral justification for his or her conduct;

(6) whether the defendant acted under extreme duress or domination; and

(7) whether the defendant acted under mental disease or defect or the effects of intoxication.

California Supreme Court:

In re Lucas, 33 Cal. 4th 682, 94 P.3d 447, 16 Cal. Rptr. 3d 331 (2004) (holding that defense counsel's inadequate and tardy investigation of available mitigating evidence for use at the penalty phase of the case constituted ineffective assistance of counsel in view of the fact that evidence of child abuse suffered by defendant was available through several sources, and counsel's decision not to present mitigating evidence was not reasonable in the absence of counsel's knowledge and understanding of the potential effect of this evidence).

People v. Ochoa, 19 Cal. 4th 353, 966 P.2d 442, 79 Cal. Rptr. 2d 408 (1998) (holding jury may not consider impact of death sentence on defendant's family), *cert. denied*, 528 U.S. 862 (1999).

People v. Sanders, 11 Cal. 4th 475, 905 P.2d 420, 46 Cal. Rptr. 2d 751 (1995) (addressing mitigating factor of defendant's age), *cert. denied*, 519 U.S. 838 (1996).

People v. Visciotti, 2 Cal. 4th 1, 825 P.2d 388, 5 Cal. Rptr. 2d 495 (addressing moral justification belief mitigating factor), *cert. denied*, 506 U.S. 893 (1992).

People v. Mickey, 54 Cal. 3d 612, 818 P.2d 84, 286 Cal. Rptr. 801 (holding 8th and 14th amendments require that sentencer not be precluded from considering as mitigating factor any aspect of defendant's character or record and any of circumstances of offense, as long as it is relevant), *cert. denied*, 506 U.S. 819 (1992).

People v. Benson, 52 Cal. 3d 754, 802 P.2d 330, 276 Cal. Rptr. 827 (1990) (addressing emotional disturbance mitigating factor), *cert. denied*, 502 U.S. 924 (1991).

People v. Adcox, 47 Cal. 3d 207, 763 P.2d 906, 253 Cal. Rptr. 55 (1988) (addressing duress mitigating factor), *cert. denied*, 494 U.S. 1038 (1990).

People v. Williams, 45 Cal. 3d 1268, 756 P.2d 221, 248 Cal. Rptr. 834 (1988) (addressing accomplice mitigating factor), *cert. denied*, 488 U.S. 1050 (1989).

People v. Thompson, 45 Cal. 3d 86, 753 P.2d 37, 246 Cal. Rptr. 245 (holding defendant not entitled to present evidence concerning how death penalty carried out or conditions of confinement for someone serving life without possibility of parole), *cert. denied*, 488 U.S. 960 (1988).

People v. Ghent, 43 Cal. 3d 739, 739 P.2d.1250, 239 Cal. Rptr. 82 (1987) (addressing mental disease or defect mitigating factor), *cert. denied*, 485 U.S. 929 (1988).

People v. Easley, 34 Cal. 3d 858, 679 P.2d 813, 196 Cal. Rptr. 309 (1983) (adopting *Lockett* in analysis of 1978 statute).

California Statutes:

Cal. Penal Code § 190.3 (West 1999) (enumerating relevant factors in aggravation and mitigation; requiring sentencer to consider listed factors and determine whether aggravating circumstances outweigh mitigating circumstances).

California Rules:

CALJIC 8.85 (jury instruction on consideration of all mitigating evidence).

Automatic Application for Modification of Verdict

The trial court must automatically review any death verdict handed down by a capital sentencing jury. Section 190.4(e) requires the trial judge to be guided by the relevant factors listed in § 190.3 and to determine whether the sentencer's decision is contrary to the law or evidence presented. In ruling on the application, the trial judge must independently reweigh the evidence of aggravating and mitigating circumstances and determine whether, in the judge's independent judgment, the weight of the evidence supports the jury verdict. *People v. Samayoa*, 15 Cal. 4th 795, 859, 938 P.2d 2, 64 Cal. Rptr. 2d 400 (1997). Although the law requires a trial judge to determine whether the law and evidence support the verdict, the law does not require the trial judge to independently determine whether the penalty of death is appropriate. *People v. Alvarez*, 14 Cal. 4th 155, 245, 926 P.2d 365, 58 Cal. Rptr. 2d 385 (1996).

When the trial court reviews a death penalty verdict under § 190.4(e), the court must limit its consideration to the evidence presented to the penalty phase jury. *People v. Welch*, 20 Cal. 4th 701, 775, 976 P.2d 754, 85 Cal. Rptr. 2d 203 (1999). A trial court should not read or consider a presentence report, statements of the victim's relatives, or any other evidence not presented to the jury during the penalty phase trial before ruling on an automatic motion to modify penalty. *People v. Benson*, 52 Cal. 3d 754, 812, 802 P.2d 330, 276 Cal. Rptr. 827 (1990) (victim's relatives); *People v. Lewis*, 50 Cal. 3d 262, 287, 786 P.2d 892, 266 Cal. Rptr. 834 (1990) (presentence report).

The state supreme court reviews a trial judge's decision not to modify a verdict of death at the time of a defendant's automatic appeal. The state supreme court reviews only for an abuse of discretion. The court's "role is to review the trial court's ruling on a defendant's modification motion for error, rather than to independently evaluate whether the evidence shows that the defendant's sentence of death is appropriate." *People v. Hines*, 15 Cal. 4th 997, 1080, 938 P.2d 388, 64 Cal. Rptr. 2d 594 (1997). The state supreme court will "not make a de novo determination of penalty." *People v. Samayoa*, 15 Cal.4th 795, 859, 938 P.2d 2, 64 Cal. Rptr. 2d 400 (1997). The state court has emphasized that it "lack[s] the power to overturn a judgment of death simply because [the court] disagree[s] with the jury's penalty determination." *People v. Hines*, 15 Cal. 4th 997, 1080, 938 P.2d 388, 64 Cal. Rptr. 2d

594 (1997).

If the trial judge grants the automatic motion and reduces the sentence to a noncapital sentence, the state may appeal to the intermediate court of appeal. *People v. Crew*, 1 Cal. App. 4th 1591, 2 Cal. Rptr. 2d 755 (1991); *People v. Burgener*, 223 Cal. App. 3d 427, 272 Cal. Rptr. 830 (1990).

California Supreme Court:

People v. Burgener, 29 Cal. 4th 833, 62 P.3d 1, 129 Cal. Rptr. 2d 747 (vacating a death sentence and remanding to the superior court for a new hearing on the application for modification of the verdict, the court held that the trial judge erred in using a deferential substantial evidence standard of review and in failing to make an independent determination whether imposition of the death penalty was proper in light of the relevant evidence and applicable law, as required by § 190.4(e)), *cert. denied*, 540 U.S. 855 (2003).

People v. Weaver, 29 Cal. 4th 833, 29 P.3d 103, 111 Cal. Rptr. 2d 2 (2001) (holding that in ruling on a verdict-modification application under § 190.4(e), trial judge's function is not to make independent and de novo penalty determination, but rather to independently reweigh evidence of aggravating and mitigating circumstances and then to determine whether, in judge's independent judgment, weight of evidence supports jury verdict), *cert. denied*, 535 U.S. 1058 (2002).

People v. Welch, 20 Cal. 4th 701, 775, 976 P.2d 754, 85 Cal. Rptr. 203 (1999) (finding that when the trial court reviews a death penalty verdict under § 190.4(e), it must limit its consideration to the evidence presented to the penalty phase jury).

People v. Hines, 15 Cal. 4th 997, 1080, 938 P.2d 388, 64 Cal. Rptr. 2d 594 (1997) (holding that the state supreme court's "role is to review the trial court's ruling on a defendant's modification motion for error, rather than to independently evaluate whether the evidence shows that the defendant's sentence of death is appropriate").

People v. Samayoa, 15 Cal. 4th 795, 859, 938 P.2d 2, 64 Cal. Rptr. 2d 400 (1997) (finding that the trial judge, during automatic review, must independently reweigh the evidence of aggravating and mitigating circumstances and determine whether, in the judge's independent judgment, the weight of the evidence supports the jury verdict; finding that the state supreme court will "not make a de novo determination of penalty").

People v. Alvarez, 14 Cal. 4th 155, 245, 926 P.2d 365, 58 Cal. Rptr. 2d 385 (1996) (finding that the law requires trial judge to determine whether the law and evidence support the verdict but does not require trial judge to independently determine whether penalty of death is appropriate), *cert. denied*, 522 U.S. 829 (1997).

People v. Benson, 52 Cal. 3d 754, 812, 802 P.2d 330, 276 Cal. Rptr. 827 (1990) (holding that a trial court should not read or consider a presentence report, statements of the victim's relatives, or any other evidence not presented to the jury during the penalty phase trial before ruling on an automatic motion to modify penalty), *cert. denied*, 502 U.S. 924 (1991).

People v. Rodriguez, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986) (holding, in deciding automatic application for modification of death verdict, trial court failed to adequately make independent determination whether death penalty was proper under law and evidence as statutorily required).

California Court of Appeal:

People v. Crew, 1 Cal. App. 4th 1591, 2 Cal. Rptr. 2d 755 (1991) (holding that trial judge erred by considering, based on past experience as trial judge in capital cases, and relying on the conclusion that imposition of the death penalty was disproportionate to the penalties imposed on other persons for similar offenses).

People v. Burgener, 223 Cal. App. 3d 427, 272 Cal. Rptr. 830 (1990) (holding trial court lacked authority to consider, when ruling on automatic motion, (1) the possibility the jury could not, as it was instructed, ignore the successfully objected-to evidence at trial, (2) a "most likely" reversal by the Supreme Court, and (3) the length and expense of a retrial of the penalty phase).

California Statutes:

Cal. Penal Code § 190.4(e) (West 1999) (providing for automatic application for modification and review by trial judge of penalty phase evidence when defendant sentenced to death).

Appellate Review of Capital Sentences

Standard of Review

The California Supreme Court's capital trial standard of review is determined by the

type of proceeding being reviewed and the error asserted. Article IV, § 13 of the California Constitution prohibits appellate reversal absent a miscarriage of justice. For state law error in guilt phase proceedings, miscarriage of justice requires a showing that there is a reasonable probability a result more favorable to the defendant would have been reached had the error not occurred. However, at the penalty phase, state law error is reviewed under a lesser "reasonable possibility" standard: the supreme court determines whether, absent the error, a reasonable possibility exists that the sentencer would have returned a life sentence.

Error of federal constitutional dimension asserted at any stage of the capital proceeding is scrutinized under the "reasonable doubt" standard of *Chapman v. California*, 386 U.S. 18 (1967). Appellate review of federal constitutional error requires harmless error to be established beyond a reasonable doubt.

A single valid special circumstance is sufficient to determine that the defendant is eligible for the death penalty. Errors involving additional special circumstances, while they may prejudicially affect the penalty trial, do not affect the verdict at the close of the guilt phase. An invalid special circumstance is not prejudicial per se but is subject to "harmless error" analysis.

United States Supreme Court:

Chapman v. California, 386 U.S. 18, 24 (1967) (holding appellate court's review of federal constitutional error requires harmless error to be established beyond a reasonable doubt).

California Supreme Court:

People v. Mickey, 54 Cal. 3d 612, 818 P.2d 84, 286 Cal. Rptr. 801 (applying independent review standard of review to appeal of denial of verdict modification explaining court reviews the trial court's determination after independently considering the record but does not make a de novo determination of penalty), *cert. denied*, 506 U.S. 819 (1992).

People v. Benson, 52 Cal. 3d 754, 802 P.2d 330, 276 Cal. Rptr. 827 (1990) (applying harmless error analysis to jury instruction addressing an invalid special circumstance), *cert. denied*, 502 U.S. 924 (1991).

People v. Bittaker, 48 Cal. 3d 1046, 774 P.2d 659, 259 Cal. Rptr. 630 (1989) (stating single valid special circumstance finding sufficient to qualify defendant as death-eligible), *cert. denied*, 496 U.S. 931 (1990).

People v. Brown, 46 Cal. 3d 432, 758 P.2d 1135, 250 Cal. Rptr. 604 (1988) (applying "reasonably probable" standard of review of state law error, announced in *People v. Watson*, 46 Cal. 2d 818, 299 P.2d 243 (1956), at guilt phase of capital trial; holding "reasonable-possibility" test applicable to review of state law error at penalty phase), *cert. denied*, 489 U.S. 1059 (1989).

California Statutes:

Cal. Const. art. VI, § 13 (prohibiting reversal absent showing of miscarriage of justice).

Proportionality Review

The California Supreme Court reviews a case to determine if the penalty is disproportionate to individual culpability. The court applies the proportionality principles of California's cruel and unusual punishment case law when reviewing proportionality claims. The U.S. Supreme Court, however, has held that the federal Constitution does not require comparative, or "inter-case" proportionality review if a state's capital justice system meets the requirements of *Furman*. In *Pulley v. Harris*, 465 U.S. 37 (1984), the Court held that California was not constitutionally required to engage in an appellate comparative proportionality review.

United States Supreme Court:

Pulley v. Harris, 465 U.S. 37 (1984) (finding California's capital punishment scheme constitutional notwithstanding absence of comparative proportionality review).

California Supreme Court:

People v. Ochoa, 26 Cal. 4th 398, 28 P. 3d 78, 110 Cal. Rptr. 2d 324 (2001) (holding that there is no constitutional requirement of intercase proportionality review; also holding as to intracase review, court need not compare defendant's death sentence with plea bargain terms received by defendant's companions, and that in any event

defendant's sentence was not disproportionate to that of his accomplices), *cert. denied*, 535 U.S. 1040 (2002).

People v. Sanders, 11 Cal. 4th 475, 905 P.2d. 420, 46 Cal. Rptr. 2d 751 (1995) (rejecting request for "intercase" proportionality review), *cert. denied*, 519 U.S. 838 (1996).

People v. Wright, 52 Cal. 3d 367, 802 P.2d 221, 276 Cal. Rptr. 731 (1990) (allowing appellate review for disproportionality of offense to individual culpability), *cert. denied*, 502 U.S. 834 (1991).

People v. Rodriguez, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986) (rejecting comparative proportionality review, *citing Pulley*).

People v. Dillon, 34 Cal. 3d 442, 668 P.2d. 697, 194 Cal. Rptr. 390 (1983) (discussing proportionality review required by state and federal "cruel and unusual punishment" provisions).

People v. Frierson, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979) (holding "cruel and unusual punishment" proportionality principles allow review of alleged disproportionality between offense and punishment).

Appeal of Death Judgment

Superior Court death judgments are automatically appealed to the California Supreme Court. A capital defendant cannot waive the Court's statutorily-mandated review.

California Penal Code § 190.6(a) declares a legislative desire for all capital sentences to be reviewed expeditiously. To realize this goal, the 1996 legislature imposed a new time schedule on capital appeals arising from post January 1, 1997, convictions. Section 190.8 requires the trial court to certify the record for completeness ninety days after imposition of sentence and to certify the record for accuracy 120 days after either appointment of appellate counsel or the record is certified as complete. Section 190.6(b) allows seven months for appellate counsel to file an opening brief, and subdivision (c) of § 190.6 sets a 210-day goal for the supreme court to decide and file an opinion reaching the merits of the appeal.

The legislature provides for extensions of time in § 190.8(d), particularly when the transcript exceeds 10,000 pages. Additionally, failure to comply with these

time requirements does not preclude imposition of the death penalty.

California Rules of Court 34-36 provide more detailed procedure for record preparation, certification, and transmittal and provide a time schedule for appellate briefing in death penalty cases.

On appeal, the supreme court may consider any question of law preserved by objection, provided it pertains to the defendant's substantial rights. Moreover, the court will review any instruction, notwithstanding trial counsel's failure to object, provided it affects substantial rights of the defendant. The supreme court will not substitute its conclusions regarding the weight of aggravating and mitigating circumstances for that of the sentencer.

California Supreme Court:

Marks v. Superior Court, 27 Cal. 4th 176, 38 P.3d 512, 115 Cal. Rptr. 2d 674 (2002) (holding that if timing of appointment process permits, habeas corpus counsel may submit to appellate counsel suggestions for correction, augmentation, and settlement of record on appeal, but that appellate counsel retains ultimate and plenary control of record correction process; accordingly holding that trial court did not abuse its discretion in declining to permit petitioner's habeas corpus counsel to participate in record correction).

People v. Turner, 8 Cal. 4th 137, 214 n.19, 878 P.2d 521, 566 n.19, 32 Cal. Rptr. 2d 762, 807 n.19 (1994) (noting perfunctory assertions of error are not properly presented to supreme court), *cert. denied*, 514 U.S. 1068 (1995).

People v. Hawthorne, 4 Cal. 4th 43, 841 P.2d 118, 14 Cal. Rptr. 2d 133 (1992) (stating supreme court will not substitute its conclusions regarding balance of aggravating and mitigating factors for that of trier of fact), *cert. denied*, 510 U.S. 1013 (1993).

People v. Stanworth, 71 Cal. 2d 820, 457 P.2d 889, 80 Cal. Rptr. 49 (1969) (holding defendant not entitled to waive automatic appeal).

California Court of Appeals:

People v. Fitzpatrick, 2 Cal. App. 4th 1285, 3 Cal. Rptr. 2d 808 (1992) (stating California Penal Code § 1259 provides that instructions may be reviewed on appeal even though no objection was made at trial if substantial rights of defendant are affected).

California Statutes:

Cal. Const. art. VI, § 11 (providing supreme court appellate jurisdiction over death judgments).

Cal. Penal Code § 190.6 (West 1999) (providing for expeditiousness of death judgment appeals for post January 1997 convictions).

Cal. Penal Code §§ 190.7 (West 1999), 190.9 (West Supp. 2006) (providing for record of capital cases on appeal; presence of court reporter and recording of proceedings).

Cal. Penal Code § 190.8 (West 1999) (providing for expeditious certification of record on appeal for trials on or after January 1, 1997).

Cal. Penal Code § 1239(b) (West Supp. 2006) (providing automatic appeal of death judgment).

Cal. Penal Code § 1254 (West 1982) (providing that two counsel are entitled to argue for each party at oral argument on capital appeal).

Cal. Penal Code § 1259 (West 1982) (providing scope of review on appeal).

California Rules:

Cal. R. Ct. 34–36 (providing preparation and certification of record for accuracy and completeness in death penalty cases; transmission of record; schedule for brief filing).

Collateral Remedies

Habeas Corpus

The writ of habeas corpus, originally codified in 1872, is the exclusive state postconviction relief vehicle for collaterally attacking a capital conviction and sentence. Original habeas corpus jurisdiction is constitutionally vested with the Supreme Court of California, the courts of appeal, and the superior courts. Despite this broad grant of jurisdiction, habeas corpus proceedings involving sentences of death are usually filed in the state supreme court.

The Supreme Court Policies Regarding Cases Arising From Judgments of Death provide timeliness and compensation schedules for capital habeas proceedings

before the supreme court, as well as procedure for funding habeas investigations. Supreme Court Rule 76.6 provides competency standards for capital habeas counsel and Internal Operating Practices and Procedure XV(A)(2) vests appointment of capital habeas counsel in the supreme court. Additionally, the 1997 legislature created the California Habeas Corpus Resource Center, a state agency housed in the judicial branch of the government, to ensure adequate representation of capital habeas petitioners by employing competent counsel and securing additional private counsel and investigators for needed representation.

The supreme court established timeliness standards, found in the court's Policies Regarding Cases Arising From Judgments of Death, to ensure that potential habeas corpus claims are presented to and heard by the supreme court in a timely fashion. Timeliness Standard 1–3 allows the court to deny any petition that fails to meet these timeliness standards. As amended effective November 30, 2005, the court presumes a habeas petition is timely (*i.e.* filed without substantial delay) if it is filed within 180 days after the final due date of the state's reply brief on direct appeal or within 36 months after appointment of habeas counsel, whichever is later.

A petition filed outside of this time frame may be considered timely if it is filed within a reasonable time after petitioner or counsel knew or should have known about the facts supporting the claim and became aware or should have become aware of the legal basis for the habeas claim. An untimely petition may be heard if good cause is established for the delay. Good cause requires a showing of particular circumstances sufficient to justify substantial delay.

In *In re Clark*, 5 Cal. 4th 750, 855 P.2d 729, 21 Cal. Rptr. 2d 509 (1993), the court created a "fundamental miscarriage of justice" exception to the 1993 Timeliness Standards on successive or untimely capital petitions. The supreme court defined "fundamental miscarriage of justice" as (1) constitutional error in the absence of which no reasonable fact finder would have convicted petitioner, (2) actual innocence, (3) trial error resulting in a grossly misleading profile of petitioner, or (4) invalid charging or sentencing statute.

If the inmate alleges facts which, if proved, would establish entitlement to a writ of habeas corpus, the supreme court may appoint a referee to hear and determine the facts. The California Supreme Court has indicated that it will ask a referee to make

findings only on disputed factual issues and will not ask the referee to resolve legal issues arising from these facts. The referee's findings of fact, though not binding, are given great weight when supported by substantial evidence. In habeas corpus proceedings, the petitioner bears the burden of proving the facts that establish a basis for habeas relief by a preponderance of the evidence.

If the capital prisoner files an initial application for writ of habeas corpus in the superior court, subsequent applications based on new facts may be filed in the superior court. However, all subsequent applications based on a point of law not raised in the original applications must be raised in the court of appeals or the supreme court.

United States Supreme Court:

Evans v. Chavis, 126 S. Ct. 846 (2006) (holding that unexplained delay of at least six months between California Court of Appeal's denial of state noncapital habeas petition and the filing of notice of appeal from that decision in the California Supreme Court could not be "reasonable" under state law and thus state habeas petition was not timely filed and statute of limitations under AEDPA was not tolled; where the Ninth Circuit had treated a decision of the California Supreme Court in denying a state habeas petition without comment or citation as on the merits, the Supreme Court said that if the appearance of "on the merits" does not automatically warrant a holding that a filing was timely, the *absence* of those words could not automatically warrant such a holding; concurring in the judgment, Stevens, J. wrote that the Court should endorse the Ninth Circuit presumption that a ruling on the merits, *simpliciter,* means that the state court has concluded that a habeas petition was timely).

Carey v. Saffold, 536 U.S. 214 (2002) (holding that (1) as used in 28 U.S.C. § 2244(d)(2), "pending" covers time between lower state court's decision and filing notice of appeal to higher state court; and (2) same "pending" rule applies to California's unique collateral review system, even though that system involves not notice of appeal but filing within "reasonable time" of further original state habeas petition in higher court; rejecting contention that state petition is not "pending" during interval between lower court's entry of judgment and timely filing of notice of appeal in next court as being inconsistent with ordinary meaning of "pending," which means in present context, until completion of collateral review process; remanding to Ninth Circuit to reconsider timeliness issue, with instructions to evaluate any special conditions justifying petitioner's delay in filing in state court and any other relevant considerations).

Ninth Circuit:

Bennett v. Mueller, 322 F.3d 573 (9th Cir.) (holding that California Supreme Court's denial of state court habeas petition "on the merits and for lack of diligence" in reliance on *In re Clark*, 5 Cal. 4th 750, 855 P.2d 729, 21 Cal. Rptr. 2d 509 (1993), and *In re Robbins*, 18 Cal. 4th 770, 959 P.2d 311, 77 Cal. Rptr. 2d 153 (1998), for untimeliness constituted an independent state ground; reversing on issue whether state ground was adequate and remanding for district court to reconsider this issue with the ultimate burden of proof on state; stating that on this record, the court could not conclude that California had regularly and consistently applied untimeliness bar in habeas cases), *cert. denied*, 540 U.S. 938 (2003).

Ross v. Craven, 478 F.2d 240 (9th Cir. 1973) (stating California Supreme Court's disposition of petition on the merits ends state habeas attack).

California Supreme Court:

In re Steele, 32 Cal. 4th 682, 85 P.3d 444, 10 Cal. Rptr. 3d 536 (2004) (holding that those who seek discovery under Penal Code § 1054.9 because they are preparing to file or have filed a petition for writ of habeas corpus challenging a judgment of death or life without the possibility of parole should generally first make the discovery motion in the trial court that rendered the judgment and that after the trial court has ruled, either party may challenge that ruling by a petition for writ of mandate in the California Court of Appeal; also holding that discovery includes, and is limited to, specific materials the prosecution or law enforcement authorities involved in the case currently possess that defendant can show fall into any of these categories: (1) materials the prosecutor provided at time of trial but have since become lost to defendant, (2) materials the prosecution should have provided at time of trial, or (3) materials defendant would have been entitled to at time of trial had defendant specifically requested them.

In re Sanders, 21 Cal. 4th 697, 981 P.2d 1038, 87 Cal. Rptr. 2d 899 (1999) (explaining timeliness requirements of *Clark*, *Robbins*, and *Gallego*; addressing whether abandonment by counsel can be "good cause" to excuse substantial delay in filing a state habeas petition).

In re Johnson, 19 Cal. 4th 447, 957 P.2d 299, 75 Cal. Rptr. 878 (1998) (discussing burden of proof and standard of review applied to referee's findings).

In re Gallego, 18 Cal. 4th 825, 959 P.2d 290, 77 Cal. Rptr. 2d 132 (1998) (concluding a denial of a request for investigative funds is relevant to determining when a petitioner should have known of information supporting a claim and, therefore, may be grounds

for establishing absence of substantial delay pursuant to Timeliness Standard 1–1.2).

In re Robbins, 18 Cal. 4th 770, 959 P.2d 311, 77 Cal. Rptr. 2d 153 (1998) (analyzing timeliness of habeas petition for (1) absence of substantial delay; (2) good cause to justify substantial delay; and (3) under *Clark* standards; finding no substantial delay where claims filed within a reasonable time after discovering prosecution allegedly lied about discovery, withheld impeaching evidence, and solicited/promoted alleged false/perjured testimony).

In re Ross, 10 Cal. 4th 184, 892 P.2d 1287, 40 Cal. Rptr. 2d 544 (1995) (stating supreme court will ask referee to make findings of fact only, not resolve legal issues arising from facts), *cert. denied*, 516 U.S. 1051 (1996).

In re Carpenter, 9 Cal. 4th 634, 889 P.2d 985, 38 Cal. Rptr. 2d 665 (stating California Constitution article VI, § 10 grants concurrent subject matter jurisdiction to courts in death penalty proceedings; habeas jurisdiction granted to court where first filing occurs), *cert. denied*, 516 U.S. 981 (1995).

In re Sassounian, 9 Cal. 4th 535, 887 P.2d 527, 38 Cal. Rptr. 2d 665 (1995) (stating habeas petitioner has burden of proving facts by a preponderance of the evidence).

In re Harris, 5 Cal. 4th 813, 855 P.2d 391, 21 Cal. Rptr. 2d 373 (1993) (stating, in non-capital case, where issue was available on direct appeal, habeas review is available only where claimed constitutional error is both clear and fundamental and strikes at heart of trial process).

In re Clark, 5 Cal. 4th 750, 855 P.2d 729, 21 Cal. Rptr. 2d 509 (1993) (creating "fundamental miscarriage of justice" exception to 1993 Timeliness Standards on successive or untimely capital petitions).

In re Jackson, 3 Cal. 4th 578, 835 P.2d 371, 11 Cal. Rptr. 2d 531 (1992) (holding referee's findings of fact given great weight when supported by substantial evidence but not binding), *cert. denied*, 508 U.S. 941 (1993).

People v. Gonzalez, 51 Cal. 3d 1179, 800 P.2d 1159, 275 Cal. Rptr. 729 (1990) (limiting discovery in a post conviction proceeding to verified prima facie claims; stating a criminal judgment may be collaterally attacked on the basis of newly discovered evidence only if the new evidence casts fundamental doubt on the accuracy and reliability of the proceedings. To undermine a penalty judgment, the evidence must so clearly change the balance of aggravation against mitigation that its omission more likely than not altered the outcome), *cert. denied*, 502 U.S. 835 (1991).

In re Stankewitz, 40 Cal. 3d 391, 708 P.2d 1260, 220 Cal. Rptr. 382 (1985) (involving writ where counsel discovered facts that formed the basis of a juror misconduct claim but waited nearly one and one half years to file the petition; permitting petitioner to file habeas with direct appeal but warning that in the future petitions should be filed as promptly as circumstances allow even if prior to direct appeal).

In re Sterling, 63 Cal. 2d 486, 407 P.2d 5, 47 Cal. Rptr. 205 (1965) (denying habeas petition based upon fourth amendment violation).

In re Jackson, 61 Cal. 2d 500, 393 P.2d 420, 39 Cal. Rptr. 220 (1964) (holding habeas corpus available for showing of reversible error established by subsequent caselaw).

In re Horowitz, 33 Cal. 2d 534, 203 P.2d 513 (1949) (stating policy to deny application for habeas corpus when grounds either presented in an earlier petition or known at time earlier petition submitted).

California Statutes:

Cal. Const. art. VI, § 10 (providing that habeas corpus jurisdiction is vested in supreme court, courts of appeal, and superior courts).

Cal. Gov't Code § 68660, *et seq*. (West Supp. 2006) (providing for California Habeas Corpus Resource Center).

Cal. Penal Code § 1054.9. (West Supp. 2006) (providing for access to discovery materials in specified circumstances).

Cal. Penal Code § 1473, *et seq*. (West 2000 and West Supp. 2006) (providing codification of writ provision).

Cal. Penal Code § 1475 (West 2000) (providing for subsequent habeas applications).

California Rules:

Cal. R. Ct. 4.551 (as amended and renumbered effective Jan. 1, 2002) (setting forth habeas corpus procedure in superior court petitions).

Cal. R. Ct. 60, 60.5(b) (providing capital habeas corpus petition filing in appellate courts).

Cal. R. Ct. 76.6 (providing supreme court competency standards for capital appellate and state habeas counsel).

Sup. Ct. Policies Regarding Cases Arising from Judgments of Death–Policy 3 (setting forth timeliness and compensation standards for capital habeas petitions).

Sup. Ct. Internal Operating Practices & Procedures XV(A)(2) (providing for supreme court appointment of counsel for indigent capital habeas petitioner).

Appellate Review of Collateral Proceedings

A superior court's order denying habeas corpus relief is not appealable. The denial of a habeas petition can be challenged only by filing a new petition in the next higher court. *People v. Griggs*, 67 Cal. 2d 314, 431 P.2d 225, 61 Cal. Rptr. 641 (1967); *In re Reed*, 33 Cal. 3d 914, 918 n.2, 663 P.2d 216, 217 n.2, 191 Cal. Rptr. 658 (1983).

The state may appeal from an order of the superior court granting relief on a defendant's petition for writ of habeas corpus. In capital cases, the appeal will lie directly to the California Supreme Court. Cal. Penal Code § 1506.

California Supreme Court:

In re Reed, 33 Cal. 3d, 914, 918 n.2, 663 P.2d 216, 217 n.2, 191 Cal. Rptr. 658 (1983) (holding that petitioner challenging a denial of a habeas petition must file a new petition in the next higher court).

People v. Griggs, 67 Cal. 2d 314, 431 P.2d 225, 61 Cal. Rptr. 641 (1967) (holding that the denial of a habeas petition can be challenged only by filing a new petition in the next higher court).

California Statutes:

Cal. Penal Code § 1506 (West 2000) (providing procedure for habeas appeal).

California Rules:

Cal. R. Ct. 39.2 (providing for appeals and hearings in habeas matters).

Procedural Bar/Waiver/Exhaustion

Habeas corpus may not be used as a substitute for raising issues that should have been raised on appeal. *In re Dixon,* 41 Cal. 2d 756, 264 P.2d 513 (1953); *In re Harris*, 5 Cal. 4th 813, 855 P.2d 391, 21 Cal. Rptr. 2d 509 (1993). Similarly, contentions raised and rejected on appeal cannot be renewed in a state habeas petition. *In re Waltreus*, 62 Cal. 2d 218, 397 P.2d 1001, 42 Cal. Rptr. 9, *cert. denied*, 382 U.S. 853 (1965).

Case law recognizes the reviewing court's discretion to issue a writ if it believes an appeal is not an adequate remedy or if prompt disposition is required in the interests of justice. Additionally, California Penal Code § 1475 provides for successive applications for writ of habeas corpus if there exists "some ground not existing in fact at the issuing of the prior writ."

California Supreme Court:

In re Harris, 5 Cal. 4th 813, 855 P.2d 391, 21 Cal. Rptr. 2d 373 (1993) (stating, in non-capital case, where issue was available on direct appeal, habeas review is available only where claimed constitutional error is both clear and fundamental and strikes at heart of trial process).

In re Clark, 5 Cal. 4th 750, 855 P.2d 729, 21 Cal. Rptr. 2d 509 (1993) (providing "fundamental miscarriage of justice" exception to Timeliness Standards procedural bar).

In re Martin, 44 Cal. 3d 1, 744 P.2d 374, 241 Cal. Rptr. 263 (1987) (discussing rule that petition for habeas corpus based on same grounds as previously denied petition will be denied where change in facts or law does not substantially affect petitioner).

In re Waltreus, 62 Cal. 2d 218, 397 P.2d 1001, 42 Cal. Rptr. 9 (holding contentions raised and rejected on appeal cannot be renewed in petition for habeas corpus), *cert. denied*, 382 U.S. 853 (1965).

In re Dixon, 41 Cal. 2d 756, 264 P.2d 513 (1953) (holding, in absence of special circumstances, habeas corpus not available where the claimed errors could have been but were not raised on appeal).

California Statutes:

Cal. Penal Code § 1475 (West 2000) (granting successive habeas applications).

California Rules:

Sup. Ct. Policies Regarding Cases Arising from Judgments of Death–Policy 3.1 (providing timeliness standards for capital habeas petitions).

Execution

California Penal Code § 3603 requires that all death judgments be executed at San Quentin State Prison. Capital male inmates are usually housed at San Quentin. Effective January 1, 2002, the California Legislature amended California Penal Code § 3600 to provide that inmates who commit certain enumerated offenses while incarcerated or order others to commit such offenses as members of a prison gang will be housed in secure condemned inmate housing at the California State Prison in Sacramento and that condemned inmates whose medical or mental conditions are so critical as to endanger themselves or others may be housed at the California Medical Facility or other appropriate institution. Capital female inmates are held at the Central California Women's Facility in Chowchilla. At least three days prior to the day of execution, they are transferred to San Quentin.

Upon notification that the supreme court has affirmed a capital sentence on automatic appeal, the superior court in which the conviction was rendered enters an order establishing the day of execution and issues a warrant to the state prison warden. The court sets the execution day between sixty and ninety days from the date of the court's order. The convicting court also may issue an order and death warrant setting the execution date between thirty and sixty days from the issuance of the order when a death judgment remains outstanding for any reason other than pendency of an automatic appeal. In either scenario, the prisoner may not appeal the order fixing the time for execution. Rule 4.315 of the California Rules of Court requires that an execution date be set at a public court session at which the defendant and the state are represented. The court must provide at least ten days' notice of the hearing to the attorney general, the district attorney, the defendant, defendant's counsel (or, if none,

counsel who most recently represented the defendant on appeal or in postconviction legal proceedings), and the executive director of the California Appellate Project.

The legislature amended California's Penal Code in 1992 to provide that the death penalty can be inflicted either by lethal gas or lethal injection at the election of the inmate; prior to that amendment, lethal gas was the method of administering the death penalty. In 1996, the legislature amended the code to provide for execution by lethal injection in the event the inmate declines to elect an execution method. Although the Ninth Circuit held that execution by lethal gas was cruel and unusual punishment, *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996), the U.S. Supreme Court vacated the decision and remanded with instructions for the Ninth Circuit to consider the decision in light of the statutory changes. *See Gomez v. Fierro*, 519 U.S. 918 (1996). The California Supreme Court held the 1996 amended statute constitutional in *People v. Bradford*, 14 Cal. 4th 1005, 929 P.2d 544, 60 Cal. Rptr. 2d 225 (1997).

California Penal Code § 3605 requires the warden to be present at the execution. The warden also is required to invite two physicians, the attorney general, the victim's family, and at least twelve "reputable" citizens. If the defendant requests, the warden additionally must permit the presence of up to two spiritual counselors and up to five relatives or friends selected by the defendant. Effective January 1, 2002, the California Legislature amended California Penal Code § 3605 to provide that (1) no physician or any other person invited to witness an execution, whether or not employed by the Department of Corrections, may be compelled to attend the execution; (2) any physician's attendance is voluntary; and (3) any person's refusal to attend the execution may not be used in any disciplinary action or negative job performance citation. The Ninth Circuit has held that a prison procedure limiting public viewing to the time after administrators insert the IV into the prisoner unconstitutionally restricts the public's First Amendment right to view executions from the moment the inmate is escorted into the execution chamber. *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002).

United States Supreme Court:

Gomez v. Fierro, 519 U.S. 918 (1996) (vacating Ninth Circuit opinion declaring lethal gas unconstitutional, remanding in light of amended California Penal Code § 3604

allowing choice of method of execution and requiring death by lethal injection if prisoner declines to choose).

Ninth Circuit:

Morales v. Hickman, 438 F.3d 926 (9th Cir. 2006) (per curiam) (holding that district court did not abuse its discretion in modifying lethal injection protocol to give State of California the option of allowing an anesthesiologist to monitor and verify that inmate remained unconscious throughout the execution procedure).

Beardslee v. Woodford, 395 F.3d 1064 (9th Cir.) (per curiam) (denying motion for stay of execution in § 1983 action alleging that prisoner's execution pursuant to California's lethal injection protocol would constitute cruel and unusual punishment, the court held that given undisputed evidence that death or unconsciousness is likely to occur prior to administration of pancuronium bromide and lack of showing of any unique risk to him in limited record, district court did not abuse its discretion in denying preliminary injunction; also rejecting prisoner's First Amendment claim that administration of pancuronium bromide would prevent him from audibly expressing his pain), *cert. denied*, 125 S. Ct. 982 (2005).

Cooper v. Rimmer, 379 F.3d 1029 (9th Cir. 2004) (affirming the district court's order denying prisoner's motion for preliminary injunction in his action under 42 U.S.C. § 1983, seeking to prevent his execution in accordance with California's lethal injection protocol, the court held that prisoner failed to show that he was subject to an unnecessary risk of unconstitutional pain or suffering such that his execution by lethal injection must be restrained; noting that the Ninth Circuit had previously upheld the constitutionality of lethal injection as a method of execution as to executions in Arizona, the court said that the prisoner made no case that there were material differences in California's process).

California First Amendment Coalition v. Woodford, 299 F.3d 868 (9th Cir.2002) (holding prison procedure limiting public viewing of lethal injection execution to time after IV was inserted into condemned inmate was exaggerated, unreasonable response to prison official's legitimate concerns for safety of prison staff and violates public's First Amendment right to view executions; affirming permanent injunction prohibiting defendants from prohibiting uninterrupted viewing of executions from moment condemned inmate enters execution chamber until condemned inmate is declared dead).

Fierro v. Terhune, 147 F.3d 1158 (9th Cir. 1998) (remanding to district court with instruction to vacate prior judgment, subject to reinstatement on motion of inmate who

has standing to challenge execution by lethal gas).

Fierro v. Gomez, 77 F.3d 301 (9th Cir.) (affirming district court ruling that execution by lethal gas is unconstitutional), *vacated and remanded*, 519 U.S. 918 (1996).

California Supreme Court:

People v. Bradford, 14 Cal. 4th 1005, 929 P.2d 544, 60 Cal. Rptr. 2d 225 (1997) (holding California Penal Code § 3604(b), as amended in 1996, constitutional because it permits an election by persons sentenced to death to have punishment imposed by either lethal gas or lethal injection and provides for death by lethal injection if the prisoner chooses not to elect execution method).

California Court of Appeal:

Thorburn v. California Dep't of Corrections, 66 Cal. App. 4th 1284, 78 Cal. Rptr. 2d 584 (1998) (holding physician participation in executions is not unprofessional conduct within the meaning of California Business and Professional Code).

California Statutes:

Cal. Penal Code § 1193 (West Supp. 2006) (providing for superior court order and warrant for execution date).

Cal. Penal Code § 1227 (West 1982) (providing for superior court order on unexecuted death judgment).

Cal. Penal Code §§ 3600–3607 (West 2000 and West Supp. 2006) (providing designation of prison; delivery of female inmates; location, method, and election of execution; witnesses to execution).

California Rules:

Cal. R. Ct. 4.315, as renumbered effective Jan. 1, 2001 (providing that execution date set at a public court session).

Competency for Execution

California capital punishment law forbids execution of an insane or pregnant inmate.

Therefore, once an execution date is set, three psychiatrists employed by the department of corrections examine the prisoner's sanity and report their opinions to the governor at least twenty days prior to the execution date.

Additionally, if at any time the prison warden believes a death-eligible inmate is insane, the warden must notify the district attorney of the county where the prison is located. The district attorney then must file a petition in superior court for an inquiry into the prisoner's sanity. The court is required to hold a jury trial on the sanity determination.

The warden has considerable discretion to trigger an inquiry into the prisoner's sanity. State law presumes that the warden will correctly determine whether there is good reason to question the prisoner's sanity at the time the prisoner is delivered for execution.

If the medical institution determines that the inmate is sane, it must certify this determination to the superior court that declared the prisoner insane. Upon receiving the certification, the court holds a bench trial to determine whether the inmate is sane. The court certifies its sanity finding to the governor, who is required to issue an execution warrant to the prison warden who must proceed with the execution. However, if the judge concludes that the defendant is still insane, the court orders that the prisoner be placed in the Department of Correction's medical facility until sanity is restored.

Three doctors examine an allegedly pregnant inmate and certify their findings to the superior court. If the inmate is pregnant, the superior court orders the warden to suspend the execution. Upon notification that the inmate is no longer pregnant, the governor issues an execution warrant.

California Supreme Court:

People v. Kelly, 1 Cal. 4th 495, 822 P.2d 385, 3 Cal. Rptr. 677 (stating state may not constitutionally execute insane person), *cert. denied*, 506 U.S. 881 (1992).

McCracken v. Teets, 41 Cal. 2d 648, 262 P.2d 561 (1953) (stating warden is presumed to correctly determine whether there is good reason to question prisoner's sanity at time of execution).

California Statutes:

Cal. Penal Code § 3700.5 (West 2000) (providing sanity investigation of all persons sentenced to death, report to governor, warden, counsel).

Cal. Penal Code § 3701 (West 2000) (providing warden's notice to district attorney upon good cause; jury trial).

Cal. Penal Code § 3702 (West 2000) (providing hearing, subpoena power).

Cal. Penal Code § 3703 (West 2000) (providing commitment to medical facility upon verdict).

Cal. Penal Code § 3704 (West 2000) (providing certification if sanity recovered, hearing, governor's warrant).

Cal. Penal Code §§ 3705–06 (West 2000) (providing procedures when inmate is pregnant).

Stays of Execution

The statutorily-mandated appeal automatically stays a judgment of death. Once the court has affirmed the judgment on direct appeal, a date for execution of a judgment of death may be set only at a public hearing, and all interested parties must be given at least ten days' notice prior to the hearing. Cal. R. Ct. 4.315(a).

If the supreme court affirms a judgment and sentence of death, the superior court may, on its own motion, and shall, on the motion of the district attorney, set an execution date. The date of execution must be at least sixty, but not more than ninety, days after the date of the order. If the direct appeal is no longer pending and the judgment of death remains valid but has not been executed, on the motion of the district attorney, the trial court shall set a date for the execution of the judgment of death at least thirty, but not more than sixty, days after the date of the order. Cal. Penal Code §1227. Alternatively, the trial court may set an execution date on its own motion. An order fixing the time for execution of a death judgment is not an appealable order. Cal. Penal Code §§ 1193, 1227.

The supreme court has authority to stay an execution upon a motion submitted in connection with a petition for writ of habeas corpus or to permit certiorari

review by the U.S. Supreme Court. The prison warden also may stay an execution upon cause to believe the inmate is insane or pregnant. Finally, the governor has the power to grant a stay in connection with clemency proceedings. However, if the governor grants a reprieve and then denies clemency, the execution must be carried out on the day immediately after the period of the stay without further judicial proceedings.

California Statutes:

Cal. Penal Code § 1193 (West Supp. 2006) (setting execution date; order fixing time for execution of a death judgment is not an appealable order).

Cal. Penal Code § 1227 (West 1982) (providing if direct appeal is no longer pending and judgment of death remains valid but has not been executed, on motion of district attorney, trial court shall set a date for execution of judgment of death at least thirty, but not more than sixty, days after date of order; order fixing time for execution of death judgment is not an appealable order).

Cal. Penal Code § 1227.5 (West 1982) (setting execution after governor's reprieve or denial of clemency).

Cal. Penal Code § 1243 (West Supp. 2006) (providing stay of death judgment on appeal to supreme court).

Cal. Penal Code § 3700 (West 2000) (providing for executive clemency, governor's power to stay execution; no stay unless appeal is taken).

California Rules:

Cal. R. Ct. 30.2(b), (d) (providing stay of judgment on appeal to supreme court).

Cal. R. Ct. 4.315(a) (providing that once judgment is affirmed on direct appeal, date for execution for judgment of death may be set only at public hearing, and all interested parties must be given at least ten days' notice prior to hearing).

Sup. Ct. Policies Regarding Cases Arising from Judgments of Death–Policy 1 (addressing stay of execution related to habeas corpus petition and Supreme Court certiorari proceedings).

Sup. Ct. Internal Practices & Procedures XIV(F) (requiring supreme court to rule on

stays of execution at weekly meetings).

Clemency Procedures

The California Constitution grants clemency power to the governor subject to application procedures provided by statute. In capital cases, the governor's power is entirely discretionary. Section 1218 of the California Penal Code requires a court that imposed a death judgment automatically to transmit to the governor a copy of the judgment, conviction, and record.

The governor may seek the assistance of the Board of Prison Terms, which comprises nine commissioners appointed by the governor with senate confirmation, to investigate and report on clemency applications. The Board has broad latitude to conduct a complete investigation. In addition to reviewing the record, the commissioners may take testimony and examine witnesses. Both the governor and the Board of Prison Terms may request the prosecutor and the trial court to furnish statements of fact, grounds, and recommendations for granting or denying clemency. If an applicant is a twice-convicted felon, California Penal Code § 4802 requires the governor to refer the matter to the Board of Prison Terms for recommendation.

The Board of Prison Terms may also initiate clemency proceedings without receiving an application. Under California Penal Code § 4801, the Board may report to the governor the names of any persons it recommends to receive clemency. If the Board of Prison Terms recommends relief in favor of the applicant, or if the governor independently chooses relief in favor of an applicant, the supreme court also submits a recommendation on the application. A favorable supreme court recommendation requires the endorsement of four justices. Although a favorable supreme court recommendation normally is required for the governor to grant clemency to a twice-convicted felon, since 1996, this limitation on the governor's power no longer applies to capital defendants.

The supreme court is statutorily required to review any application receiving a favorable recommendation by the Board of Prison Terms in addition to any application specially referred by the governor.

At the beginning of every legislative session, the governor must provide the legislature with an accounting of any reprieve, commutation, or pardon, including the

name of the person, the crime, and the date of clemency.

United States Supreme Court:

Shick v. Reed, 419 U.S. 256 (1974) (defining pardoning powers as intending to include powers to commute sentences on conditions that do not offend the Constitution).

California Supreme Court*:*

In re Collie, 38 Cal. 2d 396, 240 P.2d 275 (1952) (stating governor's power includes conditional pardon), *cert. denied*, 345 U.S. 1000 (1953).

California Statutes:

Cal. Const. art. V, § 8 (providing for governor's clemency power).

Cal. Penal Code § 1218 (West 1982) (providing for statement transmitted to governor).

Cal. Penal Code § 1219 (West 1982) (providing for opinion of supreme court justices and attorney general on statement).

Cal. Penal Code § 4800, *et seq.* (West 2000) (providing procedure for consideration of clemency applications).

Cal. Penal Code § 4852.01(d) (West 2000) (omitting capital defendants from prisoners subject to § 4852.16).

Cal. Penal Code § 4852.16 (West 2000) (limiting governor's power where defendant twice convicted of a felony).

Cal. Penal Code § 4850, *et seq*. (West 2000) (providing duties of supreme court regarding clemency applications).

Cal. Penal Code § 5075 (West 2000) (providing for Board of Prison Terms).

California Rules:

Sup. Ct. Internal Practices & Procedures XIV(A) (providing procedure for supreme court clemency recommendation).

IDAHO

History

Prior to 1973, Idaho's sentencing statutes provided for either a sentence of death or life imprisonment for capital offenses. In 1973, in response to *Furman v. Georgia*, 408 U.S. 238 (1972), the Idaho legislature amended the capital sentencing law to make the death penalty mandatory for all first degree murder convictions, in an attempt to eliminate any discretion on the part of the sentencer. The legislature also transferred the role of sentencing from the jury to the court.

In 1977, after mandatory death sentences were held unconstitutional in *Woodson v. North Carolina,* 428 U.S. 280 (1976), the Idaho legislature amended the sentencing statute to require the court to conduct a sentencing hearing at which all relevant information on aggravation and mitigation is presented prior to the court's determination of whether the death penalty should be imposed. In addition, the statutory scheme provides for mandatory review of all death sentences by the Idaho Supreme Court.

In 2003, in response to *Ring v. Arizona*, 536 U.S. 584 (2002) (see § 4.6.1.), the Idaho legislature amended the sentencing statute to provide that a sentencing proceeding be conducted before a jury unless the jury is waived by the defendant with the prosecuting attorney's consent (Idaho Code § 19-2515).

United States Supreme Court:

Ring v. Arizona, 536 U.S. 584 (2002) (holding that capital defendants are entitled to jury determination of any fact on which legislature conditions increase in their maximum punishment).

Woodson v. North Carolina, 428 U.S. 280 (1976) (declaring mandatory death sentences unconstitutional).

Furman v. Georgia, 408 U.S. 238 (1972) (holding unguided discretionary sentencing unconstitutional).

Idaho Supreme Court:

State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981) (stating that § 19-2827 mandates supreme court examine not only sentence but procedure followed in imposing sentence regardless of whether an appeal taken).

State v. Lindquist, 99 Idaho 766, 768, 589 P.2d 101, 103 (1979) (holding 1977 amendment to unconstitutional death penalty statute did not apply retroactively to defendant).

Idaho Statutes:

Idaho Code § 18-4004 (2004) (providing death or life imprisonment for first degree murder) (defining first degree murder).

Idaho Code § 19-2515 (2004) (providing for sentencing hearing for aggravation and mitigation evidence).

Idaho Code § 19-2827 (2004) (requiring automatic review of all death sentences by Idaho Supreme Court).

Capital Offenses

Section 18-4004 of the Idaho Code, as amended in 2003, provides that every person convicted of first degree murder must be sentenced to death or a fixed life sentence. Idaho also permits the imposition of a death sentence for first degree kidnaping or perjury resulting in the execution of an innocent person. Prosecution for the death penalty for the latter crimes, however, is rarely, if ever, pursued.

In 2003, following the decision in *Atkins v. Virginia*, 536 U.S. 304 (2002) (see § 1.6), the Idaho legislature enacted Idaho Code § 19-2515A, which prohibits the execution of the mentally retarded. "Mentally retarded" is defined as significantly subaverage general intellectual functioning, which in turn is defined as an I.Q. of 70 or below. The significantly subaverage general intelligence functioning must be accompanied by significant limitations in adaptive functioning and both must have had an onset before age 18.

Section 19-2515A of the Idaho Code provides that in any case where the

state has provided notice of an intent to seek the death penalty and where the defendant intends to claim he or she is mentally retarded, the defendant must give notice of such intention at least 90 before trial. On receipt of such notice the court must conduct a hearing promptly. If the court finds by a preponderance of the evidence that the defendant is mentally retarded, the death penalty may not be imposed.

United States Supreme Court:

Roper v. Simmons, 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed).

Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executing the mentally retarded violates the Eighth Amendment's prohibition against cruel and unusual punishment).

Idaho Statutes:

Idaho Code § 18-4003 (2004) (defining first degree murder).

Idaho Code § 18-4004 (2004) (providing death penalty or life imprisonment for first degree murder).

Idaho Code § 18-4502 (2004) (defining first degree kidnaping).

Idaho Code § 18-4504 (2004) (providing death sentence for first degree kidnaping unless kidnaped person liberated unharmed).

Idaho Code § 18-5411 (2004) (providing death penalty for perjury resulting in execution of innocent person).

Idaho Code § 19-2515A (2004) (prohibiting execution of mentally retarded person).

Representation in Capital Case

Idaho defendants have a statutory right to counsel during trial and appeal. Death-sentenced defendants also have the right to appointed counsel for representation during

their first postconviction relief proceeding. At the time the district court imposes a death sentence, it also appoints at least one attorney, other than trial counsel, for postconviction relief representation. Appointed counsel may also handle a defendant's appeal.

At the trial stage, the public defender represents indigent defendants. If the county does not have a public defender, contract attorneys provide representation. The amount of compensation paid to contract attorneys depends upon the complexity of the case.

In 1998, the Idaho legislature passed the State Appellate Public Defender Act to alleviate the fiscal burden of an indigent's legal representation on appeal. The appellate defender, appointed by the governor, provides representation for death-sentenced indigent defendants during their criminal appeals and postconviction relief proceedings. The act also created the capital crimes defense fund. Appellate defender representation is available only to counties who are members of this fund.

Also in 1998, the Idaho Supreme Court adopted Rule 44.3, which establishes standards for the qualification of appointed counsel in capital cases at all stages of representation. The rules went into effect on January 2, 2001.

Idaho Supreme Court:

Porter v. State, 139 Idaho 420, 80 P.3d 1021 (2003) (holding in capital case that fact that defendant's counsel during his first post-conviction proceedings was different from trial counsel satisfied requirement that he be afforded ability to consult with different counsel on appeal; also holding that claims of prosecutorial misconduct and ineffectiveness of counsel could not be raised on third post-conviction proceeding.

Idaho Statutes:

Idaho Code § 19-106 (2004) (providing that defendant entitled to counsel in criminal actions).

Idaho Code § 19-852 (2004) (providing for indigent defendant's entitlement to counsel).

Idaho Code § 19-860 (2004) (providing for establishment of county public defender's

office; representation and compensation by contract attorney).

Idaho Code § 19-863A (2004) (creating capital crimes defense fund).

Idaho Code § 19-867–872 (2004) (providing State Appellate Public Defender Act).

Idaho Code § 19-2719A (2004) (requiring court inquiry at sentencing into need for new postconviction counsel).

Idaho Code § 19-4904 (2004) (providing for district court's authority to appoint counsel for defendants for postconviction relief representation).

Idaho Rules:

Idaho Crim. R. 44 (providing criminal defendant's right to assignment of counsel).

Idaho Crim. R. 44.2 (requiring sentencing judge to appoint at least one attorney, other than trial counsel, for postconviction representation).

Idaho Crim. R. 44.3 (establishing competency standards for appointed capital defense counsel).

Trial of Capital Offenses

Idaho's trial court of general jurisdiction is the district court. This court exercises original jurisdiction over civil and criminal cases, including felonies, postconviction applications, and habeas corpus petitions.

Idaho's capital offense trials proceed in two steps: a guilt phase and a sentencing phase. Prior to 2003, if the jury convicted a defendant of a capital crime in the guilt phase, the court held a sentencing hearing and determined whether the death sentence should be imposed

In *Ring v. Arizona*, 536 U.S. 584 (2002) the Supreme Court held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. See § 4.6.1. In 2003, the Idaho legislature amended Idaho Code § 19-2515 to comply with *Ring*. The statute now provides that, where a notice of intent to seek the death penalty was filed as provided in Idaho Code § 18-4004A, and where a guilty plea or verdict is entered, the special

sentencing phase of a first degree murder case must be conducted before a jury unless a jury trial was waived by the defendant with the prosecuting attorney's consent. See discussion below "Capital Sentencing, Penalty Hearing."

United States Supreme Court:

Schriro v. Summerlin, 542 U.S. 348 (2004) (holding that *Ring v. Arizona* did not apply retroactively to cases already final on direct review; also holding that (1) that the *Ring* decision is properly classified as procedural, rather than substantive; and (2) the *Ring* rule does not fall under the second exception under *Teague* for watershed rules of criminal procedure).

Ring v. Arizona, 536 U.S. 584 (2002) (holding that capital defendants are entitled to jury determination of any fact on which legislature conditions increase in their maximum punishment; also holding that *Walton v. Arizona*, 497 U.S. 639 (1990) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) are irreconcilable and overruling *Walton* to extent that it allowed sentencing judge, sitting without jury, to find aggravating circumstance necessary for imposition of death penalty).

Ninth Circuit:

Hoffman v. Arave, 236 F.3d 523 (9th Cir. 2001) (declining to engage in a participatory overruling and holding that *Walton v. Arizona* forecloses Hoffman's *Apprendi*-based challenge to Idaho's capital sentencing scheme; *but see* Judge Pregerson's dissent holding that Idaho's sentencing scheme is unconstitutional in light of *Apprendi* but harmless error under in this case).

Idaho Supreme Court:

State v. Hoffman, 142 Idaho 27, 121 P.3d 958 (2005) (rejecting the contention that *Schriro v. Summerlin*, 542 U.S. 348 (2004), was not applicable to Idaho cases).

Porter v. State, 140 Idaho 780, 102 P.3d 1099 (2004) (reversing an order that had granted a petition for post-conviction relief in a capital case based on the retroactive application of *Ring v. Arizona,* the court rejected petitioner's contention that Idaho should apply a more lenient standard of retroactively to *Ring* than did the Supreme Court in *Schriro v. Summerlin), cert. denied,* 125 S. Ct. 2967 (2005).

Idaho Statutes:

Idaho Const. art. I, § 7 (1982) (providing right to jury trial).

Idaho Code § 18-4004A (2004) (requiring prosecutor to provide notice of intent to seek death penalty within 30 days of entry of plea; requiring notice to contain list of statutory aggravating circumstances on which state will rely; providing that jury be informed at start of jury selection if death penalty is not sentencing option).

Idaho Code § 19-2515(3)(a) (2004) prohibiting imposition of death sentence without notice of intent).

Idaho Rules:

Idaho Crim. R. 31 (requiring unanimous verdict).

Capital Sentencing

Penalty Hearing

In 2003 the Idaho legislature amended the statutory scheme in response to the decision of the Supreme Court in *Ring v. Arizona*, 536 U.S. 584 (2002). See § 4.6.1 for a discussion of *Ring*.

Formerly, the court heard all relevant evidence and arguments of counsel in aggravation and mitigation of the offense without jury participation. As amended in 2003, Idaho Code § 19-2515 provides that if a person is found guilty of first degree murder, whether by acceptance of a guilty plea, by a jury verdict, or by the court sitting without a jury, and if a notice of intent to seek the death penalty was filed, a special sentencing proceeding must be conducted before a jury unless a jury trial is waived with the prosecutor's consent. If the defendant's guilt was determined by a jury verdict, the same jury must hear the special sentencing proceeding unless it is impractical to reconvene the same jury due to an insufficient number of jurors. If a special sentencing proceeding is conducted before a newly impaneled jury, the state and defense may present evidence to inform the jury of the nature and circumstances of the murder.

Section 19-2515, as amended in 2003, provides that a sentence of death

cannot be imposed unless the jury, or the court if a jury is waived, finds beyond a reasonable doubt at least one statutory aggravating circumstance. Where a statutory aggravating circumstance is found, the defendant must be sentenced to death unless mitigating circumstances are found to be sufficiently compelling that the death penalty would be unjust. The jury must not direct imposition of a death sentence unless it unanimously finds at least one statutory aggravating circumstance and unanimously determines the death penalty should be imposed. If the jury finds the existence of a statutory aggravating circumstance and no mitigating circumstances, the defendant will be sentenced to death by the court.

The jury must return a special verdict stating whether the aggravating circumstances were proven beyond a reasonable doubt, and if so, when weighed against the aggravating circumstance, whether there are mitigating circumstances that are sufficiently compelling that the death penalty would be unjust.

If a jury trial was waived, the court must make written findings regarding any aggravating and mitigating factors it considers at the sentencing hearing. If the court finds that mitigating circumstances compel a life sentence, it must detail this finding in writing.

At the sentencing hearing all relevant evidence in aggravation and mitigation is admissible. Disclosure of evidence to be relied on must be made in accordance with Idaho Criminal Rule 16.

United States Supreme Court:

Lankford v. Idaho, 500 U.S. 110 (1991) (holding death sentence unconstitutional where state did not seek death penalty but trial court imposed it after a sentencing hearing in which the parties argued over concurrent or consecutive sentences).

Idaho Supreme Court:

State v. Fetterly, 137 Idaho 729, 52 P.3d 874 (2002) (noting that *Ring v. Arizona* appears to invalidate Idaho's death penalty scheme, which to this time has allowed the sentencing judge to make factual findings of the aggravating factors necessary to the imposition of a death sentence, while *Ring* requires those factual findings to be made by a jury; vacating death sentence and remanding to district court for resentencing following appeal of death sentence and petition for postconviction review).

State v. Hairston, 133 Idaho 496, 988 P.2d 1170 (1999) (holding trial court did not violate United States or Idaho constitutions by refusing to appoint a mitigation specialist).

State v. Creech, 132 Idaho 1, 966 P.2d 1 (1998) (holding no double jeopardy when trial court changed its findings at resentencing, when death sentence imposed at initial sentencing), *cert. denied,* 526 U.S. 1147 (1999).

State v. Charboneau, 116 Idaho 129, 774 P.2d 299 (holding district court must weigh all mitigating factors against each aggravating factor; mitigating circumstances must outweigh each aggravating factor), *cert. denied,* 493 U.S. 922 (1989), *overruled on other grounds*, *State v. Card*, 121 Idaho 425, *cert. denied*, 506 U.S. 915 (1992).

Idaho Statutes:

Idaho Code § 19-2515 (2004) (providing for capital sentencing procedure; requiring written findings of aggravation and/or mitigation; listing aggravating factors; requiring finding of at least one aggravating factor beyond a reasonable doubt; providing for presentence report only when no statutory aggravating circumstance is proven beyond reasonable doubt or when no special sentencing proceeding is held; providing for impanelment of new jury in some circumstances).

Idaho Code § 18-4505 (2004) (defining capital sentencing procedure for first degree kidnaping).

Idaho Rules:

Idaho Crim. R. 33.1 (defining court procedure in capital sentencing hearing).

Idaho Crim. R. 33.2 (requiring report on defendant's background).

Aggravating Circumstances

Idaho Code § 19-2519(9) specifies ten aggravating circumstances for first degree murder, one of which must be found beyond a reasonable doubt to sustain a sentence of death. These circumstances are as follows:

(1) defendant had a prior conviction of murder;

(2) defendant also committed another murder at the same time as the instant murder;

(3) defendant knowingly created a great risk of death to many persons;
(4) defendant committed murder for remuneration, promise of remuneration, or defendant employed another to commit the murder for remuneration or promise of remuneration;
(5) murder was especially heinous, atrocious or cruel, manifesting exceptional depravity;
(6) murder, or circumstances surrounding its commission, exhibited defendant's utter disregard for human life;
(7) defendant committed murder in perpetration or attempted perpetration of arson, rape, robbery, burglary, kidnaping, or mayhem and defendant killed, intended a killing, or acted with reckless indifference to human life;
(8) by prior conduct or in murder at hand, defendant exhibited propensity to commit murder which will probably constitute continuing threat to society;
(9) defendant committed murder of a peace officer, executive officer, officer of the court, judicial officer, or prosecuting attorney because of the exercise of official duty;
(10) defendant committed murder of a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.

Aggravating circumstances for first degree kidnaping are codified at Idaho Code § 18-4505.

In 2003, the Idaho legislature amended Idaho Code § 19-2515 in response to decision of the Supreme Court in *Ring v. Arizona*, 536 U.S. 584 (2002), in which the Supreme Court held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. See § 4.6.1. Section 19-2515(8) of the Idaho Code, as amended in 2003, provides that the jury must return a special verdict stating whether each statutory aggravating circumstance alleged has been proven beyond a reasonable doubt, and if so, whether all mitigating circumstances, when weighed against the aggravating circumstance, are sufficiently compelling that the death penalty would be unjust. If a jury trial has been waived, the court must make written findings setting forth any statutory aggravating circumstance found beyond a reasonable doubt, any mitigating circumstance considered, and, after weighing the mitigating circumstances against each statutory

aggravating circumstance, whether mitigating circumstances are found to be sufficiently compelling that the death penalty would be unjust.

United States Supreme Court:

Arave v. Creech, 507 U.S. 463 (1993) (holding aggravating factor "utter disregard for human life" is constitutional as narrowed by the Idaho Supreme Court in *Osborn*).

Ninth Circuit:

Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004) (per curiam) (holding that aggravating circumstance that murder was "especially heinous, atrocious or cruel, manifesting exceptional depravity" was not unconstitutionally vague where the Idaho Supreme Court construed the aggravator by relying in part on the limiting construction given to similar language by other states), *cert denied*, 125 S. Ct. 2540 (2005).

Idaho Supreme Court:

State v. Hairston, 133 Idaho 496, 988 P.2d 1170 (1999) (declining to address challenges to two of four aggravators found by sentencer where sentencer had found that mitigating factors did not outweigh any of the four found aggravating circumstances).

State v. Wood, 132 Idaho 88, 967 P.2d 702 (1998) (holding g(7) (presently codified as h(7)) aggravating factor not overbroad or arbitrary; g(7) (presently codified as h(7)) factor constitutional notwithstanding that it duplicates an element of first degree murder in § 18-4003), *cert. denied*, 526 U.S. 1118 (1999).

State v. Charboneau, 116 Idaho 129, 774 P.2d 299 (holding g(5) and g(6) (presently codified as h(5) and h(6)) not duplicative aggravating factors), *cert. denied,* 493 U.S. 922 (1989), *overruled on other grounds*, *State v. Card*, 121 Idaho 425, *cert. denied*, 506 U.S. 915 (1992).

State v. Sivak, 105 Idaho 900, 674 P.2d 396 (1983) (stating court need not apply beyond a reasonable doubt standard to weighing aggravating circumstances against mitigating circumstances), *cert. denied*, 468 U.S. 1220 (1984).

State v. Creech, 105 Idaho 362, 670 P.2d 463 (1983) (holding list of statutory aggravating factors not exclusive, but decision to impose death must be based on finding at least one statutory factor), *cert. denied*, 465 U.S. 1051 (1984).

State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981) (holding (g)(6) (presently codified as h(6)) statutory aggravating factor "utter disregard" interpreted as "cold-blooded, pitiless slayer," constitutional; (g)(5) (presently codified as h(5)) aggravating factor, as defined, also constitutional).

Idaho Statutes:

Idaho Code § 18-4505(6) (2004) (setting forth five aggravating circumstances for first degree kidnaping).

Idaho Code § 19-2515(9) (2004), *as amended by* 2005 Id. Laws, ch. 152, § 1 (enumerating aggravating circumstances for first degree murder).

Mitigating Circumstances

The Idaho capital sentencing statute enumerates no mitigating factors, reflecting the unlimited mitigation provision endorsed in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Section 19-2515 of the Idaho Code specifies that the jury, or the court if a jury trial is waived, should consider only "relevant" mitigating circumstances. The Idaho Supreme Court has held that § 19-2515 encompasses not only the defendant's conduct and circumstances surrounding the commission of the crime but also the conduct and character of the defendant as an individual apart from the crime. These factors may include defendant's background, age, upbringing, and environment, as well as any other considerations appropriate to a determination of the degree of defendant's culpability.

United States Supreme Court:

Eddings v. Oklahoma, 455 U.S. 104 (1982) (requiring mitigating evidence in capital sentencing).

Idaho Supreme Court:

State v. Row, 131 Idaho 303, 955 P.2d 1082 (holding when one statutory factor outweighs all mitigating factors, court not required to perform weighing against other established aggravating factors), *cert. denied,* 525 U.S. 967 (1998).

State v. Charboneau, 116 Idaho 129, 774 P.2d 299 (holding district court must weigh all mitigating factors against each aggravating factor; mitigating circumstances must outweigh each aggravating factor), *cert. denied* 493 U.S. 922 (1989), *overruled on other grounds, State v. Card*, 121 Idaho 425, *cert. denied*, 506 U.S. 915 (1992).

Sivak v. State, 112 Idaho 197, 731 P.2d 192 (holding that resentencing trial judge must permit defendant to introduce new mitigating evidence, including evidence of events taking place after first sentencing), *cert. denied*, 516 U.S. 1095 (1996).

State v. Creech, 105 Idaho 362, 670 P.2d 463 (1983) (holding that judge not required to reference each circumstance of mitigation in its findings when imposing death sentence), *cert. denied*, 465 U.S. 1051 (1984).

State v. Owen, 73 Idaho 394, 253 P.2d 203 (1953) (interpreting § 19-2515 to encompass defendant's character and background as possible mitigating factors).

Idaho Statutes:

Idaho Code § 19-2515(5) (2004) (requiring hearing considering all relevant aggravating and mitigating circumstances).

Appellate Review of Capital Sentences

The Idaho Supreme Court hears all appeals of trial court determinations in death penalty cases. The state court of appeals lacks the jurisdiction to hear cases involving extraordinary writs or capital appeals.

The supreme court considers the mandatory sentencing review and direct appeal, if any, in a consolidated proceeding. If the defendant seeks postconviction relief, the court also considers any appeal of the district court's denial of such relief in a consolidated proceeding. Section 19-2719 of the Idaho Code provides special procedures for appeals and petitions for postconviction relief in death penalty cases. Section 19-2827 provides the procedures for the supreme court's mandatory sentencing review.

The defendant has forty-two days from the filing of the death warrant to file a direct appeal. The supreme court initiates mandatory sentencing review upon receipt of the trial transcript. The parties have a right to brief submission and oral argument. On

mandatory review, the supreme court must determine: (1) whether the death sentence was imposed under passion or prejudice, or arbitrarily; (2) whether the record supports a finding of a statutory aggravating factor; and (3) whether the death sentence is excessive. By considering these factors, the Idaho Supreme Court reviews the imposition of a death sentence for constitutional error.

The supreme court may either affirm the death sentence, remand for resentencing by the district court, or remand for a new trial.

Ninth Circuit:

Beam v. Paskett, 3 F.3d 1301, 1306–07 (9th Cir. 1993) (holding supreme court is deemed to have implicitly reviewed imposition of death sentence for certain constitutional error even though defendant did not raise claims with specificity on appeal to supreme court), *cert. denied*, 511 U.S. 1060 (1994).

Idaho Statutes:

Idaho Const. art. V, § 9 (1994) (providing original and appellate jurisdiction of Idaho Supreme Court).

Idaho Code § 19-2719 (2004) (providing special procedures for appeals and petitions for postconviction relief in capital cases; all issues relating to conviction, sentence, and postconviction challenge must be considered in the same appellate proceeding).

Idaho Code § 19-2719(4), § 19-4901(a)(6) and § 19-4902(b)-(f) (2004) (providing special procedures for fingerprinting and DNA testing on evidence secured in respect to petitioner's trial that resulted in petitioner's conviction).

Idaho Code § 19-2827 (2004) (requiring and setting procedures for supreme court mandatory review of death sentences).

Collateral Remedies

The Idaho Code provides for a system of state postconviction review in capital cases designed to minimize successive petitions for relief. Section 19-2719 of the Idaho Code provides special postconviction procedures for capital cases. These procedures govern a death-sentenced defendant's use of Idaho's Uniform Post-Conviction

Procedure Act (Idaho Code §§ 19-4901–4911). Under § 19-2719, the defendant must make any collateral attack on the judgment before direct appellate review. The trial court files a death warrant forty-two days after judgment of death. The court stays this time period during the time the defendant makes a postconviction challenge. During this forty-two-day period before filing of the death warrant, the defendant must make a collateral challenge to the sentence or conviction or waives the right to do so. The district court has ninety days to hear any petition for collateral relief.

The time for filing of the direct appeal begins to run when the death warrant is filed. The defendant then takes any direct appeal and any appeal of the denial of postconviction relief to the supreme court.

The Ninth Circuit Court of Appeals has held that the forty-two day time limit violated the Sixth Amendment right to counsel. Consequently, the federal habeas court will hear any claims that were procedurally defaulted by the state court for not being raised within this time period. *Hoffman v. Arave*, 236 F.3d 523 (9th Cir.), *cert. denied*, 534 U.S. 944 (2001).

Ninth Circuit:

Hoffman v. Arave, 236 F.3d 523 (9th Cir.) (holding Idaho Code § 19-2719's forty-two day statute of limitations for filing a postconviction petition in a capital case violates the Sixth Amendment because it denies the petitioner any meaningful review of his ineffective assistance of counsel claims, *cert. denied*, 534 U.S. 944 (2001).

Idaho Statutes:

Idaho Code § 19-2719 (2004) (providing special postconviction procedures for capital cases; defendant must make collateral attack before direct review; trial court must file death warrant forty-two days after death judgment; stay during time postconviction action pending; if no collateral challenge to sentence or conviction during forty-two-day period, challenges deemed waived; district court has ninety days to hear petition; after death warrant filed, time for filing direct appeal begins to run and any appeal may be taken to supreme court).

Idaho Code §§ 19-4901–4911 (2004) (setting forth postconviction procedures).

Habeas Corpus

The writ of habeas corpus is a remedy recognized and protected by the Idaho Constitution. Article I, § 5. The legislature may enact statutes to promote the efficiency of proceedings, but may not limit this remedy secured by the Idaho Constitution. *Mahaffey v. State*, 87 Idaho 228, 231, 392 P. 2d 279, 280 (1964).

Prior to 1999, the Idaho habeas corpus statute, Idaho Code § 19-4201, provided that "[e]very person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." In 1999, the Idaho legislature repealed the habeas corpus statute, and replaced it with a series of statutes comprising the "Idaho Habeas Corpus and Institutional Litigation Procedures Act," Idaho Code § 19-4201, *et seq*. Currently, Idaho Code § 19-4203 delineates five specific categories of claims that may be brought by an in-state prisoner in a habeas corpus petition: (a) conditions of confinement; (b) revocation of parole; (c) miscalculation of sentence; (d) loss of good time credits; or (e) a detainer lodged against him or her.

In Idaho, a petitioner challenging the validity of his conviction is required to use the post-conviction petition procedure rather than habeas corpus to raise such issues. *Dionne v. State*, 93 Idaho 235, 237, 459 P.2d 1017, 1019 (1969). The Idaho Supreme Court has construed the postconviction relief statute as an expansion, not a limitation, of the writ of habeas corpus. *Id.*

Idaho Supreme Court:

Mahaffey v. State, 87 Idaho 228, 392 P. 2d 279 (1964) (holding legislature may not limit remedy of habeas corpus, but may enact statutes to promote efficiency of proceedings).

Still v. State, 95 Idaho 766, 519 P. 2d 435 (1974) (holding Uniform Post-Conviction Procedure Act is expansion of constitutional habeas remedy and therefore properly replaces it).

Dionne v. State, 93 Idaho 235, 459 P.2d 1017 (1969) (holding that petitioner challenging validity of conviction must use post-conviction petition procedure rather than habeas corpus).

Idaho Statutes:

Idaho Const. art. I, § 5 (providing constitutional remedy of habeas corpus).

Idaho Code §§ 19-4201 - 19-4226 (2004) (providing Idaho Habeas Corpus and Institutional Litigation Procedures Act)

Idaho Code § 19-4901(b) (2004) (providing that Uniform Post-Conviction Procedure Act replaces proceedings in habeas corpus).

Postconviction Relief

Since 1967, Idaho has had in place the Uniform Post-Conviction Procedure Act, which replaces all common law or statutory remedies as the sole procedural device available to challenge the validity of a conviction or sentence. Idaho Code § 19-4901, *et seq*. Proceedings under the Uniform Post-Conviction Procedure Act are distinct from the criminal action that resulted in the conviction; as a result, state rules of civil procedure govern the proceedings.

Grounds for relief under the Uniform Post-Conviction Procedure Act, as set forth in Idaho Code § 19-4901(a), include the following: (1) that the conviction or the sentence violates the federal or state constitution or laws of the state; (2) that the court was without jurisdiction to impose the sentence; (3) that the sentence exceeds the maximum authorized by law; (4) that there exists evidence of material facts, not previously presented and heard, requiring vacation of the conviction or sentence in the interest of justice; (5) that the sentence has expired, or that probation or conditional release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint; (6) subject to the provisions of Idaho Code § 19-4902(b) through (f), that the petitioner is innocent of the offense; and (7) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy.

Idaho Code § 19-2719 provides special postconviction procedures for capital cases. These special capital procedures are used in addition to the Uniform Post-Conviction Procedure Act; the special capital procedures supersede any conflicting

sections in the Uniform Post-Conviction Procedure Act. *McKinney v. State*, 133 Idaho 695, 992 P.2d 144 (1999), *cert. denied*, 530 U.S. 1208 (2000). The special capital procedures provide a different time limitation on filing, different appellate procedures, and different language regarding waiver of claims. See *supra* "Collateral Remedies."

Idaho Code § 19-4903 requires a petitioner to include specific content in his postconviction petition; all facts within the petitioner's personal knowledge must be verified. If the petitioner is unable to supply affidavits, records, or other evidence supporting the allegations of the petition, the petition must specify why they are not attached.

The district court where the conviction took place initially hears the postconviction relief petition. Any court within that district may hear the petition. The Uniform Post-Conviction Act requires the state to reply to the petition within thirty days or such further time as fixed by the court. The special death penalty procedures require the court to decide the petition within 90 days after filing, unless extraordinary circumstances exist.

After reviewing the postconviction petition and record, if the court is satisfied that the petitioner is not entitled to post-conviction relief and no purpose would be served by any further proceedings, the court may indicate that it intends to dismiss the application and must indicate the reasons therefor. The petitioner then has 20 days to reply to the proposed dismissal. After reviewing the reply, or if none is filed, the court may order the petition dismissed, grant leave to file an amended petition, or direct that the proceedings otherwise continue. Summary dismissal is appropriate where it appears from the petition and from accompanying documentary evidence that there is no genuine issue of material fact and that the respondent is entitled to judgment as a matter of law.

If a genuine issue of material fact exists, the court holds an evidentiary hearing, and may receive proof by affidavit, deposition, oral testimony, or other evidence, and may order the petitioner to appear at the hearing. Idaho Code § 19-4907(a). When the court grants a hearing on a sentence challenge, the petitioner should be present at the hearing if there are "substantial issues of fact as to the evidence in which he participated." Idaho Code § 19-4907(b).

Idaho Supreme Court:

Pizzuto v. State, 134 Idaho 793, 10 P.3d 742 (2000) (affirming dismissal of third amended petition for postconviction relief as facially insufficient because allegation was one of withheld impeachment evidence).

McKinney v. State, 133 Idaho 695, 992 P.2d 144 (1999), *cert. denied*, 530 U.S. 1208 (2000) (holding that special capital procedures of Idaho Code § 19-2719 supersede any conflicting sections in the Uniform Post-Conviction Procedure Act).

State v. Hairston, 133 Idaho 496, 988 P.2d 1170 (1999) (finding trial court did not abuse its discretion declining to appoint two attorneys in capital defendant' s postconviction relief proceeding).

Idaho Statutes:

Idaho Code § 19-853(b) (2004) (notifying that defendant's right to court-appointed counsel for uniform postconviction relief cases is with the discretion of the court pursuant to § 19-4904).

Idaho Code § 19-2719 (2004) (providing special postconviction procedures for capital cases; defendant must make collateral attack before direct review; trial court must file death warrant forty-two days after death judgment; stay during time postconviction action pending; if no collateral challenge to sentence or conviction during forty-two-day period, challenges deemed waived; district court has ninety days to hear petition, extended upon showing that fair consideration impossible; after death warrant filed, time for filing direct appeal begins to run, and any appeal may be taken to supreme court).

Idaho Code § 19-2719(4), § 19-4901(a)(6) and § 19-4902(b) - (f) (2004) (providing special procedures for fingerprinting and DNA testing on evidence secured in respect to petitioner's trial that resulted in petitioner's conviction).

Idaho Code §§ 19-4901 – 4911 (2004) (providing postconviction procedures).

Idaho Rules:

Idaho Crim. R. 57 (providing form for postconviction relief petition).

Appellate Review of Collateral Proceedings

Either party may appeal the district court's final postconviction judgment to the Idaho Supreme Court within forty-two days from entry of the judgment. Under Idaho Code § 19-2719(6), however, the appeal in a capital case must be consolidated with the appeal from the conviction and sentence. The state supreme court reviews the district court's postconviction order under a clearly erroneous standard.

Idaho Supreme Court:

Holmes v. State, 104 Idaho 312, 658 P.2d 983 (1983) (applying clearly erroneous standard to supreme court review of postconviction order).

Idaho Statutes:

Idaho Code § 19-2719(6) (2004) (consolidating appeal of collateral proceedings with appeal of conviction and sentence).

Idaho Code § 19-4909 (2004) (stating final judgment under Post-Conviction Act may be reviewed on appeal by either party within forty-two days of judgment).

Idaho Rules:

Idaho Appellate R. 14 (requiring notice of appeal to be filed in district court within forty-two days of death warrant filing).

Procedural Bars/Waivers/Exhaustion

The Idaho Code has various waiver and other limiting provisions governing the failure of a party to make objection or to pursue a claim under the procedures set forth under state law. The special capital procedures specify that the failure to assert a claim for relief within 42 days after judgment acts as a waiver of any claim he or she knew or reasonably should have known existed. The courts have no power to consider or grant relief on any such waived claims. Idaho Code § 19-2719(5).

Idaho courts have consistently applied the special capital procedures set forth in Idaho Code § 19-2719(5) to bar "any legal or factual challenge to the sentence or

conviction that [was] known or reasonably should [have been] known" within 42 days after judgment. In *Paz v. State*, 123 Idaho 758, 852 P.2d 1355 (1993), the Idaho Supreme Court extended the reach of § 19-2719(5)(a), holding that claims that were not known or could not have reasonably been known within 42 days of judgment must be asserted within a "reasonable time" after they are known. In *Dunlap v. State*, 131 Idaho 576, 577, 961 P.2d 1179, 1180 (1998), the Idaho Supreme Court held that a two-year delay in filing was reasonable. There, the defendant did not know the difference between an appeal and postconviction relief until his postconviction counsel informed him, and he did not know that his first attorney had failed to file a postconviction relief petition.

The special capital procedures severely limit the filing of successive postconviction petitions. Idaho Code § 19-2719(5)(a) through (c). Successive petitions not falling into one of the specified exceptions must be summarily dismissed. Such a summary dismissal is not subject to a motion to alter, amend, or reconsider, and it is not appealable. These procedures are currently being challenged in the Idaho Supreme Court by death penalty petitioners asserting that they should be able to bring sentence challenges based upon *Ring v. Arizona* in a successive postconviction petition.

In contrast to the special capital procedures, the Uniform Post-Conviction Act has a more liberal successive petition provision for noncapital petitioners, who may use a successive proceeding to assert claims "which for sufficient reason [were] not asserted or [were] inadequately raised in the original, supplemental, or amended application. Idaho Code § 19-4908.

In a capital case, the defendant has exhausted all state remedies only after the defendant has asserted or waived any postconviction challenges, the state supreme court has completed its mandatory review and issued a remittitur, and the district court has set an execution.

When a federal court returns a death sentence to the state courts for further proceedings, Idaho Code § 19-2818 requires the Idaho Supreme Court to consider whether it can correct any legal or factual error without further remand to the state district court.

Idaho Supreme Court:

Porter v. State, 136 Idaho 257, 32 P.3d 151 (upholding trial court's dismissal of defendant's second postconviction petition, finding that three-year span from date of filing of first appellate brief to assertion of current claims was unreasonable length of time; concluding that *Fields* did not per se bar consideration of claims, but also noting that second postconviction petition was filed one year after Federal Defenders' office was appointed to represent defendant for purposes of his federal habeas corpus petition and more than five months after his habeas petition was filed), rehearing denied, 136 Idaho 257, 32 P.3d 151 (2001).

Row v. State, 135 Idaho 573, 21 P.3d 895 (finding that where same counsel was prosecuting both appeal and simultaneous postconviction proceeding, to hold that counsel's failure to raise in the postconviction proceedings the alleged errors they were making while prosecuting appeal would effectively preclude defendant from ever having the opportunity to raise claim of ineffective assistance of appellate counsel; dismissing appeal from summary dismissal of second application for postconviction relief and request for habeas corpus relief on alternate basis that petition, which listed various issues that defendant desired to raise regarding effectiveness of her appellate counsel, did not include, nor was it accompanied by, sworn statements setting forth material facts supporting the issue), *rehearing denied*, 135 Idaho 573, 21 P.3d 895 (2001).

Rhoades v. State, 135 Idaho 299, 17 P.3d 243 (2000) (finding claims based on newly discovered evidence not brought within reasonable time following discovery where none of claims brought earlier than six months from time of discovery), *rehearing denied*, 135 Idaho 299, 17 P.3d 243 (2001).

Fields v. State, 135 Idaho 286, 17 P.3d 230 (2000)(affirming trial court's dismissal of postconviction petition, holding that two and one-half year span between date first appellate brief filed and filing of postconviction petition asserting ineffective assistance of appellate counsel is an unreasonable length of time), *rehearing denied*, 135 Idaho 286, 17 P.3d 230 (2001).

Sivak v. State, 134 Idaho 641, 8 P.3d 636 (2000) (affirming trial court's dismissal of third postconviction petition as procedurally barred because state's withholding of exculpatory evidence was cumulative and claim of prosecutorial misconduct should have been know at time of first petition), *rehearing denied*, 134 Idaho 641, 8 P.3d 636 (2000).

McKinney v. State, 133 Idaho 695, 992 P.2d 144 (1999) (holding that ineffectiveness of

postconviction counsel neither constitutes a separate basis for an additional postconviction proceeding nor justifies petitioner's failure to raise issues that should reasonably have been known at time of first petition).

Dunlap v. State, 131 Idaho 576, 961 P.2d 1179 (1998) (finding two-year delay in filing postconviction relief petition reasonable where defendant did not know his first attorney failed to file a timely postconviction relief petition).

Paradis v. State, 128 Idaho 223, 912 P.2d 110 (1996) (applying § 19-2719 to bar late claims)

Pizzuto v. State, 127 Idaho 469, 903 P.2d 58 (1995) (barring late claims under § 19-2719).

Paz v. State, 123 Idaho 758, 852 P.2d 1355 (1993) (holding claims not known or reasonably could have been known within forty-two days of judgment must be asserted within reasonable time).

Idaho Statutes:

Idaho Code § 19-2719(5) (2004) (providing that defendant deemed to waive claims if fails to apply timely for § 19-2719(3) appellate or postconviction relief; court may not consider any claims so waived).

Idaho Code § 19-2719(10) (2004) (requiring exhaustion of state remedies).

Idaho Code § 19-2719(11) (2004) (requiring dismissal of successive petitions).

Idaho Code § 19-2818 (2004) (providing for duties of supreme court upon federal remand).

Execution

The district court must file a death warrant forty-two days after its judgment imposing death or, if the defendant has initiated postconviction proceedings, forty-two days after the conclusion of such proceedings. The warrant must set forth an execution date no more than thirty days after the date of entry of the warrant. Rule 38(a) of the Idaho Criminal Rules mandates a stay of execution during any appeal or review. Section 19-2802 provides that an appeal to the supreme court stays the sentence in a capital case.

Any stay pursuant to § 19-2719 is dissolved upon remittitur, at which time the district court sets a new execution date.

Death-sentenced prisoners are housed at the Idaho Maximum Security Institution at Boise. In 2003 the Idaho legislature amended Idaho Code § 19-2705 to remove statutory restrictions regarding the imposition of solitary confinement on persons on death row. Section 19-2705 provides for solitary confinement of those prisoners on death row for whom a death warrant has been issued that has not been stayed. When a person has been sentenced to death, but the death warrant has been stayed, the warden is not required to hold such person in solitary confinement until the stay of the death warrant is lifted or a new death warrant is issued, but such prisoner must still be housed in maximum security. Prisoners subject to solitary confinement are allowed visits only with family members, their spiritual adviser, and their attorneys of records and those attorneys' agents.

The prisoner is put to death by lethal injection or, if the prison director finds lethal injection "impractical," by a firing squad.

Idaho Statutes:

Idaho Code § 19-2705 (2004) (providing warrant sets execution date no more than thirty days after date of warrant; providing for housing and visits for death row inmates)

Idaho Code § 19-2716 (2004) (providing lethal injection or firing squad as method of execution).

Idaho Code § 19-2718 (2004) (providing for return of death warrant by executioner).

Idaho Code § 19-2719 (2004) (setting forth district court filing of death warrant forty-two days after judgment imposing death).

Competency for Execution

Idaho death penalty statutes provide that a death-sentenced inmate who is pregnant may not be executed until the district court is satisfied that the inmate is no longer pregnant. Idaho does not have a statute addressing the competency of an inmate to be executed.

Idaho Statutes:

Idaho Code § 19-2713 (2004) (providing procedures to determine whether pregnancy exists).

Idaho Code § 19-2714 (2004) (providing procedures after determination of pregnancy).

Stays of Execution

Upon appeal of a capital conviction, the clerk of the Supreme Court of Idaho automatically enters a stay of execution to permit consideration of defendant's direct appeal, mandatory review, and appellate review of postconviction proceedings. If the supreme court upholds the sentence, the stay is dissolved when the court files a remittitur. The district court then sets a new execution date for not more than thirty days thereafter. The district court can reset the execution date without holding a hearing.

Idaho Statutes:

Idaho Code § 19-2715(2) (2004) (setting new execution date thirty days after remittitur when death sentence affirmed by supreme court).

Idaho Code § 19-2715(4) (2004) (providing that no hearing necessary when execution date reset).

Idaho Code § 19-2719(12) (2004) (setting automatic stay of execution during pendency of § 19-2719 review).

Idaho Code § 19-2802 (2004) (setting automatic stay of execution upon appeal to supreme court).

Idaho Rules:

Idaho Crim. R. 38(a) (requiring death sentence stayed during any appeal or review).

Clemency Procedures

Pursuant to the Idaho constitution, the governor appoints a five-member Commission of Pardons and Parole who make recommendations to the governor in capital cases regarding commutation or pardon. The Commission makes its recommendation only after extensive notice and public hearing. Any recommendation not approved by the governor within thirty days of submission is deemed denied.

The governor may grant reprieves or respites, including stays of execution. However, the duration of these executive stays do not extend beyond the next session of the Board of Pardons.

During the summer of 1996, the governor applied Idaho's clemency procedures for the first time to a capital case. After receiving a recommendation from the Commission, the governor commuted the death sentence of state prisoner Donald M. Paradis to fixed life.

Idaho Statutes:

Idaho Const. art. IV, § 7 (1986) (creating pardoning power; requiring public notice and hearing).

Idaho Code § 20-210 (2004) (creating Commission of Pardons and Parole).

Idaho Code § 20-240 (2004) (defining pardoning power of governor; limiting power of Commission under governor in capital cases; thirty-day limit for governor to grant approval of Commission's decision; duration of governor's reprieves or respites not to extend beyond next session of legislature).

MONTANA

History

In light of the U.S. Supreme Court's holding in *Furman v. Georgia*, 408 U.S. 238 (1972), Montana amended its capital sentencing law, which had allowed for complete, unguided sentencing discretion in determining either a sentence of death or life imprisonment for capital offenses. The legislature's 1973 amendment to the capital sentencing law sought to guide the sentencing authority's decision by eliminating any discretion on the part of the sentencer. The new law made the death penalty mandatory for anyone convicted of first degree murder.

In 1977, the Montana legislature, in response to the U.S. Supreme Court's holding in *Woodson v. North Carolina*, 428 U.S. 280 (1976), again amended its death penalty statute by enacting the current capital sentencing scheme. Montana Code § 46-18-301 provides for imposition of the death penalty only after a sentencing hearing where the sentencing court considers the aggravating and mitigating circumstances. However, in 2003 Montana Code § 46-18-302 was amended to provide that evidence of aggravating circumstances may not be considered at the sentencing hearing unless the trier of fact found beyond a reasonable doubt that aggravating circumstances existed. Montana Code § 46-18-301 provides for imposition of the death penalty only after a sentencing hearing where the sentencing court considers the aggravating and mitigating circumstances. Additionally, § 46-18-307 provides for mandatory supreme court review of all death sentences. Automatic review of death sentences is limited to the issues set forth in § 46-18-310(1)(a), (b), and (c).

United States Supreme Court:

Woodson v. North Carolina, 428 U.S. 280 (1976) (declaring mandatory death sentences unconstitutional).

Furman v. Georgia, 408 U.S. 238 (1972) (holding complete, unguided discretion capital punishment statute unconstitutional).

Montana Supreme Court:

State v. Coleman, 185 Mont. 299, 605 P.2d 1000 (1979) (*Coleman II*) (upholding constitutionality of Montana's bifurcated capital sentencing scheme), *cert. denied*, 446 U.S. 970 (1980).

State v. Coleman, 177 Mont. 1, 579 P.2d 732 (1978) (*Coleman I*) (finding Montana's mandatory death penalty statute unconstitutional in light of *Woodson*).

State v. Rhodes, 164 Mont. 455, 524 P.2d 1095 (1974) (finding pre-1973 capital punishment statute unconstitutional in light of *Furman* because statute provided for complete, unguided sentencing discretion).

Montana Statutes:

Mont. Code Ann. § 46-1-401 (2005) (providing penalty enhancements).

Mont. Code Ann. § 46-18-301 (2005) (requiring sentencing hearing after capital conviction to determine appropriate sentence).

Mont. Code Ann. § 46-18-302 (2005) (listing evidence that may be received at sentencing hearing; evidence introduced at guilt phase need not be reintroduced at penalty phase).

Mont. Code Ann. § 46-18-307 (2005) (requiring automatic review of death sentences by Montana Supreme Court, limited to issues set forth in § 46-18-310(a)-(c)).

Capital Offenses

Deliberate homicide is subject to capital punishment in Montana. Section 45-5-102 of the Montana Code defines deliberate homicide as (1) purposely or knowingly causing the death of another human being, or (2) death incident to a robbery, rape, arson, burglary, kidnapping, aggravated kidnapping, felonious escape, assault with a weapon, aggravated assault, or any other forcible felony. Deliberate homicide is punishable by death, life imprisonment, or a term of between ten to one hundred years.

The death penalty is also available upon a conviction for aggravated kidnapping. In 1997, the Montana legislature sanctioned the death penalty for a second

conviction for rape, provided the offender inflicted serious bodily injury upon the victim during each offense.

The 1999 legislature amended Montana Code § 46-18-220, which previously subjected state inmates to the death penalty if convicted of aggravated kidnapping, attempted deliberate homicide, aggravated assault or aggravated kidnapping while in state prison. The new law subjects anyone "in official detention" to the death penalty if convicted of an above-listed offense. Official detention is defined broadly. It includes any confinement or lawful detention, including detention pursuant to an arrest. The legislature also passed a law prohibiting the death penalty from being imposed upon a person less than 18 years old when the offense was committed.

The Montana Code does not currently prohibit execution of the mentally retarded. However, on June 20, 2002, the U.S. Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the execution of the mentally retarded constitutes cruel and unusual punishment prohibited by the Eighth Amendment. See § 1.6.

United States Supreme Court:

Roper v. Simmons, 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed).

Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executing the mentally retarded violates the Eighth Amendment's prohibition against cruel and unusual punishment).

Montana Statutes:

Mont. Code Ann. § 45-5-102 (2005) (defining deliberate homicide and punishment).

Mont. Code Ann. § 45-5-303 (2005) (providing death penalty for aggravated kidnapping).

Mont. Code Ann. § 45-5-503(3)(c) (2005) (providing death penalty for second aggravated rape offense).

Mont. Code Ann. § 46-18-220 (2005) (providing death sentence for person in official

detention committing attempted deliberate homicide, aggravated assault, or aggravated kidnapping).

Mont. Code Ann. § 45-2-101(50) (2005) (defining "official detention").

Representation in Capital Cases

On April 24, 1997, the Montana Legislature passed legislation directing the state attorney general to petition the supreme court for a court order establishing standards for competency of counsel appointed to represent death-sentenced indigents on their state postconviction proceedings. 1997 Mont. Laws ch. 378, § 7. In response to this petition, the supreme court established an advisory commission who submitted proposed competency standards in October 1998. The supreme court adopted these standards for competency on June 29, 1999, and they became effective on January 1, 2000. The standards provide for the appointment of two attorneys to represent a death-sentenced indigent at trial, appellate, and postconviction stages.

The legislation also requires the trial court within thirty days of sentencing to notify a death-sentenced indigent defendant of the right to appointed postconviction counsel who meet the supreme court's competency standards. Additionally, within seventy-five days from the date the death conviction becomes final, the sentencing court must appoint postconviction counsel unless the court determines after a hearing that the indigent defendant knowingly rejects counsel. The standards prohibit the court from appointing counsel who previously represented the defendant at any stage in the case unless the defendant and counsel agree to the appointment. Appointed counsel receive "reasonable compensation" and reasonable costs as determined by the court.

In 2005, the Montana Legislature passed the Montana Public Defender Act establishing a statewide public defender system and replacing the Appellate Defender Commission with a Public Defender Commission. Many of the provisions of the Act do not take effect until July 1, 2006.

Montana Statutes:

Mont. Code Ann. § 46-8-101 (2005), (providing for indigent criminal defendant right to counsel).

Mont. Code Ann. § 46-8-104 (2005) (providing appointment of postconviction counsel).

Mont. Code Ann. § 46-8-111 (2005), *repealed by* 2005 Mont. Laws, ch 449 § 74, effective 7/1/2006 (providing determination of indigence eligibility for court-appointed counsel); see 2005 Mont Laws, ch 449 establishing a statewide public defender system.

Mont. Code Ann. § 46-8-201 (2005), *repealed by* 2005 Mont. Laws, ch 449 § 74, effective 7/1/2006 (providing remuneration of court-appointed counsel); see 2005 Mont Laws, ch 449 establishing a statewide public defender system.

Mont. Code Ann. § 46-21-201(3) (2005), *amended by* 2005 Mont. Laws, ch 449 § 53, effective 7/1/2006 (requiring sentencing court, within specified time period, to appoint postconviction counsel pursuant to supreme court guidelines); see 2005 Mont Laws, ch 449 establishing a statewide public defender system.

Mont. Code Ann. § 46-21-201(3)(e) (2005), *amended by* 2005 Mont. Laws, ch 449 § 53, effective 7/1/2006 (requiring appointed counsel to be compensated as provided in § 46-8-201–compensation certified as reasonable by the supreme court); see 2005 Mont Laws, ch 449 establishing a statewide public defender system.

1997 Mont. Laws ch. 378, § 7 (requiring state attorney general to petition supreme court for competency standards).

Trial of Capital Offenses

Montana's trial court of general jurisdiction is the district court. The district court exercises original jurisdiction over civil and criminal cases, including felonies and postconviction proceedings. Capital trials are held in two phases, a guilt phase and a penalty phase. In any case in which death is a potential punishment if: (1) the defendant is found guilty; (2) an enhancing act was noticed in the information; and (3) the jury unanimously finds the enhancing act occurred beyond a reasonable doubt, the court holds a penalty phase to determine the defendant's sentence. General criminal trial procedures provided in Chapter 16 of Title 46 of the Montana Code apply to the guilt phase proceedings in a capital case. Also, a few rules and procedures apply specifically to capital cases: A juror who has conscientious objections to the death penalty may not serve on a capital case. Each side in a capital case has eight peremptory challenges, and the defendant's voluntary absence in a capital case

precludes the case from proceeding through the verdict.

Montana Supreme Court:

State v. Gollehon, 262 Mont. 1, 864 P.2d 249 (1993) (holding that death qualification of jury is constitutional), *cert. denied,* 513 U.S. 827 (1994).

Montana Statutes:

Mont. Code Ann. § 46-1-401 (2005) (providing penalty enhancements).

Mont. Code Ann. § 46-16-115(2)(h) (2005) (allowing challenge for cause in capital case where juror has conscientious objections to death penalty).

Mont. Code Ann. § 46-16-116 (2005) (providing each side in capital case eight peremptory challenges).

Mont. Code Ann. § 46-16-122(3) (2005) (voluntary absence of defendant precludes case from continuing through verdict in capital cases).

Capital Sentencing

Penalty Hearing

If the trier returns a verdict of guilty in a capital case, the court conducts a sentencing hearing to determine the aggravating and mitigating circumstances of the crime. This determination is made by the court alone. A jury does not participate in the sentencing process. In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. The Supreme Court reasoned that because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense" (*Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000), the Sixth Amendment requires that they be found by a jury. See § 4.6.1, for further discussion.

In 2003 Montana Code § 46-18-302 was amended, in response to *Ring v. Arizona*, to provide that evidence of an aggravating circumstance may not be considered at the sentencing hearing unless the defendant pleaded guilty and admitted

the aggravating circumstance or the trier of fact found beyond a reasonable doubt that the aggravating circumstance existed. Montana Code § 46-1-401 was also amended to provide that a penalty enhancement may not be imposed unless a defendant who knowingly and voluntarily pleaded guilty to an offense also admitted to the enhancing act, omission, or fact. The Legislature did not amend the language of Montana Code § 46-18-301, which provides for imposition of the death penalty only after a sentencing hearing where the sentencing court considers the aggravating and mitigating circumstances. At the capital sentencing hearing, the court hears evidence concerning the nature and circumstances of the crime; the defendant's character, background, history, and mental and physical condition; the harm caused to the victim and the victim's family as a result of the offense; and any other facts in aggravation or mitigation of the penalty. Mont. Code § 46-18-302. Evidence of an aggravating or mitigating nature introduced at the guilt phase of the trial need not be reintroduced at the sentencing phase. The court may receive any evidence of probative value, notwithstanding its admissibility under the rules of evidence.

After receiving this evidence, the court must impose a death sentence if the evidence shows that one or more aggravating circumstances exist and that no mitigating circumstance is "sufficiently substantial to call for leniency." If the court finds at least one aggravating factor but also finds that mitigating circumstances are sufficiently substantial to warrant leniency, it may impose a sentence for life or a term of years.

When the court imposes a sentence of death, the court must render specific written findings of fact as to the existence or nonexistence of each statutorily enumerated mitigating and aggravating circumstance. The court must pronounce sentence within 120 days of the verdict and is limited to one extension of time of up to sixty days.

Supreme Court:

Schriro v. Summerlin, 542 U.S. 348 (2004) (holding that *Ring v. Arizona* did not apply retroactively to cases already final on direct review).

Ring v. Arizona, 536 U.S. 584 (2002) (holding that capital defendants are entitled to

jury determination of any fact on which legislature conditions increase in their maximum punishment; also holding that *Walton v. Arizona*, 497 U.S. 639 (1990) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) are irreconcilable and overruling *Walton* to extent that it allowed sentencing judge, sitting without jury, to find aggravating circumstance necessary for imposition of death penalty).

Montana Supreme Court:

State v. Smith, 280 Mont. 158, 931 P.2d 1272 (1996) (holding death penalty statute that does not require court to find aggravating factor(s) beyond a reasonable doubt constitutional), *cert. denied*, 522 U.S. 965 (1997).

State v. Smith, 261 Mont. 419, 863 P.2d 1000 (1993) (expressing displeasure with district court's verbatim adoption of state's proposed findings but finding not inherently flawed to warrant reversal; stating written findings need not be filed contemporaneously with oral imposition of death penalty).

State v. Langford, 248 Mont. 420, 813 P.2d 936 (1991) (holding death penalty constitutional under state constitution; affirming *McKenzie*), *cert. denied*, 522 U.S. 1102 (1998).

State v. Smith, 217 Mont. 461, 705 P.2d 1087 (1985) (holding jury participation in capital sentencing not constitutionally required), *cert. denied*, 474 U.S. 1073 (1986).

State v. Smith, 211 Mont. 379, 704 P.2d 19 (1984) (finding statute imposes no affirmative duty on supreme court to predisclose to defendant cases it will consider in proportionality review).

State v. McKenzie, 186 Mont. 481, 608 P.2d 428 (holding death penalty does not violate Eighth Amendment or state constitution, as amended by the 1972 constitutional convention), *cert. denied*, 449 U.S. 1050 (1980).

Montana Statutes:

Mont. Code Ann. § 46-18-301 (2005) (providing capital penalty sentencing hearing conducted before court alone; providing 120-day time limit).

Mont. Code Ann. § 46-18-302 (2005) (listing evidence that may be received at sentencing hearing; evidence of aggravating circumstance may not be considered at sentencing hearing unless defendant pleaded guilty and admitted aggravating circumstance or trier of fact found beyond a reasonable doubt that aggravating

circumstance existed; evidence introduced at guilt phase need not be reintroduced at penalty phase).

Mont. Code Ann. § 46-18-305 (2005) (stating court at sentencing phase must impose death sentence if defendant pleaded guilt and admitted to, or trier of fact found beyond a reasonable doubt, one or more aggravating circumstances and court finds no mitigating circumstances sufficiently substantial to call for leniency).

Mont. Code Ann. § 46-18-306 (2005) (requiring written findings of fact).

Aggravating Circumstances

Section 46-18-303 of the Montana Code sets forth ten aggravating circumstances for the court's consideration:

(1) deliberate homicide committed while in official detention;
(2) deliberate homicide committed by an offender previously convicted of another deliberate homicide;
(3) deliberate homicide committed by torture;
(4) deliberate homicide committed by lying in wait or ambush;
(5) deliberate homicide committed as part of a scheme or operation which could cause death of more than one person;
(6) deliberate homicide committed during commission of rape, deviant sexual conduct, or incest, and victim was less than 18 years old;
(7) deliberate homicide of peace officer;
(8) aggravated kidnapping resulted in death of victim or death of victim's rescuer;
(9) attempted deliberate homicide, aggravated assault, or aggravated kidnapping committed while in official detention by an offender who was previously convicted of deliberate homicide or is a persistent felon; and
(10) rape committed by an offender previously convicted of rape and offender inflicted serious bodily harm upon victim in course of committing both offenses.

As amended in 2003, § 46-1-401 provides that the aggravating circumstances contained in § 46-18-303 are enhancing acts, omissions, or facts, except that use of the fact of one or more prior convictions for the same type of offense or for one or more

other types of offenses to enhance the penalty for a charged offense is not subject to the requirements of § 46-1-401.

Montana Supreme Court:

State v. Gollehon, 262 Mont. 1, 864 P.2d 249 (1993) (holding lower court's finding that conviction for deliberate homicide by accountability constituted deliberate homicide for aggravating factors determination was not error), *cert. denied*, 513 U.S. 827 (1994).

State v. Smith, 261 Mont. 419, 863 P.2d 1000 (1993) (holding constitutional § 46-18-303(5), defining a deliberate homicide committed as a part of a scheme or operation that, if completed, would have resulted in the death of more than one person).

State v. Langford, 248 Mont. 420, 813 P.2d 936 (1991) (holding sentencing court's consideration of lack of remorse as aggravating factor not error), *cert. denied*, 522 U.S. 1102 (1998).

State v. Keith, 231 Mont. 214, 754 P.2d 474 (1988) (finding that parolee does not qualify as person serving sentence of imprisonment under § 46-18-303; § 303(7) constitutionally narrows class of death-eligible defendants).

Montana Statutes:

Mont. Code Ann. § 46-1-401 (2005) (providing penalty enhancements).

Mont. Code Ann. § 46-18-303 (2005) (enumerating aggravating circumstances).

Mitigating Circumstances

Section 46-18-304 of the Montana Code sets forth seven specific statutory mitigating circumstances:

(1) lack of significant prior criminal activity;
(2) influence of extreme mental or emotional disturbance;
(3) extreme duress or substantial domination by another person;
(4) substantial impairment of defendant's capacity to appreciate criminality of conduct or to conform his or her conduct to the requirements of law;
(5) victim's participation in or consent to defendant's conduct;
(6) defendant's conduct was relatively minor participation as accomplice in

offense committed by another person;

(7) defendant was less than18 years of age;

In addition, the statute provides that the court may consider "any other fact that exists in mitigation of the penalty."

Ninth Circuit:

Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990) (holding that court applied § 403 unconstitutionally by not weighing and considering all mitigating circumstances together).

Montana Supreme Court:

State v. Sattler, 288 Mont. 79, 956 P.2d 54 (1998) (holding that court did not err in discussing each statutory mitigating factor in its findings, even when defendant did not raise each factor; court not required to make findings on each piece of proffered mitigating evidence).

State v. Smith, 280 Mont. 158, 931 P.2d 1272 (1996) (holding that proportionality evidence cannot be considered by sentencing court as a mitigating factor), *cert. denied*, 522 U.S. 965 (1997).

State v. Smith, 261 Mont. 419, 863 P.2d 1000 (1993) (holding postconviction conduct is relevant mitigation evidence; therefore, court erred resentencing defendant without ordering a current presentence report).

State v. Langford, 248 Mont. 420, 813 P.2d 936 (1991) (allowing lack of remorse as evidence of absence of mitigating factors; holding defendant's lack of prior violent criminal activity does not require sentencing leniency), *cert. denied*, 522 U.S. 1102 (1998).

State v. Dawson, 233 Mont. 345, 761 P.2d 352 (1988) (holding court did not err finding mitigating factor 304(1)(a), lack of significant history of prior criminal activity, but finding factor did not warrant leniency; prosecutor's comment regarding defendant's silence at trial was not an improper comment on defendant's failure to testify because reference was in response to defense presented at trial; finding that defendant has demonstrated no remorse or genuine concern or respect for human life was properly viewed as absence of a mitigating factor).

Fitzpatrick v. State, 194 Mont. 310, 638 P.2d 1002 (1981) (finding statute placing burden on defendant to prove mitigating circumstances in order to avoid penalty of death constitutionally sound because evidence in mitigation does not have to do with guilt or innocence).

Montana Statutes:

Mont. Code Ann. § 46-18-304 (2005) (listing mitigating factors).

Appellate Review of Capital Sentences

The Montana Supreme Court has appellate jurisdiction over final judgments of the district courts. Additionally, the court conducts an automatic, en banc review of every death sentence. The court considers the mandatory sentencing review and any direct appeal in a consolidated proceeding. The court's sentencing review is limited to determining: (1) whether the sentencing court imposed the death sentence under the influence of passion, prejudice, or any other arbitrary factor, (2) whether the evidence supports the court's finding of the existence or nonexistence of the aggravating or mitigating circumstances, and (3) considering both the crime and the defendant, whether the death sentence is excessive or disproportionate to the penalty that the court imposed in other § 46-18-310 sentencing hearing cases.

To assure that a death sentence is not disproportionate to the degree of the defendant's culpability for the victim's death, in 1996 the Montana Supreme Court rejected the U.S. Supreme Court's *Tison* analysis, adopting instead an *Enmund* proportionality analysis grounded in the state constitution. *See State v. Kills on Top*, 279 Mont. 384, 928 P.2d 182 (1996). Although the supreme court had affirmed the defendant's sentence on appeal in 1991, it reversed itself, as well as the defendant's death sentence, in the postconviction appeal.

Montana's Rules for Automatic Review of a Death Sentence consist of eleven rules defining the procedures involved in such review. The Rules require the county attorney to file in the district court a notice of automatic review within five days after a death sentence is imposed. Within sixty days after receiving certification of the trial court record, the supreme court initiates the automatic review. This time period can be extended for good cause. The automatic review has priority over other cases before the supreme court. The rules also provide to the parties the right to brief

submission and oral argument.

The defendant may appeal any final judgment of conviction as well as orders affecting the defendant's substantial rights. The supreme court cannot reverse a conviction on trial court error unless the record shows that the defendant suffers prejudice as a result of the error. On appeal, the supreme court may: (1) reverse, affirm, or modify a judgment or order; (2) set aside, affirm, or modify proceedings dependent upon the judgment or order from which the appeal was taken; (3) reduce an offense to a lesser included offense; (4) reduce the punishment imposed by the trial court; or (5) order a new trial.

Montana Supreme Court:

State v. Sattler, 288 Mont. 79, 956 P.2d 54 (1998) (holding that if one of several statutory aggravating factors found not to exist on appeal, court not required to reverse or remand as long as it finds inapplicability of factor does not render death penalty arbitrary or capricious).

State v. Smith, 280 Mont. 158, 931 P.2d 1272 (1996) (holding that supreme court's role in reviewing death sentence is not to reweigh aggravating and mitigating circumstances but rather to independently determine whether evidence supports trial court's findings; proportionality review does not violate due process), *cert. denied*, 522 U.S. 965 (1997).

State v. Kills on Top, 279 Mont. 384, 928 P.2d 182 (1996) (adopting *Enmund*-type proportionality analysis grounded in the state constitution and reversing death sentence), *reh'g denied* January 2, 1997.

State v. Smith, 261 Mont. 419, 863 P.2d 1000 (1993) (holding that remand for sentencing to different judge appropriate in death penalty case when error found relating to mitigation findings).

State v. Langford, 248 Mont. 420, 813 P.2d 936 (1991) (finding that automatic supreme court review prevents random or arbitrary imposition of the death penalty), *cert. denied*, 522 U.S. 1102 (1998).

Montana Statutes:

Mont. Const. art. VII, § 2 (providing for supreme court appellate jurisdiction).

Mont. Code Ann. § 46-18-307 (2005) (providing automatic review by supreme court of death sentences).

Mont. Code Ann. § 46-18-308 (2005) (providing sixty days for supreme court initiation of automatic review; consolidating automatic review and direct appeal if any; setting automatic review cases as priority).

Mont. Code Ann. § 46-18-310 (2005) (listing issues court shall determine on mandatory sentencing review; requiring clearly erroneous standard of review).

Mont. Code Ann. § 46-20-104 (2005) (defining scope of appeal by defendant).

Mont. Code Ann. § 46-20-701 (2005) (providing that no cause reversed unless showing of prejudicial error).

Mont. Code Ann. § 46-20-703 (2005) (listing action reviewing court may take).

Montana Rules:

Mont. R. Death Sent. Rev. 1 (stating violation of rules does not entitle party to relief unless right to a fair hearing is significantly prejudiced).

Mont. R. Death Sent. Rev. 2 (providing for notice of automatic review by county attorney within five days of death sentence).

Mont. R. Death Sent. Rev. 5 (limiting supreme court review to issues listed in § 46-18-310 unless defendant files notice of appeal).

Mont. R. Death Sent. Rev. 6, 7 (providing for briefs from parties and en banc oral argument on automatic appeal).

Collateral Remedies

Montana provides postconviction collateral relief for challenges to the validity of a conviction or sentence. Montana's postconviction review statute incorporates all common law remedies, including the writ of habeas corpus.

Postconviction Relief

An application for postconviction relief must allege that the sentence is in violation of the state or federal constitution or laws, that the sentencing court was without jurisdiction, or that the trial proceedings would have otherwise been subject to attack through a writ of habeas corpus or other common law writ.

A petition for postconviction relief is made to the sentencing court. It must be filed within one year of the date of conviction, or, if the claim is based on newly discovered evidence which would establish petitioner's innocence, within one year from the date the evidence is discovered or reasonably should have been discovered.

In a postconviction proceeding, the district court has the discretion to dismiss the petition on its face, dismiss the petition after briefing, or adjudicate the issues. The district court may receive proof by affidavit or deposition, or hold an evidentiary hearing. The rules of civil procedure apply in postconviction proceedings, to the extent they are applicable and are not inconsistent with the postconviction statute.

In death penalty cases, the court is required to promptly hold a conference to schedule an expeditious resolution of the proceeding. The court must issue its opinion within ninety days of any hearing or within ninety days of the submission of briefs if there is no hearing.

Montana Supreme Court:

State v. Redcrow, 294 Mont. 252, 980 P.2d 622 (1999) (holding that for statute of limitation purposes, conviction means the date of verdict).

Hawkins v. Mahoney, 294 Mont. 124, 979 P.2d 697 (1999) (setting forth 1997 amendment, precluding postconviction relief petitions from being filed in the supreme court and imposing new one-year statute of limitation that applies only to convictions that became final after April 24, 1997, or to convictions that became final between April 24, 1996, and April 24, 1997, if a petition was filed within one year after April 24, 1997 (quoting Compiler's Comments)).

Hagen v. State, 293 Mont. 60, 973 P.2d 233 (1999) (holding that nonrecord-based ineffective assistance of trial counsel and ineffective assistance of appellate counsel claims properly brought in a postconviction relief petition).

Gollehon v. District Court, 271 Mont. 363, 897 P.2d 1058 (1995) (holding, under former five-year statute of limitation, that state has right to seek execution of death sentence during five-year period within which postconviction petition can be filed).

Montana Statutes:

Mont. Code Ann. § 46-21-101(1) (2005) (providing grounds for postconviction collateral petition).

Mont. Code Ann. § 46-21-102 (2005) (providing that petition must be filed within one year of conviction or if claim based on newly discovered evidence within one year from date evidence discovered).

Mont. Code Ann. § 46-21-104 (2005) (requiring elements of petition).

Mont. Code Ann. § 46-21-105 (2005) (providing amendments; subsequent petitions; waiver of grounds for relief).

Mont. Code Ann. § 46-21-201(1)(b) (2005) (duty imposed on court to expedite death penalty proceeding; ninety-day decision deadline).

Mont. Code Ann. § 46-21-201(5) (2005) (providing for evidentiary hearing and proof by other evidence such as affidavits and depositions).

Habeas Corpus

The statutory habeas writ is available to inquire into the cause of imprisonment or restraint, but it is not available to attack the validity of a prisoner's conviction or sentence. In such cases, a postconviction collateral petition is the appropriate remedy.

Montana Supreme Court:

Kills on Top v. State, 273 Mont. 32, 901 P.2d 1368 (1995) (holding substitution of postconviction relief proceedings is not unconstitutional suspension of writ of habeas corpus), *cert. denied*, 516 U.S. 1177 (1996).

Montana Statutes:

Mont. Code Ann. § 46-21-101 (2005) (providing that error alleged under writ of habeas corpus should be raised in postconviction relief petition).

Mont. Code Ann. § 46-22-101 (2005) (providing that writ of habeas corpus not appropriate for attacking validity of sentence or conviction).

Appellate Review of Collateral Proceedings

Either party may appeal a district court's decision to the supreme court within sixty days of the entry of a postconviction order.

Montana Statutes:

Mont. Code Ann. § 46-21-203 (2005) (providing either party may appeal to the supreme court on order entered on postconviction petition within sixty days).

Procedural Bar/Waiver/Exhaustion

Montana law provides that the failure to make a timely objection during trial to any alleged error affecting the judgment of the court constitutes a waiver of the objection. Errors concerning jurisdictional or constitutional rights will be disregarded on appeal if not objected to at trial, unless the error is shown to be prejudicial to the guilt or sentencing determination and the defendant establishes either: (1) that the right claimed did not exist at the time of trial and that it has a retroactive application, (2) that the state suppressed evidence that prevented the claim from being raised, or (3) that "material and controlling facts" upon which the claim is based were not known to the defendant or the defendant's attorney and could not have been ascertained by use of reasonable diligence.

Grounds that could reasonably have been raised on direct appeal may not be raised in a postconviction proceeding. Additionally, any grounds for relief that were not raised in the original or amended petition are considered waived. However, the court may permit a subsequent petition if the petition alleges grounds which could not reasonably have been raised in the first petition, except for an ineffective assistance

claim against prior postconviction counsel.

Montana Supreme Court:

Smith v. State, 303 Mont. 47, 15 P.3d 395 (2000) (affirming trial court's dismissal of postconviction petition in capital case because issues either procedurally barred or barred by res judicata), *cert. denied*, 533 U.S. 917 (2001).

Dawson v. State, 301 Mont. 135, 10 P.3d 49 (2000) (declining to reconsider claims raised on direct appeal because petitioner failed to make a showing that the "ends of justice" would be served by reconsideration), *cert. denied*, 532 U.S. 928 (2001).

Gollehon v. State, 296 Mont. 6, 986 P.2d 395 (1999) (declining to rule whether claims raised in postconviction proceeding were raised on appeal, notwithstanding that petitioner sought clarification to assure exhaustion of claims in federal court; holding claims-if properly raised-were barred by res judicata and if improperly raised were procedurally barred), *cert. denied*, 529 U.S. 1041 (2000).

State v. Redcrow, 294 Mont. 252, 980 P.2d 622 (1999) (holding "miscarriage of justice" exception to § 46-21-102 procedural bar arises when a jury could find, in light of new evidence, that the defendant is actually innocent of the crime).

Hans v. State, 283 Mont. 379, 942 P.2d 674 (1997) (holding when counsel has abandoned defendant's appeal, defendant should raise in one postconviction relief petition all claims that could have been raised on direct appeal, along with all postconviction relief issues; court rejected procedure allowing "out of time" appeal when counsel abandoned defendant's appeal).

Kills on Top v. State, 273 Mont. 32, 901 P.2d 1368, 1387 (1995) (applying § 46-21-105(2), holding claims which could reasonably have been raised on appeal are procedurally barred from consideration in postconviction proceedings; bar not limited to cases where state establishes that claims were withheld from appeal to cause delay), *cert. denied*, 516 U.S. 1177 (1996).

Montana Statutes:

Mont. Code Ann. § 46-20-104 (2005) (providing that failure to make objection during trial waives objection).

Mont. Code Ann. § 46-20-701(2) (2005) (listing errors considered on review).

Mont. Code Ann. § 46-21-105(2) (2005) (providing postconviction relief proceedings; waiver of grounds for relief).

Execution

At the time of sentencing, the trial court sets a date for execution between thirty and sixty days from the date of sentencing. After setting the date, the court must sign an execution warrant within five days. The warrant, which communicates the date of execution and the duration of the warrant, is delivered to the director of the department of corrections.

There must be a currently valid execution warrant for an execution to occur. Accordingly, if the date set for execution by a warrant passes while a judicial stay is imposed, the sentencing court must set a new date twenty to ninety days from the date the new warrant is issued. The capital prisoner is entitled to be present in court on the day the new execution date is set. If the governor stays an execution by granting a respite, the death warrant remains valid and the execution occurs on the date the respite expires.

Montana inflicts death by lethal injection. State statute requires that executions occur at the state prison outside of public view. However, the warden must allow twelve witnesses to the execution, three of whom the prisoner may designate.

Montana Supreme Court:

Langford v. State, 287 Mont. 107, 951 P.2d 1357 (1997) (requiring all executions to be performed by lethal injection, not ex post facto law or bill of attainder under state constitution, as applied to prisoner who opted for execution by hanging under former law), *cert. denied*, 522 U.S. 1102 (1998).

State v. McKenzie, 271 Mont. 32, 894 P.2d 289 (1995) (holding failure to execute death warrant on original date fixed does not result in discharge of prisoner but rather requires court to fix new date for execution).

Montana Statutes:

Mont. Code Ann. § 46-19-103(1) (2005) (requiring court to set execution date with

pronouncement of death sentence; reissue execution date if passes during stay; presence of defendant).

Mont. Code Ann. § 46-19-103(3) (2005) (providing lethal injection as method of execution).

Mont. Code Ann. § 46-19-103(4) (2005) (requiring execution warrant issued within five days of death sentence; delivery of warrant to department of corrections' director).

Mont. Code Ann. § 46-19-103(5) (2005) (providing for place of execution).

Mont. Code Ann. § 46-19-103(6) (2005) (providing for witnesses to execution).

Mont. Code Ann. § 46-23-315 (2005) (providing for grant of respite by governor during period when application for clemency is being considered).

Competency for Execution

Montana law suspends execution while the defendant lacks mental fitness. If there is good reason to believe that the defendant lacks mental fitness, the district court will conduct a competency hearing. If the defendant is found unfit, the court will suspend the execution and remand the defendant to the custody of the state hospital until fitness is reestablished. Once the court determines that the defendant has regained fitness, the court must direct the warden to discharge the death sentence. However, if the court determines that the sentence would be unjust considering the time spent in the state hospital, the court may suspend the death sentence and order the defendant discharged.

The court orders the suspension of an execution if three physicians determine that the defendant is pregnant. The governor issues a new death warrant specifying a date for the execution upon satisfaction that the defendant no longer is pregnant.

Montana Statutes:

Mont. Code Ann. §§ 46-19-201–202 (2005) (providing procedures regarding mental fitness of death row inmate).

Mont. Code Ann. §§ 46-19-203–204 (2005) (providing procedures regarding pregnancy of death row inmate).

Stays of Execution

When a notice of automatic review of a death sentence is filed, the district court enters a stay of execution. The stay expires upon issuance of remittitur on the supreme court's order affirming, vacating, or modifying the death sentence. If the stay expires after the execution date or within five days before the execution date, the district court sets a new execution date.

A petitioner seeking postconviction relief may seek a stay of execution from the district court.

Montana Statutes:

Mont. Code Ann. § 46-20-204(1) (2005) (providing for stay of execution issued on initiation of appeal).

Montana Rules:

Mont. R. App. P. 7 (providing for stay of execution during appeal of postconviction judgment).

Mont. R. Death Sent. Rev. 9 (providing for stay of execution on automatic appeal; expires on remittitur of Supreme Court; remand for new execution date if stay expires within five days prior to execution date).

Clemency Procedures

The governor has the power to grant clemency subject to statutory procedures. The Montana Code defines clemency as mercy exercised by the governor, such as commutation of the death sentence to one less severe, respite (stay of execution of the sentence), or pardon (relieving the convict of all legal consequences of the conviction). In capital cases, an application for clemency may not be filed while an automatic review is pending. An application must also be filed within ten days after the district court sets a date of execution.

While clemency is a matter for the governor's discretion, the governor may exercise these powers only upon an application for clemency filed with the state Board

of Pardons. The Board of Pardons, after investigating the case and holding a hearing if favored by majority vote, recommends to the governor whether clemency should be granted or denied. The Board of Pardons may hold a public hearing concerning the grant or denial of clemency after giving appropriate notice. The governor's grant or denial of clemency is not appealable.

The governor may also grant a respite, a temporary suspension of the death sentence for a definite period of time, upon application of a person authorized to apply for executive clemency, without any prior recommendation or action by the Board of Pardons. Where the execution of a prisoner has been stayed by the governor's respite, if no further clemency is granted before the end of the respite period, the death warrant still will be considered valid. If the date set for execution has passed, execution will occur on the date the respite expires.

Montana Statutes:

Mont. Const. art. VI, § 12 (providing pardoning power of governor).

Mont. Code Ann. § 46-23-301(1) (2005) (defining clemency).

Mont. Code Ann. § 46-23-301(2) (2005) (requiring filing of all clemency applications with board; capital defendant may not file application while automatic review pending and must file application within ten days after district court sets execution date).

Mont. Code Ann. § 46-23-301(3) (2005) (providing that governor's clemency ruling final).

Mont. Code Ann. §§ 46-23-302–307 (2005) (providing board hearing on clemency).

Mont. Code Ann. § 46-23-315 (2005) (providing authority of governor to grant respite).

NEVADA

History

In *Anderson v. State,* 90 Nev. 385, 528 P.2d 1023 (1974), the Nevada Supreme Court acknowledged the unconstitutionality of the state's pre-*Furman* death penalty statute. The statute failed because it provided no guidance to control the sentencing authority in determining who would receive the death penalty and who would receive a sentence of life imprisonment.

The legislature's 1973 amendment to the capital sentencing law attempted to correct this problem by eliminating any discretion on the part of the sentencing authority. Section 200.030 of the Nevada Revised Statutes made the death penalty mandatory for defendants convicted of capital murder. However, in accord with U.S. Supreme Court opinions striking down mandatory capital sentencing, the Nevada Supreme Court held several aspects of § 200.030 unconstitutional. The U.S. Supreme Court more recently held unconstitutional the last remnant of Nevada's mandatory capital sentencing scheme as applied to a state prisoner convicted of murder while serving a life sentence. *See Sumner v. Shuman,* 483 U.S. 66 (1987).

The 1977 Nevada legislature enacted the current capital sentencing scheme. After weighing all aggravating and mitigating factors, the jury determines the punishment in a bifurcated sentencing proceeding. Additionally, Nevada law provides for automatic appellate review of death judgments and sentences.

United States Supreme Court:

Sumner v. Shuman, 483 U.S. 66 (1987) (holding unconstitutional last remnant of Nevada's mandatory sentencing scheme for state prisoner convicted of murder while serving life sentence).

Woodson v. North Carolina, 428 U.S. 280 (1976) (declaring mandatory death penalty statute unconstitutional).

Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (holding unguided discretionary sentencing unconstitutional).

Nevada Supreme Court:

Finger v. State, 117 Nev. 548, 27 P.3d 66 (2001) (en banc) (holding that legal insanity is a well-established and fundamental principle of law of United States and is protected by Due Process Clauses of United States and Nevada Constitutions; holding, therefore, that legislature could not abolish insanity as complete defense to criminal offense and that 1995 legislative amendment (S.B. 314) abolishing insanity defense was unconstitutional; also holding that all prior versions of statutes amended or repealed by S.B. 314 remain in full force and effect), *cert. denied*, 534 U.S. 1127 (2002).

Bennett v. State, 106 Nev. 135, 787 P.2d 797 (affirming constitutionality of Nevada's capital sentencing scheme), *cert. denied*, 498 U.S. 925 (1990).

Deutscher v. State, 95 Nev. 669, 601 P.2d 407 (1979) (holding death penalty statute constitutional in light of *Furman*).

Bishop v. State, 95 Nev. 511, 597 P.2d 273 (1979) (holding death penalty statute does not violate state constitution).

Meller v. State, 94 Nev. 408, 581 P.2d 3 (1978) (holding mandatory death penalty for murder of police officer unconstitutional because failure to consider mitigating factors).

Smith v. State, 93 Nev. 82, 560 P.2d 158 (1977) (holding mandatory death penalty for multiple murder under Nevada statute unconstitutional).

Nevada Statutes:

NRS § 200.030 (2005) (providing death penalty for first degree murder only if one or more aggravating circumstances found and not outweighed by mitigation).

NRS § 177.055 (2005) (providing automatic appeal of death judgment and sentence).

Capital Offenses

First degree murder is a capital offense in Nevada. If found guilty of first degree murder, a defendant may receive a sentence of life imprisonment, with or without the

possibility of parole, a definite 50-year prison term with eligibility for parole after 20 years, or a death sentence. First degree murder includes murder perpetrated by means of poison, lying in wait, torture, child abuse, or any other willful, deliberate, and premeditated killing; statutorily defined felony murder; murder committed to avoid or prevent a lawful arrest or to effect escape from legal custody of any person; and murder committed under certain circumstances that threaten the safety of pupils and school employees.

In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court held that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on those who were under the age of 18 at the time their crimes were committed. Previously, Nevada law had prohibited the imposition of the death penalty on those under 16 years of age at the time the crime was committed. In 2005, NRS § 176.025 was amended to raise the threshold age for imposition of the death penalty to 18.

The U.S. Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the execution of the mentally retarded constitutes cruel and unusual punishment prohibited by the Eighth Amendment. See § 1.6. In 2003, the Nevada legislature enacted legislation that prohibits a sentence of death for a person who is mentally retarded. See NRS § 174.098. The statute provides that "mental retardation" means significant subaverage general intellectual functioning that exists concurrently with deficits in adaptive behavior and manifested during the developmental period. NRS § 174.098(7).

Under the statute a defendant who is charged with first degree murder may, at least 10 days before the date set for trial, file a motion to declare that he or she is mentally retarded. NRS § 174.098(1). If such a motion is filed, the court must stay the proceedings pending a decision on the issue and hold a hearing within a reasonable time to determine whether the defendant is mentally retarded. The defendant must provide evidence of mental retardation not less than 30 days before the date set for the hearing and undergo an examination by an expert selected by the prosecution on the issue of mental retardation. At the hearing the defendant has the burden of proving by a preponderance of the evidence that he or she is mentally retarded. If the court determines that the defendant is mentally retarded, the court must make such a finding in the record and strike the notice of intent to seek the death penalty. Such a finding

may be appealed to the Nevada Supreme Court.

United States Supreme Court:

Roper v. Simmons, 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed).

Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executing the mentally retarded violates the Eighth Amendment's prohibition against cruel and unusual punishment).

Ninth Circuit:

Brimmage v. Sumner, 793 F.2d 1014 (9th Cir. 1986) (holding convictions for felony-murder and underlying felony does not constitute double jeopardy).

Nevada Supreme Court:

Domingues v. State, 114 Nev. 783, 961 P.2d 1279 (1998) (holding imposition of death penalty on persons under 18 years old did not violate international treaty because senate ratified treaty with caveat reserving right to impose capital punishment on minors), *cert. denied*, 528 U.S. 963 (1999).

Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997) (interpreting killing by torture to require the infliction of pain to be an integral part of the murders; the torture method need not be the cause of the victim's death), *cert. denied*, 525 U.S. 841 (1998).

Nevada Statutes:

NRS § 174.098 (2005) (specifying procedures for filing motion to declare that capital defendant is mentally retarded).

NRS § 200.010 (2005) (defining murder).

NRS § 200.030 (2005) (defining first degree murder; providing death penalty or life imprisonment for first degree murder).

NRS § 176.025 (2005) (prohibiting death sentence on person under 18).

Representation in Capital Cases

Section 2 of Nevada Supreme Court Rule 250 governs appointment of counsel for indigent capital defendants. Section 2 applies to all defense counsel, including public defenders. It establishes competency standards for capital counsel at all stages of representation, requires each judicial district to maintain a list of qualified defense counsel, and requires the court to appoint counsel from this list or hold a hearing to establish that counsel is otherwise qualified. Section 2 requires appointment of two counsel for representation at capital trials.

Section 3 of Rule 250, which applies to all capital cases, instructs trial counsel to turn over all records to successor counsel in the event of withdrawal and to prepare a detailed memorandum for successor appellate counsel. Section 3 further requires capital counsel to keep a record of all work performed while serving as trial, appellate, or postconviction counsel. The record must include time records and rationale for strategic decisions. Counsel is required to file affidavits with the district court at specified times throughout the proceedings certifying that counsel has maintained these records. Counsel must also retain either the original record or a copy until disposal is authorized by a court.

Rule 250(3) also provides for ex parte proceedings to authorize employment and payment of investigative and expert services.

Nevada Supreme Court:

Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (en banc) (clarifying that complexity of the case is not a basis for denying a defendant's request for self-representation; rather, case complexity should be considered when determining whether defendant's decision to waive counsel is made with full understanding of the consequences of the decision), *cert. denied*, 534 U.S. 1024 (2001).

Nevada Statutes:

NRS § 171.188 (2005) (providing for appointment of counsel for indigent defendants).

NRS § 180.060 (2005) (listing duties of state public defender).

NRS § 34.820 (2005) (requiring appointment of postconviction counsel for death-sentenced inmates).

Nevada Rules:

Nev. Sup. Ct. R. 250(2) (detailing appointment and qualification of capital counsel).

Nev. Sup. Ct. R. 250(3) (detailing duties and compensation of capital counsel).

Trial of Capital Offenses

The state's trial court of general jurisdiction is the district court. The district court exercises original jurisdiction over civil and criminal cases, including capital cases, postconviction review, and habeas corpus. Capital trials are held in two phases. If the defendant is found guilty of first degree murder during the guilt phase, then a penalty proceeding occurs to determine the defendant's sentence.

Chapter 175 of the Nevada Revised Statutes sets out the general trial procedures applicable at the guilt phase. The defense and the prosecution may exercise eight, rather than four, peremptory challenges to selected jurors, and two counsel for each side may argue to the jury.

Nevada Supreme Court Rule 250 requires the prosecutor to file a notice of intent to seek the death penalty within thirty days after filing an information or indictment, and the notice must specifically allege all aggravating circumstances the state intends to prove at sentencing. The state may file a late or amended notice only upon a showing of good cause, but not later than thirty days before the trial starts. The state also must file a notice of evidence in aggravation no later than 15 days before the trial commences, specifying the evidence it intends to introduce at the penalty hearing. Rule 250 additionally directs the trial court to give capital cases calendar priority and conduct proceedings with minimal delay.

Nevada Supreme Court:

Blake v. State, 121 P.3d 567 (Nev. 2005) (en banc) (holding that trial judge's failure on six occasions to admonish jury before it recessed to refrain from talking about the trial

and to avoid contact with the media did not require reversal, despite the fact that a statute mandated giving the admonishments, where there was no evidence of prejudice to defendant).

Mason v. State, 118 Nev. 554, 51 P.3d 521 (2002) (holding that Nev. Sup. Ct. R. 250(4)(f) requires state to produce notice of all evidence it intends to produce at capital penalty hearing, and that court erred in admitting certain evidence at penalty phase of trial without determining whether state had good cause for not providing notice of it earlier).

Finger v. State, 117 Nev. 548, 27 P.3d 66 (2001) (en banc) (holding that legal insanity is a well-established and fundamental principle of law of United States and is protected by Due Process Clauses of United States and Nevada Constitutions; holding, therefore, that legislature could not abolish insanity as complete defense to criminal offense and that 1995 legislative amendment (S.B. 314) abolishing insanity defense was unconstitutional; also holding that all prior versions of statutes amended or repealed by S.B. 314 remain in full force and effect; remanding to district court with instructions to permit defendant to withdraw plea of "guilty, but mentally ill"), *cert. denied*, 534 U.S. 1127 (2002).

State v. Second Judicial District Court, 116 Nev. 953, 11 P.3d 1209 (2000) (holding Nev. Sup. Ct. R. 250 does not violate the separation of powers doctrine; finding district court acted within its discretion denying state's untimely notices of intent to seek the death penalty).

Manley v. State, 115 Nev. 114, 979 P.2d 703 (1999) (finding violation of attorney-client privilege constituted sixth amendment violation; holding error not harmless beyond a reasonable doubt).

Evans v. State, 113 Nev. 885, 944 P.2d 253 (1997) (holding when first degree murder charged in alternative, jury verdict need not be unanimous on theory of first degree murder).

Libby v. State, 113 Nev. 251, 934 P.2d 220 (1997) (remanding case for evidentiary hearing, following U.S. Supreme Court's remand in light of *J.E.B. v. T.B.*, 511 U.S. 127 (1994), where defendant established a prima facie case of venire gender discrimination, and trial court refused to require the state's *Batson* explanation).

Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995) (holding state must give notice in charging document if it intends to pursue felony murder conviction; open charge of murder that did not contain felony murder charge was insufficient notice).

Shaw v. State, 104 Nev. 100, 753 P.2d 888 (1988) (holding state not required to charge underlying felony when charging felony-murder).

Nevada Statutes:

NRS § 175.051 (2005) (providing eight peremptory challenges in capital cases).

NRS § 175.151 (2005) (providing that two counsel may argue).

Nevada Rules:

Nev. Sup. Ct. R. 250(4) (addressing pretrial proceedings; notice of intent; notice of evidence in aggravation).

Nev. Sup. Ct. R. 250(5) (addressing trial procedures).

Capital Sentencing

Penalty Hearing

After a jury finds the defendant guilty in a capital case, the court conducts a sentencing hearing to determine the penalty. At the sentencing hearing, the jury determines the sentence. The rules of evidence are generally inapplicable at the sentencing hearing. Any evidence that the court determines relevant is admissible.

The jury must determine whether aggravating and/or mitigating circumstances exist, and, based on the findings, whether the defendant should be sentenced to life imprisonment with the possibility of parole, life imprisonment without parole, or death. The jury may impose a death sentence only if it finds at least one aggravating factor and no mitigating factors sufficient to outweigh the aggravating factor.

In 2003, the Nevada legislature enacted changes to the law, as a result of the decision in *Ring v. Arizona,* 536 U.S. 584 (2002). In *Ring*, the Supreme Court held that *Walton v. Arizona*, 497 U.S. 639 (1990) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) are irreconcilable and overruled *Walton* to the extent that it allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary

for imposition of the death penalty. The Supreme Court reasoned that because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense" (*Apprendi*, 530 U.S. at 494 n. 19), the Sixth Amendment requires that they be found by a jury. The Court held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. Under the former procedure in Nevada, if the penalty phase jury was unable to reach a unanimous verdict, the supreme court would appoint a three-judge panel to conduct the required penalty hearing and determine a sentence. Effective June 9, 2003, NRS § 175.556, provides that if the penalty phase jury is unable to reach a unanimous decision, the judge who conducted the trial or accepted a guilty plea must sentence the defendant to life imprisonment without the possibility of parole or impanel a new jury to determine the sentence. Formerly, if the defendant pleaded guilty or waived a jury trial, a three-judge panel determined the sentence. In this situation NRS § 175.552 now provides a jury must be impaneled for the penalty phase of the trial.

In *Colwell v. State,* 118 Nev. 807, 59 P.3d 463 (2002) (en banc), the Nevada Supreme Court held that *Ring* did not apply retroactively on state collateral review of a finalized death penalty imposed by a three-judge panel. The court adopted the general framework of a *Teague* analysis, but reserved the prerogative as a state court "not to bind quite so severely our own discretion in deciding retroactivity." *Colwell*, 59 P. 3d at 471. See generally as to *Teague v. Lane*, § 1.18.1. Later, in *Schriro v. Summerlin,* 542 U.S. 348 (2004) the United States Supreme Court also held that *Ring v. Arizona* did not apply retroactively to cases already final on direct review. However, in *Johnson v. State*, 118 Nev. 787, 59 P.3d 450 (2002) (en banc), the Nevada Supreme Court held that *Ring* applied in a case in which the supreme court had not yet reviewed the death sentence on appeal and in which the death sentence was imposed by a three-judge panel after the jury deadlocked at the penalty phase.

United States Supreme Court:

Schriro v. Summerlin, 542 U.S. 348 (2004) (holding that *Ring v. Arizona* did not apply retroactively to cases already final on direct review).

Ring v. Arizona, 536 U.S. 584 (2002) (holding that capital defendants are entitled to jury determination of any fact on which legislature conditions increase in their maximum punishment; also holding that *Walton* and *Apprendi* are irreconcilable and overruling *Walton* to extent that it allowed sentencing judge, sitting without jury, to find aggravating circumstance necessary for imposition of death penalty).

Nevada Supreme Court:

Thomas v. State, 120 Nev. 37, 83 P.3d 818 (2004) (reversing death sentence and remanding for new penalty phase trial, Nevada Supreme Court held that trial counsel's failure to object to erroneous penalty phase instruction that state board of pardons could, under certain circumstances, modify sentence, constituted deficient performance that prejudiced defendant).

Mack v. State, 119 Nev. 421, 75 P.3d 803 (2003) (per curiam) (rejecting defendant's assertion that NRS § 175.558 was unconstitutional because it did not permit a defendant to waive a jury trial as to the guilt phase, and to have a jury determine the sentence at the penalty phase, the court observed that offering a defendant the choice of having his entire trial before a jury or entirely without one does not appear to offend any of the reasoning in *Ring*; holding that here the record showed that defendant was aware that if his request for a bench trial was granted, a three-judge panel would determine his sentence).

Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002) (en banc) (holding that *Ring* does not apply retroactively on state collateral review of a finalized death penalty imposed by three-judge panel; alternatively, concluding that *Ring* was inapplicable here because petitioner had pleaded guilty and waived his right to a jury trial).

Johnson v. State, 118 Nev. 787, 59 P.3d 450 (2002) (en banc) (ruling that *Ring* applied in a case in which the supreme court had not yet reviewed the death sentence on appeal and in which the death sentence was imposed by a three-judge panel after the jury deadlocked at the penalty phase; holding that finding of aggravating circumstances and imposition of the death penalty by a three-judge panel violated the Sixth Amendment and that the error was not harmless).

Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001) (en banc) (remanding for new penalty hearing because trial and appellate counsel were ineffective in failing to challenge improper arguments made by prosecutor during penalty phase asking jurors whether they had the "intestinal fortitude" to do their "legal duty" and incorrectly informing jurors that they could consider evidence of petitioner's other crimes before determining

"death eligibility").

Hollaway v. State, 116 Nev. 732, P.3d 987 (2000) (en banc) (remanding for new penalty hearing because the stun belt worn by defendant was accidently activated during the prosecution's closing argument).

Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998) (rejecting any suggestion in *Lisle v. State,* below, that character evidence can be used to determine death eligibility itself)

Sherman v. State, 114 Nev. 998, 965 P.2d 903 (1998) (holding evidence of victim impact of prior murder not admissible in current sentencing hearing and holding prosecutor's argument that jury should return a death sentence in favor of future victims improper), *cert. denied*, 526 U. S. 1122 (1999).

Lisle v. State, 113 Nev. 679, 941 P.2d 459 (stating consideration of character evidence at penalty hearing not limited to cases where jury has determined that defendant is death-eligible), *cert. denied*, 525 U.S. 830 (1998), limited by *Middleton v. State*, above.

Colwell v. State, 112 Nev. 807, 919 P.2d 403 (1996) (holding three-judge sentencing panel constitutional).

Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993) (stating that constitutional right to be free from prison clothing does not apply at sentencing hearing), *cert. denied*, 513 U.S. 862 (1994).

Redmen v. State, 108 Nev. 227, 828 P.2d 395 (1992) (holding state may argue defendant's future dangerousness even when no evidence of violence exists independent of the charged murder; however, psychiatric opinion of defendant's future dangerousness highly unreliable inadmissible evidence at penalty hearing), *cert. denied*, 506 U.S. 880 (1992), *overruled on other grounds, Alford v. State*, 111 Nev. 1409, 906 P.2d 714 (1995).

Homick v. State, 108 Nev. 127, 825 P.2d 600 (1992) (finding admissibility of victim impact evidence at sentencing comports with state constitution), *cert. denied*, 519 U.S. 1012 (1996).

Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991) (holding nontestifying codefendant's confession not admissible at penalty hearing).

Baal v. State, 106 Nev. 69, 787 P.2d 391 (1990) (rejecting constitutional challenge to

three-judge panel sentencing defendant who pleads guilty).

Emil v. State, 105 Nev. 858, 784 P.2d 956 (1989) (holding polygraph inadmissible at trial equally inadmissible at penalty hearing).

Pellegrini v. State, 104 Nev. 625, 764 P.2d 484 (1988) (holding capital defendant's character and record relevant to jury's sentencing determination; however, evidence must be more probative than prejudicial).

Hill v. State, 102 Nev. 377, 724 P.2d 734 (1986) (holding three-judge panel sentencing procedure, when jury unable to reach unanimous verdict, did not violate defendant's right to jury trial, double jeopardy clause, or result in arbitrary and capricious imposition of death penalty), *cert. denied*, 479 U.S. 1101 (1987).

McKenna v. State, 101 Nev. 338, 705 P.2d 614 (1985) (stating jury not required to determine beyond a reasonable doubt that death was the appropriate sentence), *cert. denied*, 474 U.S. 1093 (1986)

Wilson v. State, 99 Nev. 362, 664 P.2d 328 (1983) (holding trial court not precluded from imposing death penalty where defendant had pled guilty to first degree murder prior to district attorney's notice to seek death penalty), *aff'd on reh'g*, 101 Nev. 452, 705 P.2d 151 (1985).

Nevada Statutes:

NRS § 175.552 (2005) (requiring capital penalty hearing before jury; any evidence relevant to sentence admissible).

NRS § 175.554 (2005) (addressing instructions to jury; required findings; verdict).

NRS § 175.556 (2005) (providing for sentencing panel when jury unable to reach verdict).

NRS § 175.558 (*repealed by* 2003 Nev. Laws ch 366, § 8) (former procedure providing for penalty hearing panel procedure where defendant convicted without jury).

NRS § 175.562 (*repealed by* 2003 Nev. Laws ch 366, § 8) (former providing for procedure when panel of judges unable to agree on sentence)

NRS § 200.030 (2005) (providing death penalty for first degree murder only if one or more aggravating circumstances found and not outweighed by mitigating factors).

Aggravating Circumstances

Section 200.033 of Nevada's Revised Statutes lists the only circumstances by which murder of the first degree may be aggravated. These circumstances are:

(1) defendant was under sentence of imprisonment;
(2) defendant was previously convicted of another murder or a felony involving violence;
(3) defendant knowingly created great risk of death to more than one person with a hazardous weapon or action;
(4) murder incident to robbery, sexual assault, first degree arson, burglary, invasion of the home, or first degree kidnaping and defendant had intent to kill;
(5) murder committed to prevent lawful arrest or to escape from custody;
(6) murder for money or property;
(7) murder of peace officer or firefighter;
(8) torture or the mutilation of the victim;
(9) random and motiveless murder(s);
(10) victim less than 14 years old;
(11) murder was committed because of race, color, religion, national origin, physical or mental disability, or sexual orientation of victim;
(12) multiple first or second degree murder;
(13) victim subjected to nonconsensual sexual penetration before, during, or after the murder;
(14) murder committed under certain circumstances that threatened the safety of pupils and school employees;
(15) murder committed with the intent to commit, cause, aid, further, or conceal an act of terrorism.

The state may also introduce additional evidence that is relevant to the sentence but is not a statutory aggravating factor if it has been disclosed to the defendant before the commencement of the penalty hearing. Evidence obtained in violation of the state or federal constitution is inadmissible.

Ninth Circuit:

Valerio v. Crawford, 306 F.3d 742 (9th Cir. 2002) (en banc) (holding that "depravity of mind" aggravating-circumstances jury instruction was unconstitutionally vague under *Godfrey v. Georgia* and that state appellate court cannot cure such error under *Walton v. Arizona*, by applying a narrowing construction to the instruction to a *de novo* finding of the facts when the penalty phase factfinder has been a jury; also holding that, even if the *Walton* procedure were available, the Nevada Supreme Court failed to provide "close appellate scrutiny" and therefore failed to cure the error caused by the unconstitutionally vague jury instruction and the error was not harmless)

Petrocelli v. Angelone, 248 F.3d 877 (9th Cir. 2001) (holding that trial court did nor err by admitting a deferred sentence for kidnapping from Washington state in aggravation; finding the deferred sentence constituted a conviction under Nevada law).

Nevada Supreme Court:

McConnell v. State, 102 P.3d 606 (Nev. 2004) (en banc) (per curiam) (holding that the State is prohibited from selecting among multiple felonies that occur during "an indivisible course of conduct having one principal criminal purpose" and using one to establish felony murder and another to support an aggravating circumstance).

Butler v. State, 102 P.3d 71 (Nev. 2004) (en banc) (affirming two convictions for first-degree murder with the use of a deadly weapon, but vacating death sentences and remanding for a new penalty hearing, the court held that the cumulative impact of an erroneous instruction regarding the limited use of "other matter" evidence (any other matter that the court deems relevant to sentence admitted against defendant during the penalty phase), taken together with other penalty hearing errors involving improper closing argument by the prosecutor, deprived defendant of a fair hearing).

State v. Bennett, 119 Nev. 589, 81 P.3d 1 (2003) (en banc) (holding in post-conviction capital habeas petition that death sentence that was based on invalid "at random and without apparent motive" aggravator must be vacated where, when considered in combination with the State's violations, particularly the State's failure to disclose evidence that defendant's accomplice played a dominant role in the crimes, the court could not conclude beyond a reasonable doubt that the jury would have returned a verdict of death in the absence of these errors; also holding that application of procedural bars to preclude consideration of defendant's claim amounted to a fundamental miscarriage of justice, and thus, defendant was entitled to raise claim in an untimely and successive petition).

Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001) (en banc) (finding penalty phase evidence supported finding of aggravating circumstances of mutilation, but clarifying that language referring to "other serious and depraved physical abuse" should no longer be included in the definition of "mutilation"), *cert. denied*, 534 U.S. 1024 (2001).

Leonard v. State, 117 Nev. 53, 17 P.3d 397 (2001) (en banc) (holding that prior conviction aggravator NRS § 200.033(2) (both pre and post-1997 amendment) does not require conviction to occur before date of capital offense).

Bridges v. State, 116 Nev. 752, 6 P.3d 1000 (2000) (en banc) (holding erroneous jury instruction– which failed to limit kidnapping aggravator to first degree kidnapping–harmless error, where defendant committed the murder in the course of both a first degree and second degree kidnapping; concluding there was no compelling evidence in mitigation in the case).

Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000) (en banc) (holding that postmortem mutilation falls within the statutory aggravator of mutilation; holding evidence supported finding of torture; finding instructions properly directed jurors to not consider general character evidence until they found at least one aggravating factor).

Lane v. State, 114 Nev. 299, 956 P.2d 88 (1998) (holding sentencer's finding of both robbery and receiving money as aggravating factors in context of a robbery-murder improper as duplicative).

Greene v. State, 113 Nev. 157, 931 P.2d 54 (1997) (rejecting challenge that § 200.033(12) is unconstitutionally vague and ambiguous because it cannot be differentiated from § 200.033(2)).

Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996) (holding "random and motiveless" aggravating circumstance is not unconstitutionally vague), *decision clarified on reh'g*, 114 Nev. 100, 952 P.2d 431 (1998).

Flannagan v. State, 112 Nev. 1409, 930 P.2d 691 (1996) (stating one who intends to commit multiple murders within a closely related time and place engages in a course of conduct inherently hazardous to the lives of more than one person).

Domingues v. State, 112 Nev. 683, 926 P.2d 265 (requiring torture or mutilation to exceed the act of killing itself to qualify as an aggravating circumstance; defining torture as inflicting pain for revenge, extortion, persuasion, or for any sadistic purpose), *cert. denied*, 519 U.S. 968 (1996).

McNelton v. State, 111 Nev. 900, 900 P.2d 934 (1995) (stating aggravator "under sentence of imprisonment" does not require physical incarceration), *cert. denied*, 517 U.S. 1212 (1996).

Williams v. State, 110 Nev. 1182, 885 P.2d 536 (1994) (holding provision of murder statute defining child abuse as nonaccidental physical injury to child is not unconstitutionally vague).

Pertgen v. State, 110 Nev. 554, 875 P.2d 361 (1994) (holding "torture" and "deprivation of mind" unconstitutionally vague when not defined for jury).

Redmen v. State, 108 Nev. 227, 828 P.2d 395 (1992) (holding state may argue defendant's future dangerousness even when no evidence of violence exists independent of the charged murder; however, psychiatric opinion of defendant's future dangerousness highly unreliable inadmissible evidence at penalty hearing), *cert. denied*, 506 U.S. 880 (1992), *overruled on other grounds*, *Alford v. State*, 111 Nev. 1409, 906 P.2d 714 (1995).

Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991) (holding each conviction for a violent felony, pursuant to § 200.033(2), may be alleged as separate aggravating factor), *cert. denied*, 514 U.S. 1052 (1995).

Bennett v. State, 106 Nev. 135, 787 P.2d 797 (holding state not required to charge crime enumerated in § 200.033(4) to use crime as aggravator), *cert. denied*, 498 U.S. 925 (1990).

Cavanaugh v. State, 102 Nev. 478, 729 P.2d 481 (1986) (stating that aggravating circumstance involving murder committed to avoid lawful arrest does not require proof that arrest is imminent and that victim was in some way involved in effectuating that arrest; it only requires that murder be perpetrated to avoid arrest).

Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985) (holding murder committed after present capital offense can be used as aggravating factor if defendant convicted before present trial and holding that evidence of unrelated homicide not resulting in a conviction admissible as "other matter which court deems relevant to sentencing"), *cert. denied*, 479 U.S. 871 (1986).

Wilson v. State, 99 Nev. 362, 664 P.2d 328 (1983) (holding that § 200.033(4) crimes constitute multiple, not single, aggravators), *aff'd on reh'g*, 101 Nev. 452, 705 P.2d 151 (1985).

Deutscher v. State, 95 Nev. 669, 601 P.2d 407 (1979) (holding mutilation aggravating factor not unconstitutionally vague).

Nevada Statutes:

NRS § 175.552(3) (2005) (providing that evidence secured contrary to state or federal constitution inadmissible; providing that nonstatutory aggravating factors admissible at penalty hearing if disclosed to defendant).

NRS § 200.033 (2005) (enumerating aggravating circumstances).

Mitigating Circumstances

Section 200.035 of Nevada's Revised Statutes enumerates seven factors of mitigation for first degree murder. They are:

(1) lack of significant prior criminal history;
(2) influence of extreme mental or emotional disturbance;
(3) victim's participation in or consent to defendant's criminal conduct;
(4) defendant's relatively minor participation as accomplice;
(5) duress or under the domination of another person;
(6) defendant's youth; and
(7) all other mitigating circumstances.

Nevada Supreme Court:

Gallego v. State, 117 Nev. 348, 23 P.3d 227 (2001) (en banc) (finding no error where jury did not check any mitigating factors on special verdict form notwithstanding that evidence was presented in mitigation; declining to conclude that the jury failed to consider the mitigating evidence because it failed to fill out the verdict form in full).

Collman v. State, 116 Nev. 687, 7 P.3d 429 (2000) (en banc) (affirming trial court's denial of defendant's motion to admit witness character evidence in a penalty hearing; finding proposed testimony not mitigating evidence).

Hollaway v. State, 116 Nev. 732, 6 P.3d 987 (2000) (en banc) (finding error in court's failure to instruct appropriately on mitigation where defendant refused to present any evidence in mitigation; concluding that jury may have erroneously believed they were not required or permitted to consider trial evidence in mitigation).

Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000) (en banc) (holding that under NRS § 175.554(1) in capital penalty hearing, court must instruct jury as to mitigating circumstances alleged by defense on which evidence has been presented, and does not restrict such instructions to enumerated statutory mitigators).

Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997) (holding district court may instruct jury to disregard sympathy provided jury instructed to consider mitigating circumstances), *cert. denied*, 525 U.S. 841 (1998) (*citing Riley v. State*, 107 Nev. 205, 808 P.2d 551 (1991)).

Nevada Statutes:

NRS § 200.035 (2005) (enumerating mitigating circumstances for first degree murder).

Appellate Review of Capital Sentences

A judgment and sentence of death is automatically appealed to the Nevada Supreme Court. The defendant may waive the appeal of conviction within thirty days from judgment; however, the supreme court's sentence review is mandatory. Upon review, the supreme court must consider: (a) any errors enumerated in an appeal, (b) whether the evidence supports the finding of an aggravating circumstance or circumstances, (c) whether the sentence of death was imposed under the influence of passion, prejudice, or any arbitrary factor, and (d) whether the sentence of death is excessive, considering both the crime and the defendant. In 1985, the Nevada legislature abolished appellate proportionality review.

The supreme court has statutory authority to affirm the death sentence, set aside the sentence and remand for new hearing, or set aside the sentence and impose a sentence of life without parole. The court has affirmed death sentences after reweighing the aggravating and mitigating circumstances upon a determination that an aggravating circumstance is not supported by substantial evidence.

Supreme Court Rule 250 requires the supreme court clerk to docket the appeal upon receipt of the record from the district court. The rule addresses conferencing, briefing, and hearing schedules. The court orders oral argument only when the court determines it is warranted. The rule also allows the court to remand to the district court for supplementary proceedings to assist in resolving the appeal.

Nevada Supreme Court:

Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002) (en banc) (rejecting argument that supreme court's reweighing of aggravating and mitigating circumstances constituted impermissible fact-finding that deprived petitioner of right to sentencing by jury or three-judge panel; holding that the "random and without apparent motive" aggravator does not apply to unnecessary killings during a robbery and vacating sentencing of death after invalidating two of four aggravators and remanding for new penalty hearing;).

Randolph v. State, 117 Nev. 970, 36 P.3d 424 (2001) (en banc) (holding that prosecutor's mischaracterization of reasonable doubt standard as "[y]ou have a gut feeling he's guilty, he's guilty,*"* while highly improper, was harmless error where jury instructions correctly defined reasonable doubt and district court immediately ordered incorrect argument stricken; stating that court should have also explicitly admonished the jury that prosecutor's remark was improper and was to be disregarded), *cert. denied,* 537 U.S. 845 (2002).

Servin v. State, 117 Nev. 775, 32 P.3d 1277 (2001) (en banc) (holding that death penalty was excessive and instead imposing two consecutive terms of life in prison without possibility of parole where evidence that defendant was shooter was problematical, he was 16 at time of robbery and murder and was youngest of three involved in crime, his background did not include significant criminal history, he expressed remorse for his actions, and he was under the influence of methamphetamine at time of crime).

Dennis v. State, 116 Nev. 1075, 13 P.3d 434 (2000) (en banc) (discussing comparative review in the context of determining "excessiveness;" stating that inquiry may involve a consideration of whether various objective factors which the supreme court previously considered relevant to determine excessiveness in other cases, exist in the present case).

Harte v. Nevada, 116 Nev. 1054, 13 P.3d 420 (2000) (en banc) (holding district court did not err refusing to admit testimony from a Protestant pastor, Catholic priest and Jewish rabbi regarding their opposition to the death penalty as mitigating evidence).

Geary v. State, 115 Nev. 79, 977 P.2d 344 (1999) (en banc) (holding that district court correctly found that defendant was competent to waive right to appeal death sentence where both defendant and counsel informed court that they had communicated extensively about waiver, both appointed psychiatrists testified that defendant understood proceedings, and court thoroughly questioned defendant; despite waiver,

supreme court was required to conduct mandatory review under § 177.055(2)), *cert. denied*, 529 U.S. 1090 (2000).

Chambers v. State, 113 Nev. 974, 944 P.2d 805 (1997) (holding that death penalty was excessive and instead imposing life imprisonment without the possibility of parole where facts suggested that defendant was intoxicated when he came upon victim burning heroin on defendant's tools, that both parties were stabbed, and that killing resulted from overreaction and anger and was not planned in advance).

Colwell v. State, 112 Nev. 807, 919 P.2d 403 (1996) (stating that court can conduct meaningful review to determine whether death sentence was imposed arbitrarily, under influence of passion or prejudice, or was excessive, even though defendant intentionally failed to challenge evidence, failed to present mitigating evidence, and aided state in presenting its case at penalty hearing).

Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993) (finding supreme court's decision to reweigh aggravating and mitigating circumstances on appeal does not constitute impermissible finding and is constitutional), *cert. denied*, 513 U.S. 862 (1994).

Kirksey v. State, 107 Nev. 499, 814 P.2d 1008 (applying procedure established in Nevada Rule of Appellate Procedure 42(a) to capital defendant choosing to waive appeal), *cert. denied*, 502 U.S. 989 (1991).

Nevada Statutes:

NRS § 2.090 (2005) (providing supreme court jurisdiction on appeal).

NRS § 177.055 (2005) (providing automatic appeal of death judgments; waiver; resentencing).

Nevada Rules:

Nev. Sup. Ct. R. 250(6) (detailing docketing appeal; transmitting record; briefing schedule; extensions of time; oral argument).

Nev. Sup. Ct. R. 250(8) (setting prebriefing conferences; limited remand to district court).

Collateral Remedies

Section 34.724 of Nevada's Revised Statutes provides exclusive postconviction habeas

relief for challenges to capital convictions and sentences. This statutory remedy replaces all other common law and statutory remedies previously available for challenging the validity of a conviction or sentence. The traditional habeas writ is available to inquire into the cause of imprisonment or restraint but is not available to attack the validity of a prisoner's conviction or sentence.

Nevada Statutes:

Nev. Const. art. I, § 5 (guaranteeing habeas corpus remedy).

NRS § 34.360, *et seq*. (2005) (providing habeas corpus relief).

NRS § 34.724 (2005) (providing postconviction habeas relief from conviction or sentence).

Postconviction Relief

A postconviction petition for habeas corpus must be filed within one year after entry of judgment or supreme court remittitur following appeal. The court will accept a late petition if the delay is not the petitioner's fault and dismissal would unduly prejudice the petitioner. A late petition may be dismissed upon a showing of prejudice unless the petition is based on previously unknown grounds or petitioner demonstrates that a fundamental miscarriage of justice occurred at trial. A rebuttable presumption of prejudice to the state is created when a petition is filed five or more years after entry of judgment or supreme court remittitur.

A postconviction habeas petition must be filed in the district court where the conviction occurred. The petition must be filed with the record of original proceedings and, if possible, assigned to the original judge or court. After reviewing the postconviction record, the judge determines whether an evidentiary hearing is required. An evidentiary hearing will not be held on a capital petition unless each issue of fact to be considered at the hearing has not been determined in any prior evidentiary hearing in a state or federal court or the prior evidentiary hearing was not a full and fair consideration of the issue. The rules of civil procedure apply in a postconviction proceeding to the extent they are consistent with the postconviction act.

Nevada law requires the court to make all reasonable efforts to expedite postconviction relief adjudications. In capital cases, the court has sixty days after submission to issue a decision.

Nevada Supreme Court:

Pelligrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (en banc) (holding that one-year time bar of § 34.726 applies to all postconviction petitions, not just to first petitions; rejecting contention that dismissal for delayed filing of second or successive petitions is governed only by laches provisions of § 34.800).

Beets v. State, 110 Nev. 339, 871 P.2d 357 (1994) (holding summary judgment not appropriate procedure in postconviction petition for habeas relief).

Nevada Statutes:

NRS § 34.720, et seq. (2005) (defining scope of applicable postconviction relief statute).

NRS § 34.724 (2005) (providing postconviction habeas relief from conviction or sentence).

NRS § 34.726 (2005) (providing one year statute of limitation).

NRS § 34.800 (2005) (providing for dismissal of late petitions).

NRS § 34.820 (2005) (setting forth procedures in capital cases).

Appellate Review of Collateral Proceedings

Nevada Supreme Court Rule 250(7), which invokes limited application of the Nevada Rules of Appellate Procedure, governs procedure in capital postconviction appeals. The original trial record is not transmitted to the supreme court unless requested. In postconviction appeals, the court makes a decision without oral argument unless the supreme court orders otherwise.

Nevada Rules:

Nev. Sup. Ct. R. 250(7) (providing procedures in capital postconviction appeals).

Procedural Bar/Waiver/Exhaustion

A petition shall be dismissed if (1) the conviction was upon a plea of guilty and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel; or (2) the conviction was the result of a trial and the grounds for the petition could have been raised at trial, on direct appeal, or in a prior petition, unless petitioner alleges cause and prejudice. In *Pelligrini v. State*, 117 Nev. 860, 34 P.3d 519 (2001) (en banc), the court disapproved of *Pertgen v. State*, 110 Nev. 554, 875 P.2d 361 (1994), to the extent that *Pertgen* implied that special discretion attaches to procedural bars applied in capital habeas cases. The court stated in *Pelligrini* that special import attaches to this discretion where the death penalty has been imposed; however, the plain error rule is a rule for review on direct appeal and does not create a procedural bar exception in any habeas proceeding, capital or not.

A second or subsequent petition is barred if it fails to allege new grounds for relief or if there was an abuse of the writ by the petitioner's failing to raise the issue in the initial postconviction relief petition.

Once the state raises the affirmative defenses of waiver or abuse of writ, the petitioner has the burden of proving good cause and actual prejudice. The court may dismiss a petition that fails to reference any prior proceeding known to the court.

Ninth Circuit:

Vang v. Nevada, 329 F.3d 1069 (9th Cir. 2003) (holding in noncapital case, that because the state filed a length response in which it did not rely on procedural bar, the district court erred in sua sponte applying that defense as to three claims and that NRS § 34.810, which bars claims on collateral review if they could have been brought on direct appeal, was an independent and adequate procedural bar as to two other claims and distinguishing *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002) (en banc) on the basis that the capital nature of the sentence in that case played a pivotal role in the

Nevada Supreme Court's discretion not to apply the bar).

Nevada Supreme Court:

Pelligrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (en banc) (holding that good cause and actual prejudice is required to overcome statutory procedural bars to habeas corpus relief; reaffirming that claims of ineffective assistance of counsel brought in timely first postconviction petition for writ of habeas corpus are not subject to dismissal on grounds of waiver, regardless of whether claims could have been appropriately raised on direct appeal; holding that trial court error may be appropriately raised in a timely first postconviction petition in context of claims of ineffective assistance of counsel, but independent claims based on same error are subject to waiver bars because such claims could have been presented to trial court or raised in direct appeal).

Mazzan v. Warden, Ely State Prison, 116 Nev. 48, 993 P.2d 25 (2000) (en banc) (finding cause and prejudice and granting relief on second postconviction petition; finding prosecutor withheld exculpatory material in violation of *Brady*).

McNelton v. State, 115 Nev. 396, 990 P.2d 1263 (2000) (en banc) (refusing to address issues not raised in petition but raised for first time on postconviction appeal alleging ineffective assistance of counsel because petitioner failed to allege good cause and prejudice for failing to include claims in petition).

Crump v. Warden, Nevada State Prison, 113 Nev. 293, 934 P.2d 247 (1997) (holding postconviction petitioner who has counsel appointed by statutory mandate is entitled to effective assistance of that counsel; defendant can allege ineffectiveness of his postconviction counsel in subsequent postconviction relief petition, but defendant must prove cause and prejudice to overcome procedural default).

Pertgen v. State, 110 Nev. 554, 875 P.2d 361 (1994) (considering appellate claim in postconviction proceeding).

Phelps v. Director, Nevada Dep't of Prisons, 104 Nev. 656, 764 P.2d 1303 (1988) (holding that legislature intended that the affirmative defenses of waiver or abuse of the writ must be raised by the state; the burden then falls upon the petitioner to show good cause or actual prejudice).

Nevada Statutes:

NRS § 34.810 (2005) (providing for dismissal of petition for procedural bar).

Execution

The trial court issues a death warrant along with the judgment of death. The warrant sets a week for the execution, between sixty and ninety days after the time of judgment. The director of the department of prisons may execute the sentence anytime within the designated week. The prison director is required to invite two doctors, the coroner, and not less than six citizens to the execution. Nevada law gives preference to representatives of the victim's family. The law has no provision for attendance of the defendant's family. The director of prisons is present at the execution, which is performed by lethal injection.

When a remittitur is filed in the trial court affirming a death judgment and sentence upon appeal or a postconviction relief proceeding, the clerk of the trial court may issue a new warrant ordering a new time for the execution. Additionally, the attorney general or district attorney may petition the trial court for a new warrant when the supreme court has denied appellate relief in a postconviction proceeding but has entered a stay of issuance of remittitur.

Counsel for the state is required to file written notice of any warrant of execution with the supreme court clerk and the prison director. The prison director is required to file notice of the execution date with the supreme court.

Nevada Statutes:

NRS § 176.345 (2005) (providing death warrant issued upon judgment of death; execution date set for within sixty to ninety days).

NRS § 176.355 (2005) (providing for execution by lethal injection).

NRS § 176.495 (2005) (executing new warrant).

NRS § 176.505 (2005) (providing for court order requiring execution of judgment at specified time).

Nevada Rules:

Nev. S. Ct. R. 250(10)(a) (providing notice of warrant to supreme court).

Nev. S. Ct. R. 250(10)(b) (providing notice of execution date to supreme court).

Competency for Execution

When postconviction sanity is an issue, Nevada law provides that the director of the department of prisons may allege the insanity in a petition to the state district court in the county in which the prison is located. After two doctors examine the prisoner, the court holds a hearing to determine sanity. The attorney general is required to attend the hearing. Although neither the district attorney nor the defense attorney's presence is statutorily required, each has the right to offer evidence and cross-examine witnesses.

If the court finds that the defendant is not sane, it stays the execution and orders the prison director to continue confining the defendant. If the prisoner regains sanity, the director notifies the court. If the court is satisfied with the defendant's sanity, it lifts the stay and notifies the district court who issued the death sentence. The trial court then issues a new warrant for the defendant's execution.

In *Calambro v. Second Judicial Dist. Ct.*, 114 Nev. 961, 964 P.2d 794 (1998), *cert. denied*, 525 U.S. 1149 (1999), the supreme court affirmed the district court's denial of next friend standing. In *Calambro*, the prison director never raised the issue of defendant's mental capacity in a petition to the district court. Six days before defendant's scheduled execution, Calambro's mother petitioned the court in a postconviction habeas proceeding, as next friend, raising the issue of defendant's mental incompetence. The supreme court upheld the district court's findings that Calambro was competent and that he voluntarily waived his right to challenge his sentence and conviction in postconviction proceedings and affirmed the lower court's ultimate conclusion that Calambro's mother consequently lacked standing as next friend to challenge her son's sentence.

The prison director may also petition the district court where the prison is located if a death-sentenced inmate is pregnant. Upon a determination by three physicians that the defendant is pregnant, the death sentence is stayed until the

defendant is no longer pregnant.

Nevada Supreme Court:

Calambro v. Second Judicial Dist. Ct., 114 Nev. 961, 964 P.2d 794 (1998) (holding capital prisoner's mother lacked standing to assert the absence of sanity to be executed because defendant, who was found competent, stated he did not wish to challenge his sentence), *cert. denied*, 525 U.S. 1149 (1999).

Nevada Statutes:

NRS § 176.425 (2005) (providing for sanity investigation, stay of execution).

NRS § 176.435 (2005) (providing for sanity investigation; conduct of hearing).

NRS § 176.455 (2005) (requiring suspension of execution while defendant insane).

NRS § 176.465 (2005) (providing for investigation of pregnancy).

Stays of Execution

A death sentence is automatically stayed upon appeal. The first petition challenging the defendant's conviction or sentence automatically stays the execution during the pendency of the petition and appeal. However, after the first petition, a stay of execution to pursue collateral postconviction relief is granted only after the defendant (1) files a petition, (2) establishes a compelling basis for the stay, and (3) gives notice to the state. The trial judge may enter a stay of execution to pursue an investigation into the defendant's sanity or pregnancy. The Board of Pardons Commissioners may also enter a stay.

Defense counsel must file any motion for stay of execution in the supreme court promptly upon learning the grounds to be asserted in the motion. The supreme court may impose sanctions when defense counsel knowingly delays filing the motion. Counsel for the state must notify the supreme court of any stay of execution issued by any court other than the supreme court.

Nevada Statutes:

NRS § 34.820 (2005) (providing for mandatory stay of execution for first postconviction petition).

NRS § 34.726 (2005) (providing no stay of execution during one-year period to file postconviction petition unless petition filed and compelling basis for stay).

NRS § 176.415 (2005) (providing when execution of death penalty may be stayed).

NRS § 176.425 (2005) (providing stay of execution for sanity determination).

NRS § 176.486 (2005) (permitting stay of execution after postconviction petition filed only after notice provided to state).

NRS § 177.095 (2005) (requiring automatic stay on appeal).

Nevada Rules:

Nev. S. Ct. R. 250(10)(c) (providing for notice to supreme court of entry of stay of execution).

Nev. S. Ct. R. 250(10)(d) (providing for duty of defense counsel to promptly notice supreme court of intent to file motion to stay execution).

Clemency Procedures

The State Board of Pardons Commissioners has sole authority to commute a death sentence. The Board is composed of the governor, the justices of the state supreme court, and the attorney general. However, the 1995 Nevada legislature precluded commutation of death sentences for persons convicted of capital murder after July 1, 1995, "to a sentence that would allow parole."

Nevada Supreme Court:

Sonner v. State, 114 Nev. 321, 955 P.2d 673 (1998) (providing jury instruction to comport with new Nevada Revised Statutes § 213.085 provision; holding instruction shall not discuss modification of sentences by the pardons board).

Colwell v. State, 112 Nev. 807, 919 P.2d 403 (1996) (holding Nevada Revised Statutes § 213.085 does not unconstitutionally deny defendant chance at clemency; statute merely limits power of commutation).

Nevada Statutes:

Nev. Const. art. V, § 14 (addressing power of commutation).

NRS §§ 213.005–213.100 (2005) (governing applications for clemency).

NRS § 213.085 (2005) (prohibiting commutation of death sentence).

OREGON

History

Oregon's death penalty history reflects ambivalence toward capital punishment. In 1864, the legislature established the death penalty for first degree murder and provided the court with discretion to decide punishment. In a 1914 constitutional amendment initiative, Oregon voters abolished capital punishment. However, six years later the legislature reinstated the death penalty but allowed the jury to make a binding recommendation for a life sentence. In 1964, voters again abolished capital punishment by popular vote. Although voters reinstated the death penalty in 1978, the Oregon Supreme Court invalidated the new law.

In 1984, voters adopted Oregon's current death penalty law for aggravated murder. The law, modeled after a Texas capital punishment statute approved by the U.S. Supreme Court in *Jurek v. Texas*, 428 U.S. 262 (1976), allowed for a jury to impose the death penalty after a sentencing hearing if it answered three statutory questions affirmatively. In response to the Supreme Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), the 1989 Oregon legislature amended its statute by adding a fourth sentencing question that assured jury consideration of all mitigating circumstances. In *State v. Wagner*, 309 Or. 5, 786 P.2d 93 (1990), the Oregon Supreme Court, troubled with the imprecise grammar of the 1989 amendment, clarified the constitutional requirements of the new legislation. Consequently, the 1991 legislature rewrote the fourth question to simply ask the jury whether the defendant should receive a death sentence.

United States Supreme Court:

Penry v. Lynaugh, 492 U.S. 302 (1989) (requiring jury consideration of mitigating evidence at death sentencing).

Jurek v. Texas, 428 U.S. 262 (1976) (upholding Texas capital punishment statute against Eighth and Fourteenth Amendment attacks).

Oregon Supreme Court:

State v. Wagner, 309 Or. 5, 786 P.2d 93 (holding pre-1989 death penalty statute requires submission of additional question to sentencing jury, allowing jury to conclude mitigating evidence justifies life sentence; clarifies additional question to be asked pursuant to 1989 amendment), *cert. denied*, 498 U.S. 879 (1990).

State v. Quinn, 290 Or. 383, 623 P.2d 630 (1981) (finding Oregon 1978 death penalty statute unconstitutional because it required the court to base its death penalty decision on a factual determination of the criminal act, which should be a jury decision).

Oregon Statutes:

Or. Rev. Stat. § 163.105 (2005) (providing death penalty for aggravated murder).

Or. Rev. Stat. § 163.150 (2005) (requiring sentencing hearing, before trial jury, to determine death or life sentence).

Capital Offenses

Aggravated murder is the only capital offense in Oregon. A defendant convicted of aggravated murder is sentenced to death, life imprisonment without possibility of release, or life imprisonment (a minimum of thirty years without possibility of parole).

Aggravated murder requires a finding of murder, as defined in Oregon Revised Statutes § 163.115, plus a finding of one of twelve aggravating circumstances. In *State v. McDonnell*, 313 Or. 478, 837 P.2d 941 (1992), the Oregon Supreme Court found that the aggravating circumstances listed in Oregon Revised Statutes § 163.095 presumptively constitute a narrow class of conduct sufficient to justify a death penalty.

In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court held that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on those who were under the age of 18 at the time their crimes were committed. Prior to *Roper,* Oregon law also provided that the death penalty may not be imposed upon a person who was a minor at the time the offense was committed, although the offender will be prosecuted as an adult if older than 15 years at the time of the offense.

Although no Oregon statute currently prohibits execution of the mentally retarded, on June 20, 2002, the U.S. Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the execution of the mentally retarded constitutes cruel and unusual

punishment prohibited by the Eighth Amendment. See § 1.6.

United States Supreme Court:

Roper v Simmons, 543 U.S. 551 (2005) (holding that Eighth and Fourteenth Amendments forbid imposition of death penalty on those who were under the age of 18 at time their crimes were committed).

Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executing the mentally retarded violates the Eighth Amendment's prohibition against cruel and unusual punishment).

Oregon Supreme Court:

State v. McDonnell, 313 Or. 478, 837 P.2d 941 (1992) (holding aggravating circumstances listed in § 163.095 presumptively constitute narrow class of conduct sufficient to justify death penalty).

Oregon Statutes:

Or. Rev. Stat. § 137.707 (2005) (prohibiting death penalty for offenders under 18 at time of offense).

Or. Rev. Stat. § 163.105 (2005) (providing death, life without parole, or life sentences for aggravated murder).

Or. Rev. Stat. § 163.115 (2005) (defining murder).

Or. Rev. Stat. § 163.095 (2005) (defining aggravated murder).

Representation in Capital Cases

An indigent defendant's right to counsel attaches at arraignment. In Oregon, all counsel appointed to represent indigent defendants at trial and postconviction proceedings are contract appointments. Effective October 1, 2001 the Public Defense Services Commission (PDSC) assumed responsibility for the Office of Defense Service (formerly the state public defender). The PDSC maintains contracts with capital counsel who meet established competency standards. Upon a determination of indigency, the circuit court appoints counsel in compliance with the applicable PDSC contracts for all stages of capital representation.

Upon imposition of a death sentence and a showing of indigency, the Oregon Supreme Court appoints counsel to represent the defendant on automatic appeal. The supreme court appoints counsel from the Legal Services Division of the Office of Public Defense Services unless that office has a conflict of interest or lacks the capacity to undertake the representation for budgetary or other reasons, or the court has a reasonable and objective basis to believe that the office could not provide adequate representation to the defendant. Generally, trial counsel is not reappointed for the appeal. The supreme court may limit the number of compensable hours appellate counsel may expend on the case without further review. At all stages of representation, capital counsel's pay is $55 per hour

Oregon Supreme Court:

State v. McDonnell, 313 Or. 478, 837 P.2d 941 (1992) (holding defendant has no state constitutional right to act as co-counsel in capital punishment trial proceedings).

Oregon Statutes:

Or. Rev. Stat. § 135.045 (2005) (providing for court appointment of criminal counsel at arraignment).

Or. Rev. Stat. § 135.050 (2005) (providing eligibility for court-appointed counsel).

Or. Rev. Stat. § 138.590 (2005) (providing for court appointment of counsel at postconviction proceeding).

Oregon Rules:

Or. R. App. P. 12.12 (providing appointment of counsel for automatic capital appeal).

Or. Qualification Standards for Ct. Appointed Counsel 3.1 (providing competency standards for capital counsel at trial, appeal, and state postconviction proceeding).

Or. Indigent Defense Compensation Policies & Procedures § 3.1(B) (providing fee schedule for contract appointments).

Trial of Capital Offenses

The circuit court is the state trial court of general jurisdiction. It has original jurisdiction over all civil and criminal cases, including felonies, habeas corpus, and postconviction review. Oregon's general criminal trial procedures apply to the guilt phase of a capital case. In aggravated murder cases, both the defendant and the state are entitled to twelve peremptory challenges instead of the usual six. To be convicted of aggravated murder, the state must prove at least one aggravating circumstance listed in § 163.095.

Oregon Statutes:

Or. Rev. Stat. § 136.001, *et seq.* (2005) (providing general criminal trial procedures).

Or. Rev. Stat. § 136.230 (2005) (allowing twelve peremptory challenges in capital cases).

Or. Rev. Stat. § 163.095 (2005) (defining circumstances that constitute aggravated murder).

Or. Rev. Stat. § 163.150 (2005) (requiring separate sentencing hearing for aggravated murder).

Capital Sentencing

Penalty Hearing

When a defendant is convicted of aggravated murder, the same trial jury, after a sentencing hearing, determines whether the defendant should receive a sentence of death, life, or life without the possibility of release.

At the sentencing hearing, the court may admit new evidence that it deems relevant to sentencing, including victim impact evidence and any evidence bearing on the issue of whether the defendant should receive a death sentence. The jury may consider all evidence received at trial, but the evidence cannot be reintroduced at the penalty hearing.

At the conclusion of the sentencing hearing, the court instructs the jury to

consider any mitigating evidence and to return unanimous special verdicts on four statutory questions: (1) whether the murder was deliberate and with expectation that death would result, (2) whether it is probable that the defendant will be a continuing violent threat to society, (3) whether the murder was an unreasonable response to provocation, if any, by the deceased, and (4) whether the defendant should receive the death penalty.

If a defendant pleads guilty or no contest to aggravated murder, the court impanels a jury for sentencing purposes. If the state declines to pursue the death penalty, the court will impanel a jury to determine the appropriate life sentence.

United States Supreme Court:

Oregon v. Guzek, 2006 WL397856 (U.S. Feb. 22, 2006) (vacating and remanding a decision of the Oregon Supreme Court, which had held that the federal Constitution guaranteed defendant the right at resentencing to present live alibi evidence from his mother, U.S. Supreme Court held that Constitution does not prohibit State from limiting the innocence-related evidence a capital defendant may introduce at trial; explaining that Supreme Court had not interpreted Eighth Amendment as providing such defendant a right to introduce at sentencing alibi evidence designed to cast residual doubt on his guilt of basic crime of conviction; noting that negative impact of rule restricting defendant's ability to introduce new alibi evidence was minimized by Oregon law giving defendant right to present sentencing jury all the innocence evidence from original trial through transcripts).

Oregon Supreme Court:

State v. Guzek, 336 Or. 424, 86 P.3d 1106 (2004) (holding that failure to give jury instructions on "true life sentencing option" in defendant's third penalty phase proceeding was reversible error where defendant moved to have trial court instruct jury on that sentencing option and expressly waived all ex post fact guarantees), *vacated on other grounds,* 2006 WL 397856 (U.S. Feb. 22, 2006) (*see above*).

State v. Sparks, 336 Or. 298, 83 P.3d 304 (holding that nonfamily members of a murder victim could present victim impact evidence during the penalty phase of the trial and that sentencing defendant "to death on all fifteen counts" of aggravated murder did not improperly impose multiple sentences of death), *cert. denied*, 125 S. Ct. 219 (2004).

State v. Oatney, 335 Or. 276, 66 P.3d 475 (2003) (holding that *Ring v. Arizona (*see § 4.6.1) does not require that "deliberateness" be charged specifically in the indictment before the question of deliberateness can be submitted to a jury, and that unlike in *Ring,* the trial court did not impose on defendant any punishment that the jury's answers in the special verdict in the penalty phase did not require).

State v. Rogers, 330 Or. 282, 4 P.3d 1261 (2000) (vacating death sentence and holding that trial court erred in refusing to permit jury to consider option under § 163.150(5)(a) of sentencing defendant to life in prison without possibility of parole and to permit defendant to waive *ex post facto* objection to jury's consideration of that option).

State v. Barone, 328 Or. 68, 969 P.2d 1013 (1998) (holding victim's opinion on death penalty not relevant to fourth sentencing question; conduct of past crimes admissible at sentencing hearing to establish future dangerousness, notwithstanding stipulation to charge or conviction), *cert. denied,* 528 U.S. 1135.

State ex rel. Carlile v. Frost, 326 Or. 607, 956 P.2d 202 (holding all evidence properly admitted at first trial and sentencing hearing admissible in new penalty proceeding without an Oregon Evidence Code Rule 403 balancing analysis), *remand after reversal*, 155 Or. App. 260, 958 P.2d 909 (1998).

State v. Cunningham, 320 Or. 47, 880 P.2d 431 (1994) (en banc) (holding federal and state constitutions do not require district attorney to disclose statewide information about similarly situated defendants to analyze disparate treatment in plea bargaining or sentencing), *cert. denied*, 514 U.S. 1005 (1995).

State v. Stevens, 319 Or. 573, 897 P.2d 162 (1994) (stating that standard of relevance set forth in Oregon Evidence Code Rule 401 applies in penalty-phase hearing).

State v. Boots, 315 Or. 572, 848 P.2d 76 (1993) (holding trial court did not err limiting retrial to aggravation enhancement when underlying murder conviction affirmed).

Oregon Statutes:

Or. Rev. Stat. § 163.150 (2005) (requiring bifurcated capital sentencing hearing; allowing any evidence relevant to sentencing; guilty or no contest pleas; resentencing).

Or. Rev. Stat. § 163.150(1)(b) (2005) (enumerating four questions requiring special verdict at sentencing hearing).

Aggravating Circumstances

To be convicted of aggravated murder, the district attorney must prove at least one of the following eleven aggravating circumstances: (1) receipt of money for committing the murder, (2) solicitation of another to commit the murder, (3) a prior homicide conviction, (4) multiple murder victims, (5) murder involved intentional maiming or torture, (6) victim was under 14 years old, (7) victim was a police, correctional, or judicial officer, juror, witness, or employee of the court or parole board, (8) defendant was in custody or had escaped from a penal or correctional facility at the time of the murder, (9) the murder was committed by use of explosives, (10) intentional felony murder, and (11) murder committed to conceal a crime. The jury must agree unanimously on the same aggravating circumstance.

Additionally, the sentencing jury must answer four interrogatories affirmatively to impose the death penalty: (1) Did the defendant act deliberately and with the reasonable expectation that death would result? (2) Is there is a probability that the defendant would constitute a continuing threat to society? (3) Was the defendant's conduct an unreasonable response to provocation, if any? and (4) Should the defendant receive a death sentence? The jury must agree unanimously on each of the first three questions in order to render a "yes" response.

Oregon Supreme Court:

State v. Compton, 333 Or. 274, 39 P.3d 833 (holding that § 163.150(1) and its related jury instruction did not violate Eighth or Fourteenth Amendments and that federal constitution does not require court to instruct jury in penalty phase that it is entitled to consider only aggravating factors that relate to defendant's character or to circumstances of defendant's crime in deciding whether to impose death sentence), *cert. denied,* 537 U.S. 841 (2002)

State v. Barrett, 331 Or. 27, 10 P.3d 901 (2000) (holding three aggravated murder convictions, involving same conduct and same victim, did not violate two or more statutory provisions, for purposes of constituting two or more separately punishable crimes).

State v. Langley, 314 Or. 247, 839 P.2d 692 (1992) (holding terms "confined" and "otherwise in custody" as used in §163.095(2)(b) not vague under state or federal

constitutions).

State v. Isom, 313 Or. 391, 837 P.2d 491 (1992) (appeal after remand) (holding that state correctional facility, as referenced in § 163.095(2)(f), includes a state correctional facility in any state; § 163.095(2)(f) not unconstitutionally vague under state and federal constitutions).

State v. Farrar, 309 Or. 132, 786 P.2d 161 (1990) (en banc) (holding § 163.095(2)(d) and (2)(e), defining aggravated felony murder and aggravated murder by concealment, not unconstitutionally vague under state and federal constitutions).

State v. Boots, 308 Or. 371, 780 P.2d 725 (1989) (holding jury must unanimously agree on manner in which aggravated murder was committed when alternative theories of aggravated murder charged).

State v. Wagner, 305 Or. 115, 752 P.2d 1136 (1988) (holding second interrogatory, regarding defendant being a threat to society, is not unconstitutionally vague under state constitution), *vacated on other grounds*, 309 Or. 5, 786 P.2d 93, *cert. denied*, 489 U.S. 879 (1990).

State v. Maney, 297 Or. 620, 688 P.2d 63 (1984) (holding that term "witness in a criminal proceeding," found in § 163.095 includes someone who has not yet been subpoenaed but whose testimony is desired in a criminal proceeding or grand jury investigation).

Oregon Statutes:

Or. Rev. Stat. § 163.095 (2005) (listing circumstances that qualify murder as aggravated murder).

Or. Rev. Stat. § 163.150(1) (2005) (allowing victim impact evidence at sentencing; listing four issues jury must decide after presentation of evidence at sentencing; requiring proof beyond a reasonable doubt on non-mitigating issues).

Mitigating Circumstances

Oregon death penalty law requires the court to instruct the sentencing jury to consider any mitigating circumstances offered in evidence, including, but not limited to, the defendant's age, the extent and severity of the defendant's prior criminal conduct, and the extent of the mental and emotional pressure under which the defendant was acting

at the time the defendant committed the offense. The Oregon Supreme Court, in *State v. Wagner,* 305 Or. 115, 752 P.2d 1136 (1988), rejected the contention that only mitigating evidence causally related to the offense is relevant to the sentence.

The fourth special verdict that a jury must return in a capital case is whether the defendant should receive a death sentence. The legislature added this special verdict to the statute in 1991 so the jury could consider mitigating factors and choose a punishment less than death even when all aggravating factors are present. The court must instruct the jury to answer the fourth interrogatory negatively if one or more of the jurors believe the death penalty inappropriate after considering any aggravating evidence, mitigating evidence concerning the defendant's character or background, any victim impact evidence, and the circumstances of the offense.

Oregon Supreme Court:

State v. Wright, 323 Or. 8, 913 P.2d 321 (1996) (stating that to be relevant to fourth question, evidence must relate to some aspect of defendant's character or background or to any circumstance of the crime).

State v. Wagner, 305 Or. 115, 752 P.2d 1136 (1988) (rejecting contention that all mitigating evidence causally related to offense is relevant to sentence), *vacated on other grounds*, 309 Or. 5, 786 P.2d 93, *cert. denied,* 498 U.S. 879 (1990).

Oregon Statutes:

Or. Rev. Stat. § 163.150(1)(c) (2005) (enumerating mitigating factors; requiring "no" verdict if at least one juror finds sentence less than death is justified).

Or. Rev. Stat. § 163.150(2) (2005) (requiring life sentence if no unanimous jury verdict reached).

Appellate Review of Capital Sentences

When a defendant receives a capital sentence, the judgment of conviction and the sentence receive automatic direct review by the Oregon Supreme Court. The trial court clerk commences the review by serving statutorily mandated papers on the Supreme Court Administrator. Court proceedings are transcribed and forwarded to the supreme

court. However, jury selection proceedings are not part of the appellate record unless requested by a party upon a showing of good cause. Death penalty cases take priority over other supreme court cases.

Section 138.012 of the Oregon Revised Statutes provides procedures for resentencing when a death sentence is set aside. At the election of the state, the trial court sentences the defendant to life or impanels a jury to determine if the defendant should be sentenced to death, life imprisonment, or life imprisonment without release.

Oregon Supreme Court:

State v. Moore, 324 Or. 396, 927 P.2d 1073 (1996) (holding that fourth sentencing question, which vests jury with discretion to impose death sentence and contains no burden of proof, does not unconstitutionally preclude meaningful appellate review).

State v. Quinn, 289 Or. 727, 618 P.2d 412 (1980) (holding automatic review is sole direct review in capital cases).

Oregon Statutes:

Or. Rev. Stat. § 138.012 (2005) (providing direct and automatic review for capital cases; defining procedure for resentencing after remand).

Oregon Rules:

Or. R. App. P. 12.10(1) (providing procedure for automatic supreme court review of death cases).

Collateral Remedies

The legislature enacted Oregon's Post-Conviction Hearing Act to replace the multitude of common law remedies that were available to challenge the lawfulness of criminal convictions. The Act replaces all postconviction collateral remedies except habeas corpus.

Oregon Court of Appeals:

Page v. Cupp, 78 Or. App. 520, 717 P.2d 1183 (stating purpose of Post-Conviction

Hearing Act), *review denied*, 301 Or. 338, 722 P.2d 737 (1986).

Oregon Statutes:

Or. Rev. Stat. § 138.540(1) (2005) (providing exclusive means for challenging lawfulness of criminal judgment or proceedings; replacing, with the exception of habeas corpus, all common law postconviction remedies).

Postconviction Relief

A defendant may seek postconviction relief under Oregon's Post-Conviction Hearing Act, codified at Oregon Revised Statutes §§ 138.510–138.680. This relief is not available if direct appellate review of the sentence or the conviction is pending.

For conviction or appeals becoming final after August 5, 1989, the petition must be filed within two years of either the trial judgment or the date that the state supreme court's automatic review is final. The 1993 legislature set a one-year time period in which to file petitions for convictions and appeals which became final prior to August 5, 1989. Grounds for relief under the Act are: (1) federal or state constitutional violations at trial and on appeal, (2) lack of trial court jurisdiction, (3) illegal or unconstitutional sentence, and (4) unconstitutional charging statute.

The postconviction statute limits standing to the convicted criminal defendant, who may waive the right to file. Although the Oregon Supreme Court held that the statute does not recognize the right of a third party or "next-friend" to file such a claim, *see Bryant v. Thompson*, 324 Or. 141, 922 P.2d 1219 (1996), the 1999 legislature enacted law providing for next friend representation. However, the court must personally serve the defendant with copies of all documents filed in a next friend petition proceeding.

The postconviction relief petition is filed in the circuit court in the jurisdiction where the petitioner is imprisoned but can be transferred to the circuit court in the jurisdiction where the conviction occurred. The state responds to the petition by demurrer, answer, or motion within thirty days unless the court grants an extension. After the state responds, if the petition states a ground for relief, the court conducts a hearing on the merits. A petitioner has a right to be present at any hearing unless the state demurs or the hearing involves only issues of law. The capital inmate has the

burden of proving the contents of the petition by a preponderance of the evidence.

The failure of a petitioner to seek appellate review does not preclude relief under the postconviction relief act. However, a petitioner waives any grounds that could have been raised on appeal unless the petitioner did not have counsel on appeal. Finally, the petitioner must raise all known grounds for relief available in the original or amended petition for postconviction relief. The petitioner waives any grounds not raised in the original petition unless petitioner shows that the grounds could not reasonably have been raised in the first petition.

Oregon Supreme Court:

Wallis v. Baldwin, 152 Or. App. 295, 954 P.2d 192 (holding one-year limitation period without escape clause constitutional on pre-1989 convictions), *review denied*, 327 Or. 174, 966 P.2d 218 (1998).
Wright v. Thompson, 324 Or. 153, 922 P.2d 1224 (1996) (denying third-party-counsel standing to litigate).

Bryant v. Thompson, 324 Or. 141, 922 P.2d 1219 (1996) (ruling no next-friend standing in postconviction death penalty case).

Oregon Court of Appeals:

Page v. Cupp, 78 Or. App. 520, 717 P. 2d 1183 (holding defendant required to raise all grounds for relief available in original or amended petition for postconviction relief), *review denied*, 301 Or. 338, 722 P.2d 737 (1986).

Oregon Statutes:

Or. Rev. Stat. § 137.482 (2005) (providing for personal service to defendant of all documents in a § 138.510(2) proceeding).

Or. Rev. Stat. § 138.510, *et seq.* (2005) (providing Post-Conviction Hearing Act).

Or. Rev. Stat. § 138.510(2) (2005) (providing for next friend standing).

Or. Rev. Stat. § 138.510(3) (2005) (providing two-year deadline for filing postconviction petition).

Or. Rev. Stat. § 138.530 (2005) (providing grounds for postconviction relief).

Or. Rev. Stat. § 138.540 (2005) (limiting postconviction relief to challenging lawfulness of judgment or conviction).

Or. Rev. Stat. § 138.550 (2005) (providing waiver of grounds for relief).

Or. Rev. Stat. § 138.560 (2005) (defining contents of postconviction petition).

Or. Rev. Stat. § 138.620 (2005) (providing hearing; burden of proof).

Habeas Corpus

Certain collateral relief is also available by petition for a writ of habeas corpus. Habeas corpus is available for challenging confinement on grounds other than the lawfulness of the judgment or the grounds upon which it is based; therefore, it is rarely sought in death penalty cases. Grounds for filing a habeas petition are statutorily limited to matters such as revocation of parole, completion of service of the sentence imposed, and conditions of confinement.

Oregon Supreme Court:

Bedell v. Schiedler, 307 Or. 562, 770 P.2d 909 (1989) (providing comprehensive discussion of Oregon's habeas procedure).

Oregon Statutes:

Or. Rev. Stat. §§ 34.310-34.730 (2005) (providing for habeas corpus).

Or. Rev. Stat. § 34.330 (2005) (providing that relief available under postconviction petition may not be sought under habeas corpus).

Or. Rev. Stat. § 34.360 (2005) (setting forth contents of petition challenging conditions of confinement).

Appellate Review of Collateral Proceedings

Either party may appeal to the court of appeals within thirty days after the entry of the

final judgment on a postconviction petition. The scope of review is the same as in appeals for other criminal actions except that the trial court may provide that the transcript contain only the evidence relevant to the issues on appeal. Also, there is no "escape hatch" provision for an untimely appeal. The scope of review is limited to questions of law appearing on the record, and the appellate court is not authorized to examine disputed questions of fact.

The court of appeals may dismiss the appeal without oral argument or submission of briefs if it finds that the appeal presents no substantial question of law. Such a dismissal constitutes a decision on the merits of the appeal. A decision on habeas corpus may be appealed pursuant to Oregon Revised Statutes § 34.710.

Oregon Supreme Court:

Hartzog v. Keeney, 304 Or. 57, 742 P.2d 600 (1987) (holding neither court of appeals nor supreme court may try questions of fact on appeal in postconviction proceeding).

Alcorn v. Gladden, 237 Or. 106, 390 P.2d 625 (1964) (holding trial court findings of fact in postconviction proceeding are conclusive and supreme court not authorized to reexamine disputed questions of fact, citing §138.650).

Oregon Statutes:

Or. Rev. Stat. § 34.710 (2005) (providing for appeal of habeas corpus).

Or. Rev. Stat. § 138.650 (2005) (providing for postconviction appeal).

Or. Rev. Stat. § 138.220 (2005) (defining scope of review).

Or. Rev. Stat. § 138.660 (2005) (providing for summary affirmance).

Procedural Bar/Waiver/Exhaustion

Postconviction relief is not available until completion of direct appellate review in capital cases. Any grounds for relief that could reasonably have been asserted in the direct appellate review may not later be asserted in a postconviction action unless the petitioner was not represented on appeal. Section 138.550(1) of the Oregon Revised

Statutes provides that the failure of petitioner to seek appellate review or to preserve an issue at trial does not preclude postconviction review of the issue.

Any known ground for relief that is not asserted in the original or amended petition for postconviction relief is deemed waived and may not be asserted in subsequent postconviction petitions, unless petitioner shows that the grounds could not reasonably have been raised in the first petition.

Oregon Statutes:

Or. Rev. Stat. § 138.540 (2005) (providing when postconviction petition may be filed; availability of relief).

Or. Rev. Stat. § 138.550(1) (2005) (providing that availability of relief not precluded by failure to appeal or failure to raise issue at trial).

Or. Rev. Stat. § 138.550(2) (2005) (providing waiver of claims that reasonably could have been asserted in direct review).

Or. Rev. Stat. § 138.550(3) (2005) (providing waiver of claims that reasonably could have been asserted in earlier postconviction petition).

Execution

The trial court issues a death warrant upon a hearing after the supreme court's direct review of the sentence. The defendant must be present at the hearing. If the defendant wishes to waive counsel, the court is statutorily directed to determine whether the waiver is constitutional. At the hearing, the court makes a finding as to the defendant's competency to be executed and advises the defendant of the right to pursue certiorari to the Supreme Court, state postconviction and federal habeas. The trial court then issues a death warrant to be delivered to the superintendent of the correctional institution. The court is required to personally serve the defendant with all papers filed in a death warrant proceeding, even if the defendant is represented by counsel. The trial court's orders resulting from the death warrant hearing are not appealable.

Oregon's method of execution is lethal injection. In 2001, the legislature amended the statute to provide that representatives of the media may be invited to

witness an execution.

Oregon Supreme Court:

Oregon Newspaper Publishers Ass'n v. Oregon Dep't of Corrections, 329 Or. 115, 988 P.2d 359 (1999) (holding limited access rules as to executions promulgated by Oregon Department of Corrections invalid because they limit too severely activities witnesses may see and holding that nondisclosure rules promulgated by the department of corrections invalid to extent they purport to place limits on expression rights of persons who are granted right by statute to be present at executions).

Oregon Statutes:

Or. Rev. Stat. § 137.463 (2005) (providing for death warrant hearing and delivery of warrant to prison; providing for no appeal of trial court order).

Or. Rev. Stat. § 137.473(1) (2005) (providing lethal injection as method of execution; providing who may witness execution).

Or. Rev. Stat. § 137.476 (2005) (providing that inflicting lethal injection does not constitute practicing medicine).

Or. Rev. Stat. § 137.478 (2005) (return of warrant after execution).

Or. Rev. Stat. § 137.482 (2005) (providing personal service of documents in death warrant hearing).

Competency for Execution

The initial death warrant is issued after the circuit court conducts a hearing to address the defendant's competency to be executed. The court must order a state directed competency evaluation if the defendant wishes to waive his or her right to counsel, if the court has substantial reason to doubt defendant's competency, or if requested by the state. The court must conduct an additional hearing if either party contests the state expert's competency assessment. The court lacks jurisdiction to issue a death warrant without a finding of competency. According to the Oregon Code, the circuit judge's competency determination is not appealable.

Oregon Statutes:

Or. Rev. Stat. § 137.463 (2005) (providing for death warrant hearing addressing competency; providing for no appeal of trial court order).

Or. Rev. Stat. § 137.464 (2005) (providing for competency assessment by state mental health experts).

Or. Rev. Stat. § 137.466 (2005) (providing for hearing on contested competency findings; providing for no appeal of trial court order).

Or. Rev. Stat. § 137.482 (2005) (providing personal service of documents in death warrant hearing).

Stays of Execution

The initial death warrant is issued after the supreme court affirms the judgment and sentence on automatic review. *See* "Executions," *supra*. However, the death sentence is automatically stayed for 90 days and, if the defendant files a petition for certiorari, the sentence is further stayed until the Supreme Court rules on the petition.

Once the Oregon Supreme Court's review is final, the death warrant is again automatically stayed for 30 days to provide the defendant the opportunity to file a notice of intent to file a postconviction review petition. If a notice of intent is filed and the defendant files a postconviction petition within 90 days, the death warrant is stayed until the postconviction petition is finally resolved. If the petition is not filed within 90 days following the notice of intent filing, the stay of execution will continue provided the defendant demonstrates to the circuit court that progress is being made in the preparation of the petition.

Oregon Statutes:

Or. Rev. Stat. § 137.463 (2005) (providing for death warrant issued after hearing).

Or. Rev. Stat. § 138.686 (2005) (providing stays of execution to file petition for certiorari and to file state postconviction petition).

Clemency Procedures

The state constitution provides that the governor shall have the power to grant reprieves, commutations, and pardons for all offenses except treason. The governor's discretion is without limitation, except that the governor must exercise it in good faith.

The applicant must serve an application for clemency on the district attorney, the state board of parole and postprison supervision, and the director of the department of corrections. These agencies must provide the governor with all information and records relevant to the application, including, but not limited to, photos of the victim, statements by the victim's family members, the autopsy report, and a statement by the district attorney.

After receiving the application, the governor cannot grant a request for clemency for at least thirty days. If the governor does not act upon the request within 180 days of receipt, the request lapses. The governor must report each reprieve, commutation, or pardon to the Oregon Legislative Assembly and include a statement of particulars for each case.

Ninth Circuit District Courts:

Delaney v. Shobe, 235 F. Supp. 662 (D. Or. 1964) (holding governor's discretion is without limitation, except that it must be exercised in good faith).

Oregon Statutes:

Or. Const. art. V, § 14 (providing for reprieves, commutations, pardons; power of governor).

Or. Rev. Stat. § 144.649 (2005) (formerly § 144.640) (providing governor power to grant reprieves).

Or. Rev. Stat. § 144.650(4) (2005) (providing that governor must act on clemency request between thirty and 180 days of receipt).

Or. Rev. Stat. § 144.660 (2005) (providing communication to legislature by governor).

WASHINGTON

History

After the U.S. Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the Washington Supreme Court held that the state's death penalty statute violated the Eight and Fourteenth Amendments to the U.S. Constitution because it provided no guidance to control the sentencing authority in determining who would receive the death penalty and who would receive a sentence of life imprisonment. *See State v. Baker,* 81 Wash. 2d 281, 501 P.2d 284 (1972).

The Washington legislature's 1976 amendment to the capital sentencing law attempted to correct this problem by eliminating any discretion on the part of the sentencing authority. The new law imposed a mandatory death penalty. However, in light of the U.S. Supreme Court's opinion in *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Washington Supreme Court held the amended statute unconstitutional. *See State v. Green*, 91 Wash. 2d 431, 588 P.2d 1370 (1979).

In 1981, the legislature enacted the current capital punishment scheme which provides for a bifurcated sentencing proceeding where the jury hears all evidence relevant to mitigation.

United States Supreme Court:

Woodson v. North Carolina, 428 U.S. 238 (1976) (declaring mandatory death sentences unconstitutional).

Furman v. Georgia, 408 U.S. 349 (1972) (holding complete, unguided discretion capital punishment statute unconstitutional).

Ninth Circuit:

Brown v. Lambert, 431 F.3d 661 (9th Cir. 2005) (holding that under *Campbell v. Kincheloe*, the Washington death penalty statute is facially valid and adequately channels and guides jury sentencing discretion with respect to evidence of collateral

convictions).

Campbell v. Kincheloe, 829 F.2d 1453 (9th Cir. 1987) (holding death penalty statute constitutional against attacks of unguided jury discretion, unbridled discretion of prosecutor in seeking the death penalty, and mandatory presumption in favor of death penalty), *cert. denied*, 488 U.S. 948 (1988).

Washington Supreme Court:

State v. Green, 91 Wash. 2d 431, 588 P.2d 1370 (1979) (holding Washington mandatory death penalty statute unconstitutional), *reconsidered on other grounds*, 94 Wash. 2d 216, 616 P.2d 628 (1980).

State v. Baker, 81 Wash. 2d 281, 501 P.2d 284 (1972) (holding Washington death penalty statute, which leaves imposition of penalty to unguided discretion of jury, violates constitutional prohibition against cruel and unusual punishment).

Washington Statutes:

Wash. Rev. Code § 10.95.050 (Supp. 2006) (providing special sentencing hearing for aggravated first degree murder).

Capital Offenses

Aggravated first degree murder and treason are capital crimes in Washington. If found guilty of aggravated first degree murder, a defendant receives either a death sentence or a sentence of life imprisonment without the possibility of release. Under Washington law, mentally retarded or juvenile persons cannot be sentenced to death. Furthermore, in 2002 the United States Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the execution of the mentally retarded constitutes cruel and unusual punishment prohibited by the Eighth Amendment (see § 1.6), and in 2005 the Court held in *Roper v. Simmons*, 543 U.S. 551 (2005), that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on those who were under the age of 18 at the time of the offense.

United States Supreme Court:

Roper v. Simmons, 543 U.S. 551 (2005) (holding that Eighth and Fourteenth

Amendments forbid imposition of death penalty on those who were under the age of 18 at time their crimes were committed).

Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executing the mentally retarded violates the Eighth Amendment's prohibition against cruel and unusual punishment).

Washington Supreme Court:

State v. Furman, 122 Wash. 2d 440, 858 P.2d 1092 (1993) (holding that a person under eighteen years old when crime committed cannot be sentenced to death).

Washington Statutes:

Wash. Rev. Code § 9.82.010 (Supp. 2006) (providing capital punishment for treason).

Wash. Rev. Code § 10.95.020 (Supp. 2006) (defining aggravated first degree murder).

Wash. Rev. Code § 10.95.030 (2002) (providing sentences for aggravated first degree murder, providing for death penalty if warranted by special sentencing hearing; prohibiting death penalty if defendant mentally retarded).

Representation in Capital Cases

An indigent capital defendant has a right to court-appointed counsel at trial, on appeal, and for the first postconviction relief petition. The defendant may also request payment of investigative, expert, and other services necessary for an adequate defense.

In 1997, the Supreme Court of Washington adopted rules for the appointment of counsel in death penalty cases. The trial court appoints at least two attorneys for trial representation in a capital case. The supreme court, who also appoints counsel for personal restraint petitions, appoints two attorneys for the direct appeal. The supreme court will not appoint trial counsel for postconviction representation. The court will appoint appellate counsel for postconviction representation only if appellate counsel and petitioner request continued representation. The supreme court maintains a list of counsel who meet capital case competency standards. The trial court must make findings of fact if good cause is found for not appointing list counsel. In appointing counsel on appeal, the supreme court will consider the list, but will have final discretion in the appointment of counsel.

Washington Statutes:

Wash. Rev. Code § 4.88.330 (2002) (providing payment by state for appellate review counsel for indigent defendant).

Wash. Rev. Code § 7.36.250 (Supp. 2006) (providing waiver of filing fees and costs for indigent in habeas proceeding).

Wash. Rev. Code § 10.73.150 (2002) (providing indigent capital defendant's right to counsel on first appeal and first postconviction petition; right to counsel on second and subsequent postconviction petitions if collateral attack not barred).

Washington Rules:

Wash. Crim. R. 3.1 (providing right to and assignment of counsel generally).

Wash. R. App. P. 16.25 (providing for appointment of counsel for personal restraint petition in capital cases; supreme court roster of death penalty qualified counsel).

Wash. Super. Ct. Spec. Proc. Crim. R. 2, *as amended effective Jan. 1, 2003* (providing for appointment of counsel in capital cases; supreme court roster of death penalty qualified counsel).

Trial of Capital Offenses

The state superior court, which exercises original jurisdiction over civil and criminal cases, tries all capital cases. Capital trials have two phases: a guilt phase and a penalty phase. The state must file a notice of intent to pursue a capital sentence within thirty days of arraignment. Before filing the notice, the state must determine whether sufficient mitigating circumstances exist to merit leniency.

During the guilt phase, the jury determines whether the defendant is guilty of aggravated first degree murder. Aggravating circumstances are: (1) murder of a law enforcement officer, (2) defendant was imprisoned at time of murder, (3) murder for financial gain, (4) solicited murder, (5) murder to maintain status in organization, (6) drive-by shooting, (7) murder of judge, probation officer, or district attorney, (8) murder to conceal crime or identity, (9) multiple murder victims, and (10) felony murder. A defendant also commits aggravated murder when the victim has a

restraining order against the defendant or when the victim is a family or household member and the defendant has a history of violence against the victim. If the jury finds at least one aggravating circumstance, it convicts the defendant of aggravated first degree murder. The defendant is then subject to a separate sentencing proceeding to determine whether there are sufficient mitigating circumstances to merit leniency.

Washington Supreme Court:

State v. Thomas, 150 Wash. 2d. 821, 83 P.3d 970 (2004) (reversing a conviction for aggravated first degree murder and the death sentence, the court agreed with the defendant's contention that the jury instruction and the aggravating factors special verdict form given did not require the jury to find that defendant in particular had the intent to murder or that the aggravating factors specifically applied to him as opposed to his accomplice, and held that these instructional errors were not subject to a harmless error analysis for purposes of upholding a death sentence because to do so would be to find facts that increase the sentence beyond the statutory maximum).

State v. Marshall, 144 Wash. 2d 266, 27 P.3d 192 (2001) (vacating guilty plea by defendant to aggravated first degree murder after which death sentence was imposed, and holding that where defendant moves to withdraw guilty plea on asserted basis of defendant's incompetence when plea was made, trial court must either grant motion to withdraw guilty plea or convene formal competency hearing).

In re Brett, 142 Wash. 2d 868, 16 P.3d 601 (2001) (reversing convictions for aggravated first degree murder and felony murder and vacating death sentence based on ineffectiveness of defense counsel at guilt and penalty phase of trial, where counsel knew or should have known of petitioner's significant medical and mental conditions, substantial medical opinion was available at time of trial to support defense theory, and counsel failed to conduct reasonable investigation into medical and mental conditions).

State v. Roberts, 142 Wash. 2d 471, 17 P.3d 713 (2001) (holding jury instruction unconstitutional that did not require a finding that the defendant personally caused the victim's death or was a major participant in the homicidal acts).

State v. Finch, 137 Wash. 2d, 975 P.2d 967 (1999) (holding that court abused discretion shackling defendant during a capital sentencing hearing).

S*tate v. Brown*, 132 Wash. 2d 529, 940 P.2d 546 (1997) (holding that qualifying jurors for a death case does not violate state constitution), *cert. denied*, 523 U.S. 1007 (1998).

State v. Clark, 129 Wash. 2d 805, 920 P.2d 187 (1996) (holding personal service of notice of intent to seek death penalty not required; service required in accordance with Civ. R. 5, governing service and filing of pleadings).

State v. Brett, 126 Wash. 2d 136, 892 P.2d 29 (1995) (holding robbery need not be completed to be used as an aggravating factor; aggravating factors are sentencing enhancements, not crimes; first degree murder is not a lesser included offense of aggravated first degree murder; state's reliance on multiple aggravating circumstances constitutional), *cert. denied*, 516 U.S. 1121 (1996).

State v. Ford, 125 Wash. 2d 919, 891 P.2d 712 (1995) (en banc) (holding trial court did not abuse discretion continuing arraignment in first degree murder case where defendant wanted to plead guilty but prosecutor indicated that it needed to disclose exculpatory evidence, and then allowing prosecutor to amend information to charge aggravated first degree murder).

State v. Dearbone, 125 Wash. 2d 173, 883 P.2d 303 (1994) (stating that good cause to extend thirty-day notice period requires proof of an external impediment to compliance; substantial compliance with terms of statute insufficient).

State v. Ortiz, 119 Wash. 2d 294, 831 P.2d 1060 (1992) (stating second degree felony-murder is not a lessor included offense of aggravated murder).

State v. Jeffries, 105 Wash. 2d 398, 717 P.2d 722 (holding, in regard to aggravating circumstance pertaining to concealment of crime, that specific crime is not an element of aggravated murder; it need not be stated nor proved; holding "crime" and "plan or scheme" are not unconstitutionally vague), *cert. denied*, 479 U.S. 922 (1986).

Washington Court of Appeals:

State v. Baruso, 72 Wash. App. 603, 865 P.2d 512 (holding conviction for murder not required to support jury's finding of aggravated circumstance of more than one victim in a "common scheme or plan"), *review denied*, 124 Wash. 2d 1008 (1994).

Washington Statutes:

Wash. Rev. Code § 10.95.020 (2002) (requiring at least one aggravating circumstance for finding defendant guilty of aggravated first degree murder; enumerating aggravating circumstances).

Wash. Rev. Code § 10.95.040 (2002) (requiring notice of special sentencing hearing).

Capital Sentencing

Penalty Hearing

When a jury convicts the defendant of aggravated murder, a separate sentencing proceeding occurs where the jury hears evidence and determines whether the defendant should receive a death sentence. The court with the consent of the parties has discretion to waive the jury at the sentencing hearing. If the original jury is unavailable, the court will convene a new jury.

Before the guilt phase of the trial begins, the court requires the state and the defense to provide discovery that they anticipate offering at the sentencing proceeding. However, upon a showing of cause, the trial court has discretion to defer disclosure of penalty phase evidence until completion of the guilt phase.

The Washington Rules of Evidence apply at sentencing. If the guilt phase jury is not the sentencing jury, then the defense and the state may reintroduce evidence concerning the facts and circumstances of the murder.

At the end of the sentencing hearing, the jury must return a special verdict on the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" If a unanimous jury answers affirmatively, the defendant receives a sentence of death.

As a matter of first impression, the Washington Supreme Court ruled that the trial court need not conduct a colloquy to ensure that a capital defendant's decision to waive the right to present mitigating evidence was knowing, voluntary and intelligent. The court reasoned that the decision is akin to other trial strategy decisions and thus, discussion with counsel is all that is required. *State v. Woods*, 23 P.3d 1046 (2001).

Ninth Circuit:

Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992) (holding jury instruction which required unanimous "yes" or "no" answer to mitigation question violates due process), *cert. denied*, 507 U.S. 951 (1993).

Washington Supreme Court:

In Re Woods, 154 Wash. 2d 400, 114 P.3d 607 (2005) (holding defense counsel were not deficient in failing to present a mitigation case during the penalty phase where counsel did investigate mitigation and were ready to put forth mitigation evidence but defendant steadfastly objected to the presentation of mitigation evidence, and counsel exercised reasonable professional judgment in abiding by defendant's wishes).

In Re Davis, 152 Wash. 2d 647, 101 P.3d 1 (2004) (holding that the failure of a capital defendant's attorney to object to defendant's being shackled during the penalty phase of the trial constituted ineffective assistance of counsel requiring remand for a new penalty phase trial, even though the jury's opportunity to observe defendant in shackles was partial and fleeting, since the focus in the penalty phase was not on guilt, but, rather, on defendant's character and future dangerousness).

State v. Clark, 143 Wash. 2d 731, 24 P.3d 1006 (2001) (reversing death sentence because introduction of prior conviction went beyond scope of RCW 10.95.060(4) and because evidence was unduly prejudicial), *cert. denied*, 534 U.S. 1000 (2001).

State v. Woods, 143 Wash. 2d 561, 23 P.3d 1046 (2001) (holding that the trial court need not conduct a colloquy to ensure that a capital defendant's decision to waive the right to present mitigating evidence was knowing, voluntary and intelligent), *cert. denied*, 534 U.S. 964 (2001).

In re Brown, 143 Wash. 2d 431, 21 P.3d 687 (2001) (holding that claim of budgetary constraints did not support finding of cruel and unusual punishment where petitioner was provided at state expense services of three attorneys and four experts to assist in preparation of defense against imposition of death penalty).

State v. Gentry, 125 Wash. 2d 590, 888 P.2d 1105 (following U.S. Supreme Court's *Payne* decision in holding no per se state constitutional bar to victim impact evidence), *cert. denied*, 516 U.S. 843 (1995).

State v. Bartholomew, 101 Wash. 2d 631, 683 P.2d 1079 (1984) (holding that state due process clause requires application of rules of evidence at sentencing).

Washington Statutes:

Wash. Rev. Code § 10.95.050(3) (2002) (providing jury at sentencing hearing).

Wash. Rev. Code § 10.95.060 (2002) (providing for admission of evidence at

sentencing proceeding, jury deliberation).

Wash. Rev. Code § 10.95.080 (2002) (providing for imposition of sentence upon sentencing jury's verdict).

Washington Rules:

Wash. Super. Ct. Spec. Proc. Crim. R. 4 (providing discovery in death sentence proceeding).

Aggravating Circumstances

The guilt-phase jury considers circumstances in aggravation and in mitigation of a death sentence. The sentencing-phase jury considers whether there are sufficient mitigating circumstances to merit leniency.

Washington Statutes:

Wash. Rev. Code § 10.95.020 (2002) (defining aggravated first degree murder as first degree murder and at least one enumerated aggravating circumstance).

Mitigating Circumstances

In answering the sentencing interrogatory, the jury may consider any relevant factors including but not limited to: (1) prior criminal history, (2) extreme mental disturbance when murder committed, (3) defendant's age, (4) victim's consent, (5) defendant's participation compared to co-defendant's participation, (6) duress, (7) incapacity to appreciate wrongfulness of actions and (8) likelihood that defendant will pose a danger to others in the future.

Washington Supreme Court:

State v. Davis, 141 Wash. 2d 798, 10 P. 3d 977 (2002) (finding jury could have found that there was not sufficient evidence to merit leniency despite the introduction of mental incapacity by physiologists and a difficult childhood).

State v. Elmore, 139 Wash. 2d 250 (1999) (affirming the constitutionality of RCW 10.95.060(4) rejecting the defendant's argument that the instructions limited the jury to find mitigating evidence that only related to the crime itself).

State v. Sagastegui, 135 Wash. 2d 67, 954 P.2d 1311 (1998) (stating a competent defendant constitutionally entitled not to present any mitigating evidence at sentencing; absence of mitigating evidence does not preclude mandatory appellate review).

State v. Brett, 126 Wash. 2d 136, 892 P.2d 29 (1995) (holding language "jury may consider any relevant factors" is not arbitrary and capricious), *cert. denied*, 516 U.S. 1121 (1996).

Washington Statutes:

Wash. Rev. Code § 10.95.070 (2002) (enumerating possible mitigating factors).

Appellate Review of Capital Sentences

The Washington Supreme Court has jurisdiction over direct appeals of death penalty cases and also conducts a mandatory death sentence review. To facilitate this review, the superior court provides an information report to the supreme court, which includes: (1) personal and background information about the defendant, (2) procedural and substantive information about the trial and sentencing proceeding, (4) information about the victim, and (5) information about defendant's counsel. The trial court prepares this report after receiving input from both parties.

The supreme court consolidates the mandatory sentencing review and direct appeal. On mandatory review, the supreme court must determine: (1) whether sufficient evidence supports the death verdict, (2) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, (3) whether the sentence is the result of passion or prejudice, and (4) whether the defendant was mentally retarded.

At least thirty days prior to the commencement of the capital trial, the defense must notify the prosecution if it intends to raise the defendant's mental condition at the sentencing hearing. If the defense intends to raise the defendant's mental condition, a mental expert designated by the prosecution examines the

defendant. The expert's results are disclosed to the prosecution only after the jury returns a guilty verdict and defendant elects to proceed with a mentally ill sentencing defense.

The parties may file briefs and present oral argument to the supreme court in death sentence reviews. If the supreme court invalidates the sentence based upon insufficient evidence, a proportionality analysis, or a finding of passion or prejudice, the court remands the case to the trial court for resentencing. The court has one year to make a determination and file an opinion on the mandatory sentence review.

Washington Supreme Court:

State v. Elledge, 144 Wash. 2d 62, 26 P.3d 271 (2001) (holding that defendant's waiver of right to directly appeal death sentence was made "knowingly, voluntarily, and intelligently," despite absence of expert testimony as to defendant's competency to make waiver, where defendant was questioned by counsel and trial court concerning choice to accept death sentence and his answers demonstrated appreciation of consequences of that decision; rejecting argument that special counsel be appointed to investigate and present mitigating evidence).

State v. Brett, 126 Wash. 2d 136, 892 P.2d 29 (1995) (upholding statutory appellate proportionality review as constitutional; stating purpose of review is to provide additional assurance that sentence is not disproportionate, rather than to ensure proportionality in the first instance), *cert. denied*, 516 U.S. 1121 (1996).

State v. Dodd, 120 Wash. 2d 1, 838 P.2d 86 (1992) (holding capital defendant can waive right of general review but cannot waive statutory review of death sentence).

Washington Statutes:

Wash. Rev. Code § 2.06.030 (2002) (providing for appellate jurisdiction over death cases).

Wash. Rev. Code § 10.95.100 (2002) (providing supreme court mandatory review of death sentence).

Wash. Rev. Code § 10.95.120 (2002) (requiring trial court to provide information report to supreme court in aggravated murder cases).

Wash. Rev. Code § 10.95.130 (2002) (setting forth consolidation of sentencing review and appeal; briefing and oral argument; substance of sentencing review).

Wash. Rev. Code § 10.95.140 (2002) (providing for remand upon supreme court decision).

Wash. Rev. Code § 10.95.150 (2002) (providing one-year deadline for supreme court to file opinion on mandatory sentence review).

Washington Rules:

Wash. R. App. P. 16.19–16.23 (defining rules of procedure for capital appeals).

Wash. R. Super. Ct. Proc. Crim. 5 (providing for mental examination of defendant).

Wash. R. Super. Ct. Proc. Crim. 6 (requiring counsel to submit proposed questionnaires to trial court).

Collateral Remedies

The Washington Supreme Court established by rule a single procedure, a personal restraint petition, for obtaining collateral relief in the appellate courts. This petition replaces all postconviction common law remedies in the court of appeals and the supreme court. The supreme court has original jurisdiction over personal restraint petitions in capital cases.

Habeas relief is still available through a petition to the superior court, although the superior court may transfer such a habeas petition to the appellate court for consideration as a personal restraint petition.

A petitioner must file a collateral relief petition within one year after the judgment becomes final. This limitation period is not applicable if the petitioner alleges: (1) newly discovered evidence, (2) unconstitutional charging statute, (3) double jeopardy, (4) insufficient evidence at trial, (5) illegal sentence, or (6) significant retroactive change in the law.

Washington Supreme Court:

Petition of Runyan, 121 Wash. 2d 432, 853 P.2d 424 (1993) (holding one-year statute

of limitation for filing collateral relief petition does not violate state or federal equal protection clauses).

In the Matter of Keene, 95 Wash. 2d 203, 662 P.2d 360 (1981) (holding conviction may not be collaterally attacked on a nonconstitutional ground which could have been raised on appeal).

Washington Statutes:

Wash. Rev. Code § 7.36.010, et seq. (2002) (addressing habeas corpus).

Wash. Rev. Code § 10.73.090 (2002) (permitting one-year deadline for collateral petition).

Wash. Rev. Code § 10.73.100 (2002) (enumerating exceptions to one-year statute of limitation).

Washington Rules:

Wash. R. App. P. 16.3–16.15, 16.25–16.27 (providing personal restraint petition procedures generally; special procedure in capital cases).

Wash. R. App. P. 16(3)(c) (providing Supreme Court with exclusive original jurisdiction in capital personal restraint proceedings).

Postconviction Relief

Washington Rules of Appellate Procedure establish procedures for obtaining collateral relief by way of a personal restraint petition. Appellate Rule 16.4(c) provides personal restraint relief on the following grounds: (a) lack of jurisdiction, (b) violation of state or federal constitution, (c) existence of new material facts, and (d) significant retroactive change in the law.

The supreme court chief justice initially reviews a capital personal restraint petition to determine whether the court can dispose of the petition based on the record or whether the court must remand the petition for a determination on the merits or for a limited hearing. If the court remands the petition for further findings, a superior court in the county of conviction that was not involved in the original proceeding holds a

hearing and forwards its findings of fact to the supreme court.

If the chief justice does not dismiss the petition as frivolous or remand it to the superior court for a determination on the merits, a panel of supreme court justices decides the petition.

Washington Rules:

Wash. R. App. P. 16.4 (listing grounds for personal restraint relief).

Wash. R. App. P. 16.11 (providing for chief judge's initial determination petition).

Wash. R. App. P. 16.12 (providing for superior court hearing).

Wash. R. App. P. 16.13 (detailing procedure after reference hearing).

Wash. R. App. P. 16.26 (providing for discovery in capital personal restraint petitions).

Wash. R. App. P. 16.27 (addressing investigative and expert fees in capital personal restraint petitions).

Habeas Corpus

The state's appellate courts have original discretionary jurisdiction in habeas corpus cases and consider all habeas petitions to be personal restraint petitions. The superior court shares concurrent original jurisdiction of habeas corpus cases. Although the superior court has discretion to transfer a habeas petition to the appellate court, it is not required to do so.

The only grounds for habeas relief are violations of the state or federal constitution. As in personal restraint petitions, a one-year statute of limitation applies to writs of habeas corpus.

Washington Supreme Court:

Toliver v. Olsen, 109 Wash. 2d 607, 746 P.2d 809 (1987) (holding superior court shares concurrent original jurisdiction of habeas proceeding with appellate courts; Washington Superior Court Criminal Rule 7.8(c)(2), which allows superior court to transfer motion for vacation of judgment to appellate court to be considered as a personal restraint

petition, applies to habeas petitions).

Washington Statutes:

Wash. Rev. Code § 7.36.040 (2002) (providing original jurisdiction over habeas corpus).

Wash. Rev. Code § 7.36.130 (2002) (listing grounds for habeas relief).

Wash. Rev. Code § 10.73.090 (2002) (setting one-year limit for habeas petition).

Washington Rules:

Wash. Crim. R.7.8(c)(2) (providing for superior court's discretion to transfer habeas petition to appellate court).

Appellate Review of Collateral Proceedings

A superior court decision in a personal restraint proceeding that is transferred for a merits determination is reviewable to the same extent as any other trial court decision. A habeas determination is also reviewable; however, there is no express statutory provision pertaining to review of collateral proceedings in capital cases.

Washington Rules:

Wash. R. App. P. 16.14(b) (providing review of dismissal by superior court).

Procedural Bar/Waiver/Exhaustion

The appellate court will not consider a subsequent personal restraint petition unless the petitioner certifies that he or she has not filed a previous petition on similar grounds and shows good cause why he or she did not raise the new grounds in a previous petition.

Generally, a defendant must exhaust his or her appeal before seeking collateral remedies. However, a petitioner may pursue a constitutional claim if the constitutional error attributed to petitioner's actual and substantial prejudice.

Washington Supreme Court:

In re Reismiller, 101 Wash. 2d 291, 678 P.2d 323 (1984) (holding failure to raise constitutional claim on appeal does not automatically bar claims in personal restraint petition; to overcome bar, must demonstrate "actual and substantial prejudice").

In re Keene, 95 Wash. 2d 203, 622 P.2d 360 (1980) (holding a conviction may not be collaterally attacked upon nonconstitutional ground which could have been raised on appeal but was not).

Washington Statutes:

Wash. Rev. Code § 10.73.140 (2002) (limiting collateral attack as to subsequent petitions).

Execution

After the state supreme court affirms a death sentence, it remands the case to the superior court for issuance of a death warrant. The trial court judge signs the warrant and directs it to the superintendent of the state penitentiary. The superior court sets the date of execution between thirty and ninety days from the date of the supreme court remand. Lethal injection is the primary method of execution; however, the inmate may choose execution by hanging.

Washington allows up to seventeen witnesses to an execution. An interested witness, who is required to submit an application to the superintendent of prisons, must be a member of the media, the judiciary, the victim's family, or the defendant's family. The superintendent compiles a list of witnesses which is certified by the superior court.

Ninth Circuit:

Campbell v. Wood, 18 F.3d 662 (9th Cir.) (execution by hanging is not cruel and unusual punishment), *cert. denied,* 511 U.S. 1119 (1994).

Washington Statutes:

Wash. Rev. Code § 10.95.140 (2002) (providing affirmation of sentence; remand for

execution).

Wash. Rev. Code § 10.95.160 (2002) (providing for death warrant issuance).

Wash. Rev. Code § 10.95.180 (2002) (providing for lethal injection, or, at election of defendant, hanging).

Stay of Execution

The clerk of the supreme court grants a stay of execution upon request of a petitioner filing a first personal restraint petition. The en banc court grants stays pursuant to subsequent petitions only upon a showing that the subsequent petition is not barred by state law or supreme court rule. When a stay issued by any court of competent jurisdiction is lifted, a new execution date is automatically set by the department of corrections at thirty days after entry of the order lifting a stay.

Washington Supreme Court:

In re the Personal Restraint Petition of Lord, 123 Wash. 2d 737, 870 P.2d 964 (1994) (holding order lifting stay is not inherent in the denial of a personal restraint petition; such order is entered separately and simultaneously with a "certificate of finality").

State v. Davis, 6 Wash. 2d 696, 717, 108 P.2d 641 (1940) (stating courts possess an inherent power, independent of statutory authority, to act upon a showing of supervening insanity, and, if necessary, to issue a stay of execution to permit a proper and adequate investigation).

Washington Statutes:

Wash. Rev. Code § 10.95.160 (2002) (setting new execution date when stay lifted).

Washington Rules:

Wash. R. App. P. 16.24 (setting stay of execution in capital cases).

Competency for Execution

Procedures for determining whether a defendant is competent to be executed are set out in *State v. Harris*, 114 Wash. 2d 419, 789 P.2d 60 (1990). The *Harris* court urged the state legislature to address postconviction competency issues in capital cases. However, the legislature has not addressed these issues.

Washington Supreme Court:

State v. Harris, 114 Wash. 2d 419, 789 P.2d 60 (1990) (setting forth procedures to be followed when capital prisoner's mental state at issue).

Clemency Procedures

Clemency and pardoning powers are vested in the governor. After a recommendation from the clemency and pardons board, the governor may commute a death sentence only to life imprisonment without possibility of parole. The clemency and pardons board may not recommend clemency without first conducting a hearing, of which the prosecuting attorney must be notified.

Washington Statutes:

Wash. Const. art. III, § 9 (setting forth pardoning power).

Wash. Rev. Code § 9.94A.885 (2002) (providing for clemency and pardons board; petitions for review and commutation of sentences and pardons).

Wash. Rev. Code § 10.01.120 (2002) (providing for pardons, reprieves, commutations).

Wash. Rev. Code § 10.95.090 (2002) (setting forth sentence if death sentence commuted).

Chapter 1

Constitutionality and Other General Considerations

1. CONSTITUTIONALITY AND OTHER GENERAL CONSIDERATIONS

1.1 Constitutionality and Guided Discretion

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court held the death penalty statutes of Georgia and Texas (and indirectly virtually every capital sentencing statute in the country) unconstitutional because they permitted arbitrary and unguided imposition of the death sentence. The *Furman* decision prompted over thirty states to enact new capital punishment statutes. Beginning with *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court found a number of these statutes constitutional. According to the Court, a death sentence may not be imposed unless the sentencing authority finds the presence of at least one statutory aggravating factor and then weighs that factor against the evidence of mitigating factors adduced by the defendant. In general, a system for imposing the death penalty must focus on the circumstances of the crime and the character of the individual defendant and must provide "specific and detailed guidance" to the sentencing body.

Supreme Court:

Callins v. Collins, 510 U.S. 1141 (1994) (J. Blackmun, dissenting) (dissenting from the denial of certiorari and concluding that U.S. Supreme Court Eighth Amendment law of guided discretion and individualized sentencing is contradictory, and death penalty as administered by Supreme Court is unconstitutional).

Jurek v. Texas, 428 U.S. 262 (1976) (upholding Texas statute limiting capital homicides to intentional and knowing murders committed in five specified situations, and creating sentencing procedure that requires jury in penalty phase of bifurcated trial to answer three questions affirmatively in order to sentence death, and also providing for expedited review by state court).

Proffitt v. Florida, 428 U.S. 242 (1976) (upholding Florida statute requiring sentencing judge, after bifurcated trial and advisory jury verdict, to weigh aggravating and mitigating circumstances when determining death sentence and set forth these findings in writing, and also providing for automatic review by state supreme court of all death sentences).

Gregg v. Georgia, 428 U.S. 153 (1976) (upholding Georgia statute requiring sentencing judge or jury, in bifurcated trial, to find at least one of ten statutory aggravating circumstances beyond a reasonable doubt when sentencing death, to consider any additional mitigating or aggravating evidence, and to specify aggravating circumstance(s) found, and also providing for direct review by state supreme court of appropriateness of all death sentences).

Furman v. Georgia, 408 U.S. 238 (1972) (holding Georgia and Texas death penalty statutes cruel and unusual punishment due to sentencer's arbitrary discretion and thus declaring almost all death penalty statutes then in existence unconstitutional).

See generally:

William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 Harv. L. Rev. 313 (1986) (providing behind the scenes summary, by Justice Brennan, of Supreme Court death penalty views leading up to *Furman*).

Scott Burris, Note, *Death and a Rational Justice: A Conversation on the Capital Jurisprudence of Justice John Paul Stevens*, 96 Yale L.J. 521 (1987) (hypothesizing discussion between Justices Marshall, Rehnquist, and Stevens regarding issues of rational justice in *Furman* and post-*Furman* cases).

Michael W. Combs, *United States Supreme Court and Capital Punishment: Uncertainty, Ambiguity, and Judicial Control*, 7 S.U. L. Rev. 1 (1980) (analyzing Supreme Court's own uncertainty and ambiguity as seen through *Gregg* and its progeny).

Edward J. Erler & Ernest O. Vincent, *The California Supreme Court and the Death Penalty*, 2 Benchmark 143 (1986) (reviewing California death penalty history and criticizing Bird Court's approach).

Mary R. Falk & Eve Cary, *Death-Defying Feats: State Constitutional Challenges to New York's Death Penalty*, 4 J.L. & Pol'y 161 (1995) (summarizing U.S. capital jurisprudence and common constitutional challenges to death penalty and focusing on likely challenges to New York's new capital statute).

Daniel Givelber, *The New Law of Murder*, 69 Ind. L.J. 375, 397, 410 (1994) (analyzing fate of parties in early death penalty cases under new post-*Gregg* law of aggravating circumstances).

Arthur J. Goldberg, *Memorandum to the Conference re: Capital Punishment*, 27 S.

Texas L. Rev. 493 (1986) (publishing memorandum by Justice Goldberg to fellow Supreme Court Justices in 1963 prompting certiorari in later death penalty cases).

Gary Goodpaster, *Judicial Review of Death Sentences*, 74 J. Crim. L. & Criminology 786 (1983) (summarizing *Furman* and post-*Furman* cases, analyzing statutes, focusing on arbitrariness).

Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States,* 73 U. Colo. L. Rev.1 (2002) (reviewing legal and historical developments surrounding death penalty and current movement to place moratorium on executions).

Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme,* 6 Wm. & Mary Bill Rts. 345 (1998) (focusing on aggravating and mitigating factors and arguing that "guided discretion" has the constitutional problems of both mandatory death penalties and unlimited discretion death penalties).

James S. Liebman, Esq., Jeffrey Fagan and Valerie West, *A Broken System, Error Rates in Capital Cases, 1973 - 1995*, http://www.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf, (2000) (analyzing error rate in capital cases and concluding capital punishment system in the United States if flawed), *see also* Barry Latzer and James N.G. Cauthen, *Capital Appeals Revisited*, JUDICATURE, Sept.-Oct. 2000 and *The Meaning of Capital Appeals: A Rejoinder to Liebman, Fagan, and West*, JUDICATURE, Nov. - Dec. 2000 (arguing capital punishment system not "broken.") *and see also* James S. Liebman, Esq., Jeffrey Fagan and Valerie West's replies in JUDICATURE, Sept.-Oct. 2000 and JUDICATURE, Nov. - Dec. 2000.

Stephen R. McAllister, *The Problem of Implementing a Constitutional System of Capital Punishment*, 43 U. Kan. L. Rev. 1039 (1995) (examining apparent contradiction between guided discretion and individualized sentencing goals in Supreme Court's capital jurisprudence and suggesting Supreme Court resolve the dilemma along lines of J. Thomas' position that guided discretion principle be reemphasized and individualized sentencing be narrowed).

Lewis F. Powell, *Commentary: Capital Punishment*, 102 Harv. L. Rev. 1035 (1989) (summarizing history of *Furman* and its progeny from perspective of retired Supreme Court Justice Powell).

Paul Reidinger, *A Court Divided*, 73 A.B.A. J. 46 (Jan. 1987) (summarizing *Furman* and its progeny, focusing on opinions of each justice).
Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94

Mich. L. Rev. 2590 (1996) (arguing that current body of death penalty law and guided discretion is "disastrous"; proposing model jury instructions which return to relatively unstructured capital sentencing).

Richard E. Wirick, Comment, *Dark Year on Death Row: Guiding Sentencer Discretion After Zant, Barclay, and Harris*, 17 U.C. Davis L. Rev. 689, 692-97 (1984) (analyzes sentencer discretion and summarizes guided discretion in *Furman* and later cases).

Franklin E. Zimring & Gordon Hawkins, *A Punishment in Search of a Crime: Standards for Capital Punishment in the Law of Criminal Homicide*, 46 Md. L. Rev. 115, 123-28 (1986) (analyzing statutes upheld in *Gregg*, *Jurek*, and *Proffitt*, in light of Model Penal Code drafted before *Furman*).

1.2 Mandatory Death Sentences

After the *Furman* decision in 1972, several states chose one of two methods to amend their death penalty statutes to avoid the "arbitrary and capricious" pitfalls of the unguided discretion procedures invalidated by *Furman*. One method (now universally accepted by those states that have the death penalty) provided guidance to the sentencing body regarding the factors it should consider in imposing the death penalty. The Court upheld this approach in 1976 in *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976). The other method removed all discretion by providing for mandatory death sentences upon conviction for certain offenses. On the same day that it decided *Gregg*, *Proffitt*, and *Jurek*, the Supreme Court decided *Woodson v. North Carolina,* 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976), holding the mandatory method unconstitutional. The Court determined that the Eighth Amendment proscription of cruel and unusual punishment requires heightened reliability in death cases and that this in turn requires that each defendant be evaluated individually to determine whether the death penalty is an appropriate punishment for the particular crime.

In these 1976 opinions, the Court noted one potential exception to the ban on mandatory death sentences: defendants who committed murder while serving a previously imposed life sentence. In 1987, however, the Court decided *Sumner v. Shuman*, 483 U.S. 66 (1987), eliminating even this potential exception to mandatory death penalties. The Court held that an individualized sentencing determination is required in each capital case, and therefore a mandatory death penalty even for murders

committed by inmates serving life sentences without possibility of parole was unconstitutional.

Supreme Court:

Walton v. Arizona, 497 U.S. 639 (1990) (upholding Arizona statute mandating that court "shall" impose death penalty if it finds one or more aggravating circumstances and finds mitigating circumstances insufficient for leniency, because statute does not preclude consideration of mitigation, nor create presumption of death).

Boyde v. California, 494 U.S. 370 (1990) (upholding, based on *Blystone*, now changed California jury instruction mandating that jury "shall" impose death sentence if it finds aggravating circumstances outweigh mitigating).

Blystone v. Pennsylvania, 494 U.S. 299 (1990) (upholding Pennsylvania statute mandating death sentence if jury finds at least one aggravating circumstance and no mitigating circumstances or finds aggravating circumstances outweigh mitigating circumstances, because consideration of mitigation satisfies constitutional individualized sentencing requirement).

Sumner v. Shuman, 483 U.S. 66 (1987) (holding now repealed Nevada mandatory death penalty statute unconstitutional, even as applied to life prisoner convicted of murdering fellow prisoner, because statute does not provide constitutionally required individualized sentencing).

Baldwin v. Alabama, 472 U.S. 372 (1985) (upholding now-repealed Alabama statute requiring jury, when convicting defendant of any of specified aggravated crimes, to impose death sentence, but requiring judge, notwithstanding jury "sentence," to weigh aggravating and mitigating circumstances in sentencing death or life imprisonment).

Roberts v. Louisiana, 431 U.S. 633 (1977) (holding Louisiana statute specifying killing of on-duty police officer as one of five mandatory death penalty homicides unconstitutional because no consideration of mitigating factors).

Roberts v. Louisiana, 428 U.S. 325 (1976) (holding Louisiana mandatory death penalty statute, restricting death penalty eligibility to five homicide categories and jury finding of intent, unconstitutional for same reasons North Carolina statute unconstitutional in *Woodson*).

Woodson v. North Carolina, 428 U.S. 280 (1976) (holding North Carolina mandatory death penalty statute unconstitutional because statute contrary to contemporary

standards regarding mandatory death penalty, lack of jury standards satisfying *Furman*, and failure to consider individual offender and offense).

Ninth Circuit:

Campbell v. Wood, 18 F.3d 662, 674–75 (9th Cir.) (upholding Washington statute providing death sentence where jury finds beyond reasonable doubt insufficient mitigating circumstances to merit leniency, because allows sentencer to consider any mitigating factors), *cert. denied*, 511 U.S. 1119 (1994).

Creech v. Arave, 947 F.2d 873, 886 (9th Cir. 1991) (upholding Idaho statute mandating that court "shall" sentence death upon finding an aggravating circumstance "unless" it finds outweighing mitigating circumstances because satisfies individualized sentencing requirement by allowing consideration of all relevant mitigation), *rev'd on other grounds*, 507 U.S. 463 (1993).

See generally:

Peter G. Barber, Note, *People v. Smith*: *Mandatory Death Laid to Rest*, 49 Alb. L. Rev. 926 (1985) (analyzing, prior to *Sumner*, New York Court of Appeals case striking down mandatory death penalty applied to life-term inmate convicted of murder, reviewing New York history of death penalty, and analyzing U.S. Supreme Court and New York Court of Appeals decisions regarding mandatory death penalty).

Jocelyn March Dreier, *The Pennsylvania Death Penalty, Which Mandates a Sentence of Death Upon a Finding of One Statutory Aggravating Circumstance and No Mitigating Circumstance, Does Not Violate the Eighth Amendment to the United States Constitution*, 68 U. Det. L. Rev. 565 (1991) (discussing *Blystone*).

David S. Frankel, Note, *The Constitutionality of the Mandatory Death Penalty for Life-Term Prisoners Who Murder*, 55 N.Y.U. L. Rev. 636 (1980) (analyzing, prior to *Sumner*, constitutionality of mandatory death penalty for life-term prisoners convicted of murder, focusing on Alabama case, *Harris v. State*).

Andrea Galbo, Note, *Death After Life: The Future of New York's Mandatory Death Penalty For Murders Committed by Life-Term Prisoners*, 13 Fordham Urb. L.J. 597 (1985) (analyzing, prior to *Sumner*, constitutionality of mandatory death penalty for life-term prisoners convicted of murder, focusing on New York statute and recent Court of Appeals decision, *People v. Smith*).

Daniel R. Harris, Note, *Capital Sentencing After Walton v. Arizona: A Retreat from the*

"Death is Different" Doctrine, 40 Am. U. L. Rev. 1389, 1394-1403 (1991) (summarizing *Furman* and its progeny, and proposing that *Walton* represents a departure from that precedent).

Philip E. Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U. L. Rev. 32 (1974) (summarizing American nineteenth century opinions of mandatory death penalty, focusing on consequences of jury reluctance to sentence death).

John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 Ariz. L. Rev. 143 (1986) (reviewing history of capital jurisprudence up to *Furman*, and analyzing legislative response of mandatory statutes, and 1976 Supreme Court cases invalidating them).

1.3 Death Penalty for Crimes Other than Murder

In *Coker v. Georgia,* 433 U.S. 584 (1977), the Court held that capital punishment is inherently disproportionate, as opposed to comparatively disproportionate, and thus unconstitutionally excessive for the crime of rape of an adult woman. The broad application of this principle to cases such as rape of minors, treason, and terrorism, however, has not been tested since the Court has heard only a few non-homicide cases since *Coker* in which a court has sentenced a defendant to death.

At least one jurisdiction has held that a statute which allows a defendant who is convicted of a rape of a child under the age of twelve to be sentenced to death is not invalid on its face. In *State v. Wilson*, 685 So.2d 1063 (La. 1996), the Louisiana Supreme Court refused to hold as a mater of law that such a statute violated the Eighth Amendment prohibition against cruel and unusual punishment. The *Wilson* court found the age factor sufficient to potentially distinguish such a sentence from the result prohibited by *Coker*.

Supreme Court:

Enmund v. Florida, 458 U.S. 782 (1982) (holding death penalty unconstitutional for one who aids and abets a felony involving a murder but does not himself kill, attempt to kill, intend to kill, or to use lethal force; objective societal evidence, disproportionality, and lack of deterrent or retributive effect indicates death penalty is excessive

punishment for "nontriggerman" who lacks intent).

Hooks v. Georgia, 433 U.S. 917 (1977) (following *Coker*, reversing state death sentence for rape conviction).

Eberheart v. Georgia, 433 U.S. 917 (1977) (holding death penalty disproportionate for kidnapping and rape in which victim not killed).

Coker v. Georgia, 433 U.S. 584 (1977) (holding death penalty excessive and disproportionate for rape of adult woman where rape victim not killed).

State Courts:

State v. Wilson, 685 So.2d 1063 (La. 1996) (holding statute allowing death penalty for rape of child under age of twelve is not cruel and unusual punishment), *cert. denied*, 520 U.S. 1259 (1997).

See generally:

Jennifer L. Cordle, *State v. Wilson: Social Discontent, Retribution and the Constitutionality of Capital Punishment for Raping a Child,* 27 Cap. U. L. Rev. 135 (1998) (discussing *State v. Wilson,* 685 So.2d 1063 (La. 1996).

David J. Karp, Note, *Coker v. Georgia: Disproportionate Punishment and the Death Penalty for Rape*, 78 Colum. L. Rev. 1714 (1978) (reviewing *Coker*, disagreeing with rationale, and arguing for constitutionality of death penalty for rape and certain other non-homicide crimes).

Pamela J. Lormand, *Proportionate Sentencing for the Rape of a Minor: The Death Penalty Dilemma,* 73 Tul. L. Rev. 981 (1999) (analyzing the constitutionality of Louisiana's death penalty statute for rape of a minor under the age of twelve, and the Louisiana Supreme Court's decision in light of U.S. Supreme Court precedent).

Debra C. Moss, *Is Death Penalty for Killers Only?*, 73 A.B.A. J. 54 (Jan. 1987) (discussing *Enmund* and possibility of death penalty being extended beyond murder cases, mentioning failed death penalty for espionage bill).

Project, *Twenty-First Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1990-1991*, 80 Geo. L.J. 939, 1530-33 (1992) (providing brief summary of capital punishment proportionality law).

Supreme Court Review, 68 J. Crim. L. & Criminology 601 (1977) (summarizing holding, rationale, and arguments of justices in *Coker* opinion).

Pallie Zambrano, *The Death Penalty Is Cruel and Unusual Punishment for the Crime of Rape–Even the Rape of a Child,* 39 Santa Clara L. Rev. 1267 (1999) (discussing the appropriateness of the 1995 amendment to the Louisiana Criminal Code providing a death sentence for a person convicted of the rape of a minor under the age of twelve).

1.4 Requirement of Competency to Execute

In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Supreme Court held that the Eighth Amendment prohibits a state from executing a prisoner who is insane. Although some states have a higher standard, the constitutional threshold for sanity, according to Justice Powell in his *Ford* concurrence, is the prisoner's awareness of the execution as well as the reason for it. Most state statutes refer to a prisoner's "competence" to be executed.

Ford also addressed procedural requirements necessary to determine a condemned inmate's sanity. If a capital prisoner alleges insanity in a habeas corpus petition, the federal district court must determine if the state afforded the petitioner an adequate fact-finding procedure on the claim. If so, the facts found by the state are entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1) (2000). If not, there is no presumption of correctness, and the district court must hold an evidentiary hearing on the claim.

However, the U.S. District Court in Arizona remanded a *Ford*-based habeas petition to state court for a competency hearing. *Poland v. Stewart*, 41 F. Supp. 2d 1037 (D. Ariz. 1999). The district court reasoned that, unlike the Florida statute struck down in *Ford*, Arizona's statute for determining a capital defendant's competency was not facially unconstitutional. The court considered the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) restrictions on evidentiary hearings, and, recognizing "judicial federalism," concluded the state was the more appropriate forum for conducting the hearing.

The *Ford* Court left to the states the task of establishing a constitutionally adequate procedure for determining a condemned's sanity. In rejecting Florida's

procedure as unconstitutional, *Ford* suggests a few minimum requirements: (1) an opportunity or hearing for the insane prisoner to present evidence and argument, (2) decision-makers at the hearing who are separate from the prosecutorial or executive branch of government, and (3) an opportunity for the prisoner to submit expert psychiatric evidence and argument different from the state's expert evidence. Justice Powell's concurrence specifically suggests that states should provide an impartial officer or board to receive evidence, including expert evidence, and argument from the prisoner's counsel.

In *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), the Supreme Court addressed whether the AEDPA's prohibition against successive petitions would effectively eliminate the ability of prisoners to bring *Ford* claims in federal habeas petitions. The Court determined that Villareal's *Ford* claim was not a "second or successive" petition, as that term is used in the AEDPA, and was therefore properly before the district court.

Supreme Court:

Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) (holding that a *Ford* claim initially brought in a first petition but dismissed as unripe and later brought in a second petition was not a successive petition prohibited by the AEDPA).

Ford v. Wainwright, 477 U.S. 399 (1986) (holding Eighth Amendment prohibits execution of the insane; finding Florida's (1) failure to include prisoner in truth seeking process, (2) denying prisoner opportunity to challenge state-appointed psychiatrists, and (3) placement of decision-making power wholly in executive branch, amounted to inadequate fact-finding procedure for determining sanity, and thus petitioner entitled to evidentiary hearing on competence to be executed).

Ninth Circuit:

Allen v. Ornoski, 435 F.3d 946 (9th Cir.) (denying requests for leave to file SOS petition and for issuance of a certificate of appealability and holding that *Ford v. Wainwright* was inapposite, because there was nothing in the record that suggested that petitioner's age of 75 and physical infirmities rendered him unable to comprehend the nature and purpose of the death penalty that he faced), *cert. denied*, 126 S. Ct. 1140 (2006).

District Courts in Ninth Circuit:

Amaya-Ruiz v. Stewart, 136 F. Supp. 2d 1014 (D. Ariz. 2001) (granting evidentiary hearing on competency because state's statutory scheme offered no hearing after state's chief medical officer unilaterally determined that the petitioner had regained competency).

Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz. 1999) (remanding a *Ford* claim brought in habeas petition to state court for a competency hearing).

See generally:

Rachelle D. Dick, Note, *Ford v. Wainright*: *Warning–Sanity on Death Row May Be Hazardous to Your Health*, 47 La. L. Rev. 1351 (1987) (reviewing *Ford* and focusing on proper procedural requirements for determining competence in Louisiana).

Roberta M. Harding, *"Endgame:" Competency and the Execution of Condemned Inmates–A Proposal to Satisfy the Eighth Amendment's Prohibition Against the Infliction of Cruel and Unusual Punishment*, 14 St. Louis U. Pub. L. Rev. 105 (1994) (addressing need to revise competency-to-execute model in light of *Ford* to resolve Eighth Amendment dilemmas left after *Ford* and reduce number of executions which violate Supreme Court law).

Joseph H. Hickey, Note, *Ford v. Wainright: The Supreme Court Reconsiders the Procedural Requirements for Post-Conviction Sanity Determinations*, 18 Toledo L. Rev. 919 (1987) (reviewing *Ford* and analyzing requirements and ramifications of *Ford* on state procedure for determining sanity of death row inmates).

Stephen L. Ihm, Note, *Ford v. Wainright, The Eighth Amendment, Due Process and Insanity on Death Row*, 7 N. Ill. U. L. Rev. 89 (1986) (analyzing existing precedent found not to control issue of execution of insane, historical background of *Ford*, and basis for *Ford* decision, and also examining practical impact on states when attempting to meet constitutional requirements in executing the insane).

Gordon L. Moore III, Note, *Ford v. Wainright: A Coda in the Executioner's Song*, 72 Iowa L. Rev. 1461 (1987) (analyzing *Ford's* lack of standards for minimum due process of state procedures for determining insanity, and arguing for stricter standards to back up *Ford* basic requirements).

Sanford M. Pastroff, Note, *Eighth Amendment–The Constitutional Rights of the Insane on Death Row*, 77 J. Crim. L. & Criminology 844 (1986) (summarizing *Ford* opinion

and interpreting what procedures necessary to satisfy due process requirements for determining sanity).

Robert F. Schopp, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement*, 51 La. L. Rev. 995 (1991) (analyzing existing justifications for rule that insane may not be executed, and proposing alternative rationales and jurisprudential issues).

Esmeralda D. Yu, Note, *Constitutional Law: The Death Penalty and the Insanity Defense–Ford v. Wainwright*, 10 Harv. J.L. & Pub. Pol. 253 (1987) (summarizing *Ford* and critiquing rationales of each Justice).

1.4.1 Involuntary Administration of Anti-Psychotic Drugs

In *Washington v. Harper*, 494 U.S. 210 (1990), the Supreme Court held that treating a mentally ill prisoner with anti-psychotic drugs against his or her will does not violate substantive due process if the prisoner is dangerous to himself or herself or others and the treatment is in the prisoner's medical interest. In *Perry v. Louisiana*, 498 U.S. 38 (1990), the Court examined the constitutionality of the involuntary administration of such drugs to treat death row prisoners to competency. Instead of answering the question, however, the Supreme Court remanded the case for reconsideration in light of *Harper*. On remand, the Louisiana Supreme Court found that such involuntary medication was both cruel and unusual punishment and a violation of privacy. The court did not apply *Harper* because it recognized that medication used on death row prisoners is administered for neither the protection nor the medical interest of the prisoner.

The Supreme Court has addressed the constitutionality of administering drugs to incompetent detainees against their will in order to make them competent for trial. In *Riggins v. Nevada*, 504 U.S. 127 (1992), the Court found that forced administration of such drugs before or during trial is unconstitutional without a showing that the drugs are in the defendant's best medical interest, because it may interfere with the Sixth and Fourteenth Amendment rights to a full and fair trial and a due process liberty interest in freedom from unwanted drugs.

Supreme Court:

Riggins v. Nevada, 504 U.S. 127 (1992) (holding forced administration of anti-psychotic drug to defendant at trial violates Sixth and Fourteenth Amendment rights where no showing that drugs given in prisoner's best medical interest).

Perry v. Louisiana, 498 U.S. 38 (1990) (vacating Louisiana trial court's decision that state may administer psychotropic drugs to render mentally ill prisoner competent to be executed and remanding for reconsideration in light of *Washington v. Harper,* 494 U.S. 210 (1990)).

Washington v. Harper, 494 U.S. 210 (1990) (holding that forcible injection of medication into nonconsenting person's body is substantial interference with liberty interest, but, because of state's unique interest in prison safety and security, due process allows such involuntary treatment where there is determination that inmate is dangerous to self or others and treatment is in inmate's medical interest).

State Courts:

State v. Perry, 610 So. 2d 746 (La. 1992) (holding involuntary medication of incompetent death row prisoners violates state constitutional prohibition against cruel and unusual punishment and right to privacy; *Harper* inapplicable because medication administered for neither protection nor medical interest of death row prisoner).

See generally:

Keith A. Byers, *Incompetency, Execution, and the Use of Anti-psychotic Drugs*, 47 Ark. L. Rev. 361 (1994) (summarizing legal, medical, and ethical issues in use of anti-psychotic drugs to render condemned prisoners competent for execution, and reviewing latest law on subject, including *Ford*, *Perry*, and *Harper*).

Kristen W. Crosby, Comment, *State v. Perry: Louisiana's Cure-to-Kill Scheme Forces Death Row Inmates to Choose Between a Life Sentence of Untreated Insanity and Execution*, 77 Minn. L. Rev. 1193 (1993) (critiquing *Ford* and *Perry*, arguing drug-induced competence is insufficient for execution).

M. Catherine Healy, Comment, *Riggins v. Nevada: Are "Synthetically Sane" Criminal Defendants Competent to Stand Trial?*, 20 New Eng. J. on Crim. & Civ. Confinement 384 (1994) (analyzing *Riggins v. Nevada*).

Douglas Mossman, M. D., *The Psychiatrist and Execution Competency: Fording Murky Ethical Waters*, 43 Case W. Res. L. Rev. 1 (1992) (analyzing psychiatrists' ethical dilemmas of treating mentally incompetent death row prisoners).

William P. Ziegelmueller, *Supreme Court Review: Sixth Amendment–Due Process on Drugs: The Implications of Forcibly Medicating Pretrial Detainees with Anti-psychotic Drugs: Riggins v. Nevada*, 83 J. Crim. L. 836 (1993) (reviewing *Riggins* and anti-psychotic drugs in general and arguing that *Riggins* should be read as requiring strict scrutiny of any governmental administration of unwanted anti-psychotic drugs to pretrial detainees).

1.4.2 Competency to "Volunteer"

Courts are seeing an increasing number of death row inmates wishing to forgo their appeals, sometimes at the state level and sometimes later during federal habeas proceedings. Either the condemned's attorney, if the condemned is represented at the time, or a next friend, will petition either the state or federal court for a competency determination. The court's inquiry is twofold: firstly, is the condemned competent to withdraw his consent to proceed with his appeal and, secondly, is the condemned competent to be executed. *See* §§ 6.2.6, *et. seq*. and 6.3.4.4.4, *infra*, for additional discussion.

Ninth Circuit:

Dennis ex rel. Butko v. Budge, 378 F.3d 880 (9th Cir.) (holding that prisoner's capacity to make decision to forego further appeals of his death sentence was not substantially affected by mental illness, and therefore prisoner's former attorney failed to establish "next friend" status; holding that to establish next friend status one must (1) provide an adequate explanation–such as inaccessibility, mental incompetence, or other disability–why the real party in interest cannot appear to prosecute the action; and (2) next friend must be truly dedicated to the best interests of the person on whose behalf he or she seeks to litigate; also holding that evidence showing that prisoner's decision to seek execution is the product of a mental disease does not show that prisoner lacks the capacity to make a rational choice and that it is the latter that matters; concurring in the judgment, Judge Berzon would explicitly adopt the three-pronged approach of *Rumbaugh v. Procunier*, 753 F.2d 395 (5th Cir.1985): (1) Is the person suffering from a mental disease or defect? (2) If the person is suffering from a mental disease or defect,

does that disease or defect prevent him from understanding his legal position and the options available to him? (3) If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does that disease or defect, nevertheless, prevent him from making a rational choice among his options), *cert. denied*, 542 U.S. 959 (2004).

Comer v. Stewart, 215 F.3d 910 (9th Cir. 2000) (remanding for evidentiary hearing on issue whether petitioner competent to validly withdraw consent to proceed with appeal).

Miller v. Stewart, 231 F.3d 1248 (9th Cir.) (staying execution and remanding for hearing whether petitioner is competent to elect to die; finding that state court's *Faretta* hearing in 1998 did not address issue whether in November 2000 petitioner is competent to forgo his federal habeas appeals; finding next friend status of petitioner's former attorney sufficient for evidentiary hearing. But see dissent by Rymer, J., finding that next friend did not make threshold showing of petitioner's incompetence and concluding that evidentiary hearing not warranted), *stay vacated sub. nom. Stewart v. Miller*, 531 U.S. 986 (2000).

See generally:

John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 Mich. L. Rev. 361 (2005) (summarizing the current legal standards for volunteering and assisted suicide and proposing a standard for assessing waiver which takes in takes into account the prevalence of a suicidal motivation among volunteers).

1.5 Prohibition of Execution of Minors

In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the Supreme Court held that executing those who were under the age of 16 at the time of their offense violates the Eighth Amendment's cruel and unusual punishment prohibition. The Court based its conclusion on society's "evolving standards of decency," as reflected in existing legislation, and on the reduced culpability of juveniles due to their lesser experience, maturity, and education. A year later, in *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court held that the imposition of death sentences upon individuals who were 16 or 17 years old at the time of their crime, however, *does not* violate the Eighth Amendment. The Court found no clear societal consensus against such executions

reflected in the relevant state or federal law.

Following the decision in *Stanford*, the Supreme Court reconsidered the issue and held in *Roper v Simmons*, 543 U.S. 551 (2005), that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on those who were under the age of 18 at the time their crimes were committed. The Court said that, as in *Atkins v. Virginia*, 536 U.S. 304 (2002), the objective indicia of national consensus-- the rejection of the juvenile death penalty in the majority of states; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice--provide sufficient evidence that today society views juvenile as "categorically less culpable than the average criminal." The Court concluded that both objective indicia of consensus, as expressed in particular by legislative enactments and the Court's own determination in the exercise of its independent judgment, demonstrate that the death penalty is a disproportionate punishment for juveniles.

Additionally, by statute, the imposition of the death penalty for federal crimes is limited to those over eighteen at the time of the offense, *see infra* § 5.1.

Prior to the decision in *Roper*, California, Montana, and Oregon prohibited executing defendants who were under the age of 18 during the commission of the crime, and Nevada prohibited executing defendants who were under the age of 16 during the commission of the crime. Also, it has been held by the Washington Supreme Court in *State v. Furman*, 122 Wash. 2d 440, 858 P.2d 1092 (1993) that a person under eighteen years old when the crime was committed cannot be sentenced to death. In 2005 Nevada enacted legislation raising the threshold age for imposition of the death penalty to 18.

Supreme Court:

Roper v. Simmons, 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed).

In re Stanford, 537 U.S. 968 (2002) (mem.) (denying petition for writ of habeas corpus; but see dissenting opinion of Stevens, J. (joined by Souter, J., Ginsburg, J., and Breyer, J.,), expressing view that there were no valid procedural objections to reconsideration of issue of whether Eighth Amendment prohibits capital punishment for offense

committed by one under age of eighteen, and that given decision in *Atkins v. Virginia*, Court should reconsider issue; noting that since *Stanford v. Kentucky* was decided in 1989, four state legislatures and the Supreme Court of Washington have forbidden such execution).

Patterson v. Texas, 536 U.S. 984 (2002) (mem.) (denying stay of execution of sentence of death for crime petitioner committed when seventeen; but see dissenting opinions of Stevens, J. and Ginsburg, J. (joined by Breyer, J.). expressing view that it was time to revisit issue of whether Eighth Amendment prohibits capital punishment for crime committed while under eighteen).

Stanford v. Kentucky, 492 U.S. 361 (1989) (holding Eighth Amendment not violated by imposition of death sentence on sixteen- and seventeen-year-olds; not contrary to "evolving standards of decency" because pattern of existing legislation insufficient to establish societal consensus against execution of sixteen- and seventeen-year-olds).

Thompson v. Oklahoma, 487 U.S. 815 (1988) (holding Eighth Amendment, defined by "evolving standards of decency," violated by execution of those under sixteen when crime committed because state statutes and jury determinations show societal consensus against such execution; juveniles receive reduced culpability because less experienced, mature, educated, and intelligent, and more susceptible to influence than adults).

Eddings v. Oklahoma, 455 U.S. 104 (1982) (holding mitigating evidence of family history and emotional disturbance must be considered at death sentencing; for sixteen year old defendant, evidence of turbulent family history, abuse, and emotional disturbance especially relevant as mitigating factors; stating youth less mature, responsible than adults).

Federal Statutes:

18 U.S.C. § 3591 (2000) (prohibiting enforcement of federal death penalty on those under eighteen at time of crime).

State Statutes in Ninth Circuit:

Ariz. Rev. Stat. Ann. § 13-703(G)(5) (Supp. 2005), (including age as mitigating factor).

Cal. Penal Code § 190.5 (West 1999) (prohibiting imposition of death penalty on defendant less than 18 at time of crime).

Mont. Code Ann. § 45-5-102 (2005) (prohibiting imposition of death penalty on defendant less than 18 at time of crime).

NRS § 176.025 (2005) (prohibiting imposition of death penalty on defendant less than 18 at time of crime).

Or. Rev. Stat. § 137.707 (2005) (prohibiting death penalty for offenders under 18 at time of offense).

Wash. Rev. Code § 10.95.070 (2002) (listing age as a mitigating factor).

See generally:

Lisa K. Arnett, Comment, *Death at an Early Age: International Law Arguments Against the Death Penalty for Juveniles*, 57 U. Cin. L. Rev. 245 (1988) (reviewing *Thompson* in light of international law regarding death penalty for juveniles).

Laura Dalton, Note, *Stanford v. Kentucky and Wilkins v. Missouri: A Violation of An Emerging Rule of Customary International Law*, 32 Wm. & Mary L. Rev. 161 (1990) (summarizing customary international law and treaties regarding death penalty and juveniles, and U.S. reliance and duty to follow, and critiques *Stanford* in light of international law).

Katherine Hunt Federle, *Emancipation and Execution: Transferring Children to Criminal Court in Capital Cases*, 1996 Wis. L. Rev. 447 (1996) (arguing against judicial transfer provisions allowing minors to be tried as adults and lowering age required for adult trial; proposing alternative analysis for constitutionality of a juvenile death penalty and need for reform).

Robert P. Gritton, Note, *Capital Punishment: New Weapons in the Sentencing Process*, 24 Ga. L. Rev. 423 (1990) (summarizing 1990 Supreme Court philosophy on death penalty and modern effect of Supreme Court rulings on death penalty for juveniles and mentally retarded).

Joseph L. Hoffman, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 Hastings L.J. 229 (1989) (analyzing retributive purpose and effect of juvenile death penalty, arguing ban on juvenile death penalty cannot be supported by retributive justice principles).

Sherri Jackson, Note, *Too Young to Die–Juveniles and the Death Penalty–A Better*

Alternative to Killing Our Children: Youth Empowerment, 22 New Eng. J. on Crim. & Civ. Confinement 391 (1996) (arguing that imposition of death penalty on juveniles is cruel and unusual punishment, and offering alternatives to respond to juvenile offenses).

Jennifer Seibring Marcotte, Comment, *Death Penalty for Minors: Who Should Decide?*, 20 S. Ill. U. L.J. 621 (1996) (arguing against Supreme Court's arbitrarily established minimum age for death sentencing and that it should be left to state legislatures).

Tanya M. Perfecky, Note, *Children, the Death Penalty and the Eighth Amendment: An Analysis of Stanford v. Kentucky*, 35 Vill. L. Rev. 641 (1990) (analyzing *Stanford* in light of precedent, American norms, and international law and custom on execution of minors, and arguing *Stanford* holding inadequate).

1.6 Prohibition of Execution of the Mentally Retarded

In *Penry v. Lynaugh* (*Penry I*), 492 U.S. 302 (1989), the Supreme Court held that the Eighth Amendment does not categorically prohibit imposition of the death penalty upon the mentally retarded. The Court found no societal consensus against the execution of the mentally retarded and held that where a mentally deficient defendant is found competent to stand trial, and thus sane–meaning able to appreciate the wrongfulness of his or her actions–the Constitution does not prohibit the imposition of a death sentence on that defendant. Mental retardation must be considered as a mitigating factor in determining a death sentence, however, to ensure the individual consideration of each offender and offense.

Subsequently in *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), the Supreme Court held that the jury instructions given at the defendant's resentencing did not comply with the mandate in *Penry I* that the jury be able to "consider and *give effect to* [a defendant's mitigating] evidence in imposing sentence" and that the jury instructions were internally inconsistent. The Court held that the supplemental instruction, which stated that the jury could say "no" to one of the special issues, if the jury believed that a life sentence was appropriate in light of mitigating circumstances, but also stated that the jury should answer "no" to the special issue only if it found reasonable doubt to give a "yes" answer, provided an "inadequate vehicle for the jury to make a reasonable moral response to Penry's mitigating evidence. *Id* at 799-800.

On June 20, 2002, the Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that executions of mentally retarded individuals convicted of capital crimes are cruel and unusual punishment prohibited by the Eighth Amendment. Stating that it was fair to say that a national consensus has developed against executions of mentally retarded persons, the Court noted that in the intervening 13 years since *Penry I,* 18 state legislatures have passed laws limiting the death eligibility of certain defendants based on mental retardation alone. The Court stated that it was not so much the number of these states that was significant, but the consistency of the direction of change. The Court reasoned that given that anticrime legislation is far more popular than legislation protecting violent criminals, the large number of states prohibiting the execution of mentally retarded persons (and the complete absence of legislation reinstating such executions) provided "powerful evidence that today society views mentally retarded offenders as categorically less culpable than the average criminal." As to what constitutes mental retardation, the Court pointed out that not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. The Court held that it would leave to the states the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.

Federal law prohibits the imposition of the death penalty for a federal crime, *see infra* § 5.1, on those who are mentally retarded or disabled to the point of not understanding the death penalty to be imposed. Federal law also prohibits federal execution of pregnant women.

Arizona, California, Idaho, Nevada, and Washington have enacted legislation that expressly prohibits execution of the mentally retarded.

Supreme Court:

Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executing the mentally retarded violates the Eighth Amendment's prohibition against cruel and unusual punishment).

Penry v. Johnson (*Penry II*), 532 U.S. 782 (2001) (holding that jury instructions given at resentencing failed to comply with mandate of *Penry I* that jury was to consider and *give effect to* [a defendant's mitigating] evidence in imposing sentence).

Penry v. Lynaugh (*Penry I*), 492 U.S. 302 (1989) (holding Eighth Amendment does not categorically prohibit execution of mentally retarded capital offenders; where mentally retarded defendant found competent to stand trial, and thus sane, execution not prohibited because no national consensus against execution of mentally retarded; where mitigating evidence of mental retardation is presented, jury must be given opportunity to consider it in determining sentence).

Burger v. Kemp, 483 U.S. 776 (1987) (holding not ineffective assistance of counsel to fail to fully investigate defendant's background for mitigating circumstances where seventeen-year-old defendant has IQ of eighty-three and functioning ability of twelve-year-old).

Ninth Circuit:

United Mexican States v. Woods, 126 F.3d 1220 (9th Cir.1997) (stating in footnote two that claim that petitioner's execution would violate customary international law since he was retarded was not binding on United States and did not require a qualitatively different analysis than the incompetence to be executed claim already undertaken), *cert. denied*, 523 U.S. 1075 (1998).

District Courts in Ninth Circuit:

Odle v. Vasquez, 754 F. Supp. 749 (N.D. Cal. 1990) (finding imposition of death penalty on defendant with brain lobectomy not disproportionate under Eighth Amendment because capacity in light of mental retardation is question of fact, not law, and jury given sufficient information to conclude competency).

Other Circuits:

Bell v. Cockrell, 310 F.3d 330 (5th Cir. 2002) (following remand from the Supreme Court to reconsider in light of *Atkins v. Virginia*, holding that as to petitioner who consistently offered clinical evidence of mental retardation since his first trial in the 1970s, habeas petition should be dismissed without prejudice so that State of Texas could reconsider case in light of *Atkins*; stating that inferior federal courts have no useful role to play until and unless following *Atkins*, death sentence is reaffirmed or again imposed by state courts; noting that Supreme Court neither conclusively defined mental retardation nor provided guidance on how its ruling should be applied to prisoners already convicted of capital murder).

Bird v. Collins, 924 F.2d 67 (5th Cir.) (finding, on the facts, that district court should

not have raised, *sua sponte*, unexhausted *Penry* claim not raised in habeas petition), *cert. denied*, 501 U.S. 1213 (1991).

Federal Statutes:

18 U.S.C. § 3596 (2000) (prohibiting enforcement of federal death penalty on mentally retarded, insane, and pregnant persons).

State Statutes in Ninth Circuit:

Ariz. Rev. Stat. Ann. § 13-703(B) (Supp. 2005) (prohibiting imposition of death penalty on person suffering from mental retardation pursuant section 13-703.02 and imposing sentence of life imprisonment instead).

Ariz. Rev. Stat. Ann. § 13-703.02 (Supp. 2005), (providing for I.Q. screening of capital defendants; prohibiting imposition of death penalty on person suffering from mental retardation).

Cal. Penal Code § 1376 (West Supp. 2006) (prohibiting imposition of death penalty on defendant who is mentally retarded; providing for hearing to determine mental retardation).

Idaho Code § 19-2515A (Supp. 2005) (prohibiting execution of mentally retarded person).

NRS § 174.098 (2005) (specifying procedures for filing motion to declare that capital defendant is mentally retarded).

Wash. Rev. Code § 10.95.030 (2002) (prohibiting imposition of death sentence on those mentally retarded at time of crime).

See generally:

Samuel R. Gross, Update: American Public Opinion on the Death Penalty--It's Getting Personal, 83 Cornell L.Rev.1448, 1468 (1998) (public opinion on execution of mentally retarded individuals).

Rebecca Dick-Hurwitz, Comment, *Penry v. Lynaugh: The Supreme Court Deals a Fatal Blow to Mentally Retarded Capital Defendants*, 51 U. Pitt. L. Rev. 699 (1990) (summarizing *Penry*, death penalty in general, and rationale behind *Penry*, arguing it reflects Supreme Court's misunderstanding of mental retardation, and thus *Penry*

wrongly decided).

Denis W. Keyes and William J. Edwards, *Mental Retardation and the Death Penalty: Current Status of Exemption Legislation*, 21 Mental & Physical Disability L. Rep. 687 (1997) (summarizing the current status of legislation regarding capital punishment and mental retardation and juxtaposing with public opinion).

Juliet L. Ream, Note, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 Sw. U. L. Rev. 89 (1990) (reviewing Eighth Amendment death penalty jurisprudence, mental retardation, mental illness, and youth, and criticizing *Penry* opinion, arguing justifications for exempting insane and young should apply to mentally retarded offenders).

David L. Rumley, *A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty*, 24 St. Mary's L.J. 1299 (1993) (summarizing mental deficiency in general, characteristics of mentally retarded, and recently enacted state statutes setting IQ minimums for execution, and supporting Supreme Court's refusal to categorically exempt such offenders from capital punishment).

Joshua N. Sondheimer, Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 Hastings L.J. 409 (1990) (reviewing constitutional requirements of capital punishment statutes, and application of certain factors, such as mental deficiency, as "double-edged sword" of both aggravating and mitigating weight, and arguing that modern death penalty schemes allowing such misapplication of mitigation is unconstitutionally arbitrary).

William K. Wetzonis, Note, *Capital Punishment for Mentally Retarded Defendants: A Boundary for the Eighth Amendment is Drawn*, 34 How. L.J. 651 (1991) (summarizing *Penry* and problems of capital punishment for mentally retarded offenders, and arguing Court should extend Eighth Amendment protection to prevent mentally retarded execution).

1.6.1 Retroactivity of *Atkins*

The two exceptions to the rule in *Teague v. Lane*, 489 U.S. 288 (1989) are: (1) rules placing certain kinds of primary, private individual conduct beyond the power of the criminal law to proscribe, and (2) procedures implicit in the concept of ordered liberty without which the likelihood of an accurate conviction is seriously diminished. In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court noted that the first exception should also apply to rules "prohibiting a certain category of punishment for a class of

defendants because of their status or offense." In that case, the Court indicated that if it had announced a new rule that mentally retarded defendants could not be sentenced to death, then such a rule would satisfy the first exception. In *Bell v. Cockrell*, 310 F.3d 330 (5th Cir. 2002), citing *Penry*, the Fifth Circuit held that *Atkins* constitutes an exception to the nonretroactivity rule of *Teague*.

Other Circuits:

Bell v. Cockrell, 310 F.3d 330 (5th Cir. 2002) (holding that *Atkins v. Virginia* constitutes exception to nonretroactivity rule of *Teague v. Lane,* and therefore retroactivity applied to capital habeas case in which petitioner had consistently offered clinical evidence of his mental retardation since first trial in 1970s).

1.7 Requisite Mental State at Time of Offense for Imposition of Judgment of Death

In *Enmund v. Florida*, 458 U.S. 782 (1982), the Supreme Court held that the Eighth Amendment forbids the execution of "one who neither took life, attempted to take life, nor intended to take life." Specifically, a person who aids and abets a felony in the course of which a murder is committed by another cannot be executed absent a finding that he or she killed, attempted to kill, or intended or contemplated that life would be taken or that lethal force would be employed. In *Tison v. Arizona*, 481 U.S. 137 (1987), the Supreme Court held that a capital sentence does not violate the Eighth Amendment where a defendant both possesses a mental state of "reckless indifference to the value of human life" and is a major participant in the felony that resulted in murder.

In *Cabana v. Bullock*, 474 U.S. 376 (1986), the Court resolved a split of authority between the Fifth and Eleventh Circuits and held that a determination of *Enmund* culpability need not be made by a jury or even by the trial court. Under *Cabana*, *Enmund* is satisfied if the factual culpability determination is made at any time in the state proceedings by the jury, the trial judge, or the appellate court. This state court finding is entitled to a presumption of correctness in federal court, pursuant to 28 U.S.C. § 2254(e)(1) (2000).

In *Hopkins v. Reeves*, 524 U.S. 88 (1998), the Supreme Court refused to extend the *Enmund* holding to require that a second degree murder instruction that

includes a mens rea element be given to juries in capital felony murder cases. The Court held that the *Enmund* rationale applies only when determining the propriety of a capital sentence, not when deciding whether a defendant is guilty of a particular charge.

Supreme Court:

Hopkins v. Reeves, 524 U.S. 88 (1998) (holding that the *Enmund* rationale applies only when determining the propriety of a capital sentence, not when deciding whether a defendant is guilty of a particular charge).

Tison v. Arizona, 481 U.S. 137 (1987) (holding death penalty not cruel and unusual punishment for major participant in felony that resulted in murder and who had mental state of reckless indifference to human life).

Cabana v. Bullock, 474 U.S. 376 (1986) (holding states may make *Enmund* determination of culpable intent at any point in state trial or appellate proceedings; where state court failed to make any *Enmund* finding, federal court should require state's own judicial system to make intent findings in first instance).

Enmund v. Florida, 458 U.S. 782 (1982) (holding death penalty unconstitutional for one who aids and abets a felony involving a murder but did not himself kill, attempt to kill, intend to kill or to use lethal force; objective societal evidence, disproportionality, and lack of deterrent or retributive effect indicates death penalty is excessive punishment for "nontriggerman" who lacks intent).

Ninth Circuit:

Richmond v. Lewis, 948 F.2d 1473 (9th Cir. 1990) (holding, even where trial court never specifically found *Enmund* intent, death penalty permissible because jury instructed on both premeditation and felony murder, and sufficient evidence of petitioner's intent to participate in murder was presented), *rev'd on other grounds*, 506 U.S. 40 (1992).

Greenawalt v. Ricketts, 943 F.2d 1020 (9th Cir. 1991) (holding state findings that petitioner was active participant and knowingly created a grave risk of death is sufficient to satisfy *Enmund* requisite culpability), *cert. denied*, 506 U.S. 888 (1992).

McKenzie v. Risley, 801 F.2d 1519, 1530-31 (9th Cir. 1986) (holding, pursuant to *Cabana*, trial judge's factual findings of intent sufficient to satisfy *Enmund* culpability, even if jury made no specific finding of intent), *vacated on other grounds*, 842 F.2d

1525 (9th Cir.) (en banc), *cert. denied*, 488 U.S. 901 (1988).

State Courts:

State v. Roberts, 142 Wash. 2d 471, 17 P.3d 713 (2001) (affording condemned defendant great right under Washington Constitution than federal constitution and holding that major participation in the act giving rise to a homicide is required to convict capital defendant under an accomplice theory).

See generally:

Roy Conn III, Note, *Constitutional Law–Imposition of the Death Penalty is Violative of the Eighth and Fourteenth Amendments Where One Neither Took Life, Attempted to Take Life, nor Intended to Take Life: Enmund v. Florida*, 26 How. L.J. 1679 (1983) (reviewing Supreme Court cases before *Enmund*, analyzing and supporting *Enmund* conclusion).

Andrew H. Friedman, Note, *Tison v. Arizona: The Death Penalty and the Non-Triggerman: The Scales of Justice are Broken*, 75 Cornell L. Rev. 123 (1989) (analyzing *Tison*, arguing that it reverses *Enmund's* requirement of intent to kill, arguing Court fails to provide clear guidance, and proposes absolute prohibition of death penalty for all "nontriggermen").

Margaret C. Jenkins, Comment, *Intent After Enmund v. Florida: Not Just Another Aggravating Circumstance*, 65 B.U. L. Rev. 809 (1985) (analyzing implications of *Enmund* on state capital sentencing schemes, reviewing existing constitutional constraints on state sentencing proceedings, and explaining additional constraints necessitated by constitutional status of *Enmund* intent determination).

Nancy A. McKerrow, Note, *Mens Rea as an Element Necessary for Capital Punishment*, 48 Mo. L. Rev. 1063 (1983) (reviewing *Enmund* in light of recent pre-*Enmund* cases and role of mens rea).

Deborah Sachs, Note, *Cabana v. Bullock: The Proper Tribunal–The Supreme Court Revisits Enmund v. Florida*, 40 U. Miami L. Rev. 1023 (1986) (analyzing *Cabana*, reviewing felony-murder rule, and focusing on differing interpretations of *Enmund* resolved in *Cabana*).

Douglas W. Schwartz, Note, *Imposing the Death Sentence for Felony Murder on a Non-Trigger Man*, 37 Stan. L. Rev. 857 (1985) (reviewing *Enmund*, criticizing Court's language and reasoning, and proposing mens rea standard to relieve confusion caused

by *Enmund* in lower courts).

John L. Wickert, Note, *Eighth Amendment–The Death Penalty and Vicarious Felony Murder: Nontriggerman May Not Be Executed Absent a Finding of an Intent to Kill*, 73 J. Crim. L. & Criminology 1553 (1982) (summarizing and analyzing *Enmund* in light of Supreme Court cases recent to *Enmund*, showing that *Enmund* involves divergent approaches of Court on death penalty constitutional issues and that *Enmund* represents attempt by Court to provide clear, definitive sentencing guidelines).

Lynn D. Wittenbrink, Note, *Overstepping Precedent? Tison v. Arizona Imposes the Death Penalty on Felony Murder Accomplices*, 66 N.C. L. Rev. 817 (1988) (reviewing death penalty history in Supreme Court, focusing on death penalty of felony murder defendants, suggesting *Tison* inconsistent with *Enmund*, and arguing *Tison* "reckless indifference" standard too arbitrary).

1.7.1 Retroactivity of *Enmund*

The Supreme Court has not ruled on the retroactive application of *Enmund*. Prior to *Teague v. Lane*, 489 U.S. 288 (1989), the Fifth Circuit, in *Jones v. Thigpen*, 741 F.2d 805 (5th Cir. 1984), held that *Enmund* does apply retroactively. The Ninth Circuit, however, has addressed the issue in light of *Teague* with language to the contrary. In *Greenawalt v. Ricketts*, 943 F.2d 1020 (9th Cir. 1991), the Ninth Circuit acknowledged the Fifth Circuit's position but indicated that the intent culpability requirement of *Enmund* may constitute a new rule under *Teague* because it could not have been reasonably anticipated before it was announced. The court did not conclusively decide the issue, however, because it found that *Enmund* did not affect the outcome of that case.

Ninth Circuit:

Greenawalt v. Ricketts, 943 F.2d 1020 (9th Cir. 1991) (discussing whether *Enmund* should be applied retroactively, despite *Jones*, because, consistent with intent of *Teague*, *Enmund* holding could not have been reasonably anticipated before announced, but ultimately not deciding the question since *Enmund* did not apply to petitioner's claims), *cert. denied*, 506 U.S. 888 (1992).

Other Circuits:

Jones v. Thigpen, 741 F.2d 805 (5th Cir. 1984) (holding, prior to *Teague*, that *Enmund* applies retroactively), *vacated on other grounds*, 475 U.S. 1003 (1986).

1.8 Method of Execution

Of the current methods used to impose the death penalty in America–electrocution, lethal gas, lethal injection, hanging, and firing squad–the Supreme Court has specifically found electrocution and the firing squad to be constitutional as not violative of the Eighth Amendment prohibition against cruel and unusual punishment. The Court also has denied certiorari on claims that lethal injection and hanging are unconstitutional.

The Ninth Circuit has held that lethal injection and hanging are both constitutional execution methods. Although the Ninth Circuit has ruled more than once that execution by lethal gas is unconstitutional, the Supreme Court has vacated the Ninth Circuit decisions on nonsubstantive grounds. In *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996), the Ninth Circuit affirmed the district court's ruling that execution by lethal gas is cruel and unusual punishment. However, the Supreme Court vacated that opinion, in light of a 1996 statutory amendment to California's execution law, allowing death row inmates a choice between execution by lethal gas and lethal injection, with lethal injection as the default procedure. *Gomez v. Fierro*, 519 U.S. 918 (1996). On remand, the Ninth Circuit determined that the petitioners lacked standing to challenge the constitutionality of lethal gas since they had not chosen execution by that method. *Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998).

In *LaGrand (Karl) v. Stewart*, 173 F.3d 1144 (9th Cir. 1999), the Ninth Circuit held that petitioner did not waive his challenge to the constitutionality of execution by lethal gas by voluntarily choosing gas over the default lethal injection method of execution. The court also ruled execution by lethal gas unconstitutional and enjoined Arizona from performing any executions by lethal gas. However, the Supreme Court immediately lifted the Ninth Circuit's stay. One week later, in a per curiam decision as to the codefendant's petition, the Supreme Court ruled that

petitioner Walter LaGrand had waived his right to challenge execution by lethal gas because he opted for it. *Stewart v. LaGrand (Walter)*, 526 U.S. 115 (1999) (per curiam).

In the Ninth Circuit, Montana, Oregon, and Nevada provide for execution exclusively by lethal injection. California and Arizona provide for execution by lethal injection unless the prisoner chooses lethal gas. Washington imposes a capital sentence by lethal injection unless the inmate chooses hanging. Idaho provides for execution by lethal injection or by firing squad if lethal injection is impractical.

Pursuant to 28 C.F.R. §§ 26.1–26.5, the federal government's method of execution is lethal injection at a federal institution. However, 18 U.S.C. § 3596 provides that the method of implementing the death penalty for a federal conviction will follow that of the state in which it is imposed, and, if there is no state death penalty, then that of another state designated by the judge. Section 3597 of Title 18 provides for the use of state facilities to carry out a federally imposed death penalty.

Supreme Court:

Hill v. Crosby, 126 S. Ct. 1189 (2006) (mem.) (granting *certiorari* and a stay of execution, with the following questions presented: "1. Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?; 2. Whether, under this Court's decision in *Nelson [v. Campbell]*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. Sec. 1983?").

Nelson v. Campbell, 541 U.S. 637 (2004) (without reaching the question of how to categorize method-of-execution claims generally, holding that 42 U.S.C. § 1983 is an appropriate vehicle for petitioner's Eighth Amendment claim seeking a temporary stay and permanent injunctive relief and alleging that the use of a "cut-down" procedure requiring an incision into his arm or leg to access his severely compromised veins constituted cruel and unusual punishment).

Stewart v. LaGrand (Walter), 526 U.S. 115 (1999) (per curiam) (holding that petitioner waived right to challenge constitutionality of execution by lethal gas by opting for execution by lethal gas).

Gomez v. Fierro, 519 U.S. 918 (1996) (vacating Ninth Circuit opinion declaring lethal gas unconstitutional, remanding in light of Cal. Penal Code § 3604 providing lethal injection as execution method unless inmate chooses death by lethal gas).

Ninth Circuit:

Morales v. Hickman, 438 F.3d 926 (9th Cir. 2006) (per curiam) (holding that the district court did not abuse its discretion in modifying a lethal injection protocol to give State of California the option of allowing an anesthesiologist to monitor and verify that inmate remained unconscious throughout the execution procedure).

Beardslee v. Woodford, 395 F.3d 1064 (9th Cir.) (per curiam) (affirming the district court's order denying prisoner's motion for a preliminary injunction and denying a motion for a stay of execution in a § 1983 action alleging that prisoner's execution pursuant to California's lethal injection protocol would violate his Eighth Amendment right to be free from cruel and unusual punishment, the court held that given the undisputed evidence that death or unconsciousness is likely to occur prior to the administration of pancuronium bromide and the lack of a showing of any unique risk to him in the limited record, the district court did not abuse its discretion in applying the appropriate balancing tests in the context of the case and denying the preliminary injunction; as to the prisoner's First Amendment claim that the administration of pancuronium bromide would prevent him from audibly expressing his pain, holding that prisoner failed to establish that he would be conscious when the final two drugs were administered; further holding that claim that prisoner's rights under the First and Eighth Amendments would be violated was more properly considered as a "conditions of confinement" challenge, which is cognizable under § 1983, rather than as a challenge that would implicate the legality of his sentence and thus be appropriate for federal habeas review), *cert. denied*, 125 S. Ct. 982 (2005).

LaGrand (Karl) v. Stewart, 173 F.3d 1144 (9th Cir.) (holding petitioner did not waive his challenge to the constitutionality of execution by lethal gas by voluntarily choosing gas over the default lethal injection method of execution; holding execution by lethal gas unconstitutional), *stay vacated*, 525 U.S. 1173, *cert. dismissed*, 526 U.S. 1061 (1999).

Fierro v. Terhune, 147 F.3d 1158 (9th Cir. 1998) (holding, on remand, that petitioners lacked standing to assert unconstitutionality of lethal gas because amended state statute provided for execution by lethal gas only by choice, and petitioners had not chosen lethal gas as means of execution).

Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997) (holding Eighth Amendment claim

Fierro v. Gomez, 77 F.3d 301 (9th Cir.) (holding § 1983 proceeding proper vehicle for challenging constitutionality of execution method; holding execution by lethal gas cruel and unusual punishment), *vacated and remanded*, 519 U.S. 918 (1996).

State Courts:

Thorburn v. California Dep't of Corrections, 66 Cal. App. 4th 1284, 78 Cal. Rptr. 2d 584 (1998) (holding physician participation in executions is not unprofessional conduct within meaning of the California Business and Professional Code).

Federal Statutes:

18 U.S.C. § 3596 (2000) (providing federal death penalty carried out in manner prescribed by state in which sentence imposed).

18 U.S.C. § 3597 (2000) (providing for use of state facilities for implementing federal death sentence).

28 C.F.R. §§ 26.1–26.5 (2002) (establishing procedures for carrying out federal death sentence at federal institution; providing lethal injection as execution method).

State Statutes in Ninth Circuit:

Ariz. Rev. Stat. Ann. § 13-704 (2001) (providing lethal injection, or, for those sentenced before November 23, 1992, choice of lethal injection or lethal gas).

Cal. Penal Code § 3604 (West 2000) (providing lethal injection, unless inmate chooses lethal gas).

Idaho Code § 19-2716 (2004) (providing lethal injection, or, if impractical, firing squad).

Mont. Code Ann. § 46-19-103(3) (2005) (providing lethal injection as execution method).

NRS § 176.355 (2005) (providing lethal injection as execution method).

Or. Rev. Stat. § 137.473 (2005) (providing lethal injection as execution method).

Wash. Rev. Code § 10.95.180 (2002) (providing lethal injection, or at inmate's

method).

Or. Rev. Stat. § 137.473 (2005) (providing lethal injection as execution method).

Wash. Rev. Code § 10.95.180 (2002) (providing lethal injection, or at inmate's election, hanging).

See generally:

Kristina E. Beard, Comment, *Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishments Clause*, 51 Miami L. Rev. 445 (1997) (analyzing each method of execution under standards used by Supreme Court in deciding constitutionality of punishments under the Eighth Amendment in reviewing challenges other than method of execution).

Julian Davis Mortenson, *Earning the Right to be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause*, 88 Iowa L.Rev. 1009(2003) (arguing that tort cause of action exists in cases of botched executions and analyzing Cruel and Unusual Punishment Clause of Constitution to methods of execution).

Martin R. Gardner, *Executions and Indignities–An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 Ohio St. L.J. 96 (1978) (analyzing constitutionality of various methods of execution, in light of Supreme Court opinions, meaning of "cruel and unusual," and witness descriptions of each method).

1.8.1 Electrocution

Supreme Court:

Poyner v. Murray, 508 U.S. 931 (1993) (denying certiorari to Fourth Circuit decision upholding constitutionality of Virginia's electric chair).

Glass v. Louisiana, 471 U.S. 1080 (1985) (denying certiorari to Louisiana Supreme Court decision upholding constitutionality of electrocution).

Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947) (holding repeated electrocutions due to initial failure not cruel and unusual punishment).
In re Kemmler, 136 U.S. 436 (1980) (holding electrocution not cruel and unusual punishment).

See generally:

Deborah W. Denno, *Is Electrocution Unconstitutional Method of Execution?*, 35 Wm. & Mary L. Rev. 551 (1994) (analyzing in detail constitutionality of electrocution both in theory and practice).

Lonny J. Hoffman, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 Tex. L. Rev. 1039 (1992) (reviewing constitutionality of electrocution, arguing *Kemmler* and *Francis* were misapplied and mistakenly expanded, and should not be relied upon as authority for upholding electrocution).

1.8.2 Lethal Gas

Supreme Court:

Stewart v. LaGrand (Walter), 526 U.S. 115 (1999) (per curiam) (holding that petitioner waived right to challenge constitutionality of execution by lethal gas by opting for execution by lethal gas).

Gomez v. Fierro, 519 U.S. 918 (1996) (vacating Ninth Circuit opinion declaring lethal gas unconstitutional, remanding in light of amended state statute, providing for lethal injection as execution method unless inmate chooses death by lethal gas).

Gomez v. United States Dist. Ct. for the N. Dist. of Cal., 503 U.S. 653 (1992) (holding California inmate Robert Alton Harris' claim that lethal gas constitutes cruel and unusual punishment is procedurally barred).

Ninth Circuit:

LaGrand (Karl) v. Stewart, 173 F.3d 1144 (9th Cir.) (holding execution by lethal gas unconstitutional), *stay vacated*, 525 U.S. 1173, *cert. dismissed*, 526 U.S. 1061 (1999) .

Fierro v. Gomez, 77 F.3d 301 (9th Cir. 1996) (holding lethal gas is cruel and unusual punishment), *vacated and remanded*, 519 U.S. 918 (1996) (for further consideration in light of Cal. Penal Code § 3604), *on remand sub nom. Fierro v. Terhune* 147 F.3d 1158 (9th Cir. 1998) (dismissing cause of action for lack of standing).

District Courts in Ninth Circuit:

Fierro v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1994) (ruling that lethal gas is cruel and unusual punishment), *aff'd*, 77 F.3d 301 (9th Cir. 1996), *vacated and remanded*, 519 U.S. 918 (1996), *on remand sub nom. Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998) (dismissing cause of action for lack of standing).

See generally:

Note*, Constitutional Law–Eighth Amendment–Ninth Circuit Holds California's Lethal Gas Method of Execution Unconstitutional.–Fierro v. Gomez*, 110 Harv. L. Rev. 971 (1997) (summarizing *Fierro*).

1.8.3 Lethal Injection

Supreme Court:

Heckler v. Chaney, 470 U.S. 821 (1985) (upholding FDA decision not to exercise its enforcement power to ban unapproved drugs used in lethal injections; FDA decision not subject to judicial review).

Ninth Circuit:

Beardslee v. Woodford, 395 F.3d 1064 (9th Cir.) (per curiam) (holding that given the undisputed evidence that death or unconsciousness is likely to occur prior to the administration of pancuronium bromide and the lack of a showing of any unique risk to the prisoner in the limited record, the district court did not abuse its discretion in applying the appropriate balancing tests in the context of the case and denying the preliminary injunction; as to the prisoner's First Amendment claim that the administration of pancuronium bromide would prevent him from audibly expressing his pain, holding that prisoner failed to establish that he would be conscious when the final two drugs were administered), *cert. denied*, 125 S. Ct. 982 (2005).

Cooper v. Rimmer, 379 F.3d 1029 (9th Cir. 2004) (affirming the district court's order denying prisoner's motion for preliminary injunction in his action under 42 U.S.C. § 1983, seeking to prevent his execution in accordance with California's lethal injection protocol, the court held that prisoner failed to show that he was subject to an unnecessary risk of unconstitutional pain or suffering such that his execution by lethal injection must be restrained; see also concurring opinion of Browning, J. noting that the court's review of the denial of preliminary injunctive relief is limited and deferential,

and that the court's review of the district court's merits decision--if it is appealed--would be more rigorous).

Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997) (rejecting claim that lethal injection is cruel and unusual method of execution), *cert. denied*, 523 U.S. 1082 (1998).

District Courts in Ninth Circuit:

Lambright v. Lewis, 932 F. Supp. 1547 (D. Ariz. 1996) (agreeing with *LaGrand* that lethal injection–other Arizona method of execution–is not unconstitutional), *aff'd in part and remanded en banc sub nom. Lambright v. Stewart*, No. 191 F.3d 1181 (9th Cir. 1999).

LaGrand v. Lewis, 883 F. Supp. 451 (D. Ariz. 1995) (holding execution by lethal injection is not unconstitutional method of execution), *aff'd sub nom. LaGrand (Karl) v. Stewart*, 133 F.3d 1253, 1264–65 (9th Cir.), *cert. denied*, 525 U.S. 971 (1998).

See generally:

Bob Egelko, *Wider Access to Executions Upheld*, San Francisco Daily Journal, August 6, 1996 (reporting Ninth Circuit upholding of Northern District of California order allowing California execution witnesses to see entire lethal injection procedure, starting with insertion of needles into prisoner).

1.8.4 Hanging

Ninth Circuit:

Langford v. Day, 110 F.3d 1380, 1393 (9th Cir. 1996) (refusing to overturn en banc *Campbell* decision and rejecting argument for reconsideration of constitutionality of hanging based on South Africa's elimination of death penalty), *cert. denied*, 522 U.S. 881 (1997).

Campbell v. Wood, 18 F.3d 662 (9th Cir.) (holding hanging not cruel and unusual punishment), *cert. denied*, 511 U.S. 1119 (1994) (including Blackmun, J., dissent arguing hanging is cruel and unusual).

District Courts in Ninth Circuit:

Rupe v. Wood, 863 F. Supp. 1315 (W.D. Wash. 1994) (finding, although hanging is not generally unconstitutional, where there is significant risk of decapitation in hanging of obese inmate, hanging violates Eighth Amendment), *aff'd*, *Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996) (finding issue moot because of change in Washington capital statute), *cert. denied*, 519 U.S. 1142 (1997).

See generally:

Gary E. Hood, Note, *Campbell v. Wood: The Death Penalty in Washington State: "Hanging" on to a Method of Execution*, 30 Gonz. L. Rev. 163 (1994-1995) (analyzing *Campbell* rationale).

1.8.5 Firing Squad

Supreme Court:

Wilkerson v. Utah, 99 U.S. 130 (1878) (holding execution by shooting not cruel and unusual punishment; stating "cruel and unusual" includes that of "torture" and "unnecessary cruelty").

1.8.6 Choice of Method of Execution

Several circuits, including the Ninth, have held that a statute creating a choice between two methods of execution is constitutional. The Ninth Circuit has also held that a capital inmate has no "significantly protectable right" in the mode of execution or in the right to choose between methods under a state statute.

Ninth Circuit:

Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997) (rejecting claim that presenting prisoners with a choice of method of execution is unconstitutional), *cert. denied*, 523 U.S. 1082 (1998).

Bonin v. Calderon, 77 F.3d 1155 (9th Cir.) (holding defendant does not have state created liberty interest under California law to choose between lethal injection and gas chamber methods of execution), *cert. denied*, 516 U.S. 1143 (1996).

Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995) (holding statute allowing choice between lethal injection or lethal gas not unconstitutional), *cert. denied*, 516 U.S. 1054 (1996).

Fierro v. Grant, 53 F.3d 338 (9th Cir. 1995) (unpublished) (affirming district court's denial of death row inmate's motion to intervene in *Fierro v. Gomez* because condemned inmate has no "significantly protectable interest" in method of execution).

Campbell v. Blodgett, 978 F.2d 1502 (9th Cir.) (holding statute providing choice between death by hanging or lethal injection not cruel and unusual), *reh'g granted*, 978 F.2d 519 (9th Cir. 1992).

1.9 Tenure on Death Row

In a pre-*Furman* case, the Ninth Circuit denied relief to an inmate who argued that an inordinately long time on death row could itself constitute an Eighth Amendment violation of cruel and unusual punishment. *Chessman v. Dickson*, 275 F.2d 604 (9th Cir. 1960). In 1992, the Ninth Circuit confirmed its denial of such a claim in *Richmond v. Lewis*, 948 F.2d 1473, 1491 (9th Cir. 1990), *rev'd on other grounds*, 506 U.S. 40 (1992), pointing out the inherent contradiction created where the delay is due to the petitioner's own appeals.

The Supreme Court later entertained but declined to decide this issue. *Lackey v. Texas*, 514 U.S. 1045 (1995). Justice Stevens, however, issued a memorandum in conjunction with this decision, inviting the federal courts to investigate whether executing an inmate who has been on death row for an inordinately long time constitutes cruel and unusual punishment. Although the Supreme Court ruling in *Lackey* did not address the issue, Justice Stevens' statements nevertheless prompted several appeals based on this claim. In *McKenzie v. Day*, 57 F.3d 1493 (9th Cir.), *cert. denied*, 514 U.S. 1104 (1995), the Ninth Circuit again expressed its rejection of the claim that lengthy incarceration on death row itself constitutes cruel and unusual punishment.

Supreme Court:

Foster v. Florida, 537 U.S. 990 (2002) (Thomas, J., concurring) (concurring in denial of certiorari as to inmate who spent over 27 years awaiting execution).

certiorari as to inmate who spent over 27 years awaiting execution).

Knight v. Florida, 528 U.S. 990 (1999) (Thomas, J., concurring) (concurring in denial of certiorari regarding two cases over 20 years old with delays resulting in large part from the states' failure to apply constitutionally sufficient procedures at the time of initial sentencing).

Knight v. Florida, 528 U.S. 990, 992 (1999) (Breyer, J., dissenting) (dissenting from denial of certiorari regarding two cases over 20 years old with delays resulting in large part from the states' failure to apply constitutionally sufficient procedures at the time of initial sentencing).

Elledge v. Florida, 525 U.S. 944 (1998) (Breyer, J., dissenting) (dissenting from denial of certiorari regarding twenty-three-year delay on death row substantially resulting from successful appeals).

Gomez v. Fierro, 519 U.S. 918 (1996) (Stevens, Breyer, JJ., dissenting) (objecting to Supreme Court's remand on procedural grounds out of concern for undue delay in execution of capital judgments, where Court's decision causes delay without providing any relief to petitioner).

Lackey v. Texas, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari, but urging judges to study whether long execution delay amounts to cruel and unusual punishment, so that the Court can rule on the "novel" issue).

Ninth Circuit:

Allen v. Ornoski, 436 F.3d 946 (9th Cir.) (rejecting capital petitioner's *Lackey* claim, in which he asserted that he had been confined on death row for over 23 years under "horrific" conditions, and holding that it was SOS application which could have been discovered previously through the exercise of due diligence; noting that the *Lackey* claim was devoid of support in federal or state law), *cert. denied*, 126 S. Ct. 1140 (2006).

Gerlaugh v. Stewart, 167 F.3d 1222 (9th Cir.) (holding that a *Lackey* claim does not satisfy either gatekeeping provision of § 2244(b)(2)), *cert. denied*, 525 U.S. 1131 (1999).

Gretzler v. Stewart, 146 F.3d 675 (9th Cir.) (holding that *Lackey* claim raised in successive petition filed twenty-three years after conviction is barred under 28 U.S.C. § 2244(b); claim could have been raised in earlier petition filed seventeen years after conviction), *cert. denied*, 524 U.S. 912 (1998).

conviction), *cert. denied*, 524 U.S. 912 (1998).

Ceja v. Stewart, 134 F.3d 1368 (9th Cir.) (holding that petitioner's Eighth Amendment claim as to length of death row confinement, which was not raised in first habeas petition, is covered by AEDPA, and petitioner failed to seek or obtain permission to file second or successive petition), *cert. denied*, 522 U.S. 1085 (1998).

Bonin v. Calderon, 77 F.3d 1155 (9th Cir.) (barring *Lackey* claim because procedurally defaulted; noting *McKenzie* with approval), *cert. denied*, 516 U.S. 1143 (1996).

McKenzie v. Day, 57 F.3d 1493 (9th Cir.) (adopting *Richmond* analysis of claim of Eighth Amendment violation due to lengthy delay on death row), *cert. denied*, 514 U.S. 1104 (1995).

Richmond v. Lewis, 948 F.2d 1473, 1491 (9th Cir. 1990) (ruling lengthy delay on death row not unconstitutional because time due to petitioner's appeals; "a defendant must not be penalized for pursuing his constitutional rights, but he also should not be able to benefit from the ultimately unsuccessful pursuit of those rights"), *rev'd on other grounds*, 506 U.S. 40 (1992).

Chessman v. Dickson, 275 F.2d 604, 607 (9th Cir. 1960) (denying claim that eleven and one-half years on death row constitutes cruel and unusual punishment; "it may show a basic weakness in our governmental system that a case like this takes so long, but . . . we can[not] offer life (under a death sentence) as a price for one who can stall the processes for a given number of years"; also noting inevitable arbitrariness of minimum time necessary for delay claims).

District Courts in Ninth Circuit:

Alldredge v. Davis, 2001 WL 793274 (N.D. Cal. July 3, 2001) (holding that imprisoned petitioner's writ of habeas corpus, in which he claimed a constitutional entitlement to a sentence of death, is dismissed without prejudice because collateral challenges to length of confinement must properly be exhausted through state remedies first).

Other Circuits:

Free v. Peters, 50 F.3d 1362 (7th Cir.) (denying Eighth Amendment claim, distinguishing on grounds that Free's time on death row was spent pursuing discretionary–as opposed to mandatory–direct appeals; any inordinate delay in execution of sentence is directly attributable to defendant's own conduct), *cert. denied*, 514 U.S. 1034 (1995).

State Courts:

State v. Richmond, 180 Ariz. 573, 886 P.2d 1329 (1994) (reducing capital sentence to life sentence after twenty years on death row; declining to decide constitutional question of delay, but implying that extended time weighs in favor of leniency).

People v. Ochoa, 26 Cal. 4th 398, 28 P.3d 78, 110 Cal. Rptr. 2d 324 (2001) (holding that execution notwithstanding 9-year delay associated with defendant's appeals furthered both deterrent and retributive functions and that shielding defendant from execution solely on this basis would frustrate these two penological purposes), *cert. denied,* 535 U.S. 1040 (2002) .

See generally:

Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 Seton Hall L. Rev. 147 (1998) (arguing that executions after inordinate delay are "unusual" because most defendants are executed before spending inordinate time on death row and are "cruel" in the constitutional sense because defendants experience severe mental anguish while awaiting execution).

Amber A. Bell, Note, *McKenzie v. Day: Is Twenty Years on Death Row Cruel and Unusual Punishment?*, 26 Golden Gate L. Rev. 41 (1996) (addressing issue of length of death row incarceration as cruel and unusual punishment and criticizing *McKenzie* opinion).

Jessica Feldman, Comment, *A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment Becomes Unconstitutional*, 40 Santa Clara L. Rev. 187 (1999) (addressing whether execution after prolonged death row incarceration violates Eighth Amendment prohibition of cruel and unusual punishment and whether there is merit to "Lackey claim."

Michael P. Connolly, Note, *Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment*, 23 New Engl. J. on Crim. & Civ. Confinement 101 (1997) (exploring question of whether prolonged time on death row violates cruel and unusual punishment clause of Eighth Amendment, arguing it does).

Kathleen M. Flynn, Note, *The "Agony of Suspense": How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 Wash. & Lee L. Rev. 291 (1997) (arguing that execution after protracted death row confinement violates Eighth Amendment).

1.9.1 Last Rites

Rich v. Woodford, 210 F.3d 961 (9th Cir. 2000) (Reinhardt, Pregerson, Kozinski and Wardlaw, J.J., dissenting from denial of rehearing en banc) (arguing condemned inmate entitled to last rites of Native American sweat lodge ceremony as fundamental to religious beliefs, notwithstanding prison's stated security concerns).

1.10 Proportionality Review

The capital statutes of certain states include appellate review for comparative proportionality to ensure that a given death sentence is not disproportionate relative to other sentences imposed for similar crimes. The Supreme Court has held that comparative proportionality, as opposed to inherent proportionality (which measures the proportionality of a sentence to the severity of the crime) is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37 (1984). The Court upheld California's death penalty sentencing statute, which does not include comparative proportionality review. However, in doing so, the Court recognized that a capital sentencing scheme could be so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review. *Pulley* further indicated that the federal constitution may require a state to follow its own statutory proportionality requirement. However, constitutional review on federal habeas is limited to whether the state court engaged in a good faith proportionality review. *Walton v. Arizona*, 497 U.S. 639, 655–56 (1990). In the Ninth Circuit, only Montana and Washington require comparative proportionality review.

Supreme Court:

Turner v. California, 498 U.S. 1053 (1991) (denying certiorari in appeal of California Supreme Court refusal, based on *Pulley*, to review petitioner's complaints of lack of comparative proportionality).

Walton v. Arizona, 497 U.S. 639, 655–56 (1990) (limiting federal habeas review of state proportionality analysis to whether state court engaged in good faith review).

Pulley v. Harris, 465 U.S. 37 (1984) (upholding California statute, and holding Constitution does not require comparative proportionality review in every capital case).

Ninth Circuit:

Allen v. Woodford, 395 F.3d 979 (9th Cir.) (holding that *Pulley v. Harris* foreclosed the claim that either the Eighth Amendment or due process required comparative proportionality review; also holding that for equal protection purposes, defendants sentenced under the California Determinate Sentencing Law are not similarly situated to defendants sentenced in the capital system, and, therefore, a capital defendant was not denied equal protection on the basis that state law required that the Board of Prisons Terms review all determinate sentences to ascertain comparative proportionality, while there was no comparable provision under the capital sentencing scheme), *cert. denied,* 126 S. Ct. 134 (2005).

McKenzie v. Risley, 842 F.2d 1525 (9th Cir.) (finding Montana sentencing procedure constitutionally adequate, citing *Pulley* for proposition that comparative review not constitutionally required), *cert. denied*, 488 U.S. 901 (1988).

Neuschafer v. Whitley, 816 F.2d 1390, 1393-94 (9th Cir. 1987) (holding that, once state sentencing scheme places checks on arbitrariness, proportionality review is question of state law).

Hines v. Enomoto, 658 F.2d 667, 672 (9th Cir. 1981) (holding federal habeas relief may be available if state's failure to conform to own law amounts to a denial of due process), *cert. denied*, 463 U.S. 1211 (1983).

District Courts in Ninth Circuit:

Fetterly v. Paskett, 744 F. Supp. 966 (D. Idaho 1990) (upholding Idaho's sentencing scheme, because provides enough safeguards against arbitrariness so that proportionality review not constitutionally required), *cert. denied*, 506 U.S. 1002 (1992).

Neuschafer v. Whitley, 630 F. Supp. 897, 902 (D. Nev. 1986) (holding that where state statute requires proportionality review, federal court does not conduct *de novo* review but rather determines whether state court properly performed its task under statute), *aff'd*, 816 F.2d 1390 (9th Cir. 1987).

State Courts:

State v. Salazar, 173 Ariz. 399, 844 P.2d 566 (1992) (en banc) (holding appellate proportionality review not constitutionally required and discontinued), *cert. denied*, 509 U.S. 912 (1993).

State v. Brett, 126 Wash. 2d 136, 892 P.2d 29 (1995) (upholding constitutionality of state appellate proportionality review), *cert. denied*, 516 U.S. 1121 (1996).

State Statutes in Ninth Circuit:

Ariz. Rev. Stat. Ann. § 13-703.01 (Supp. 2005) (providing automatic supreme court review, without mention of comparative proportionality review).

Cal. Penal Code § 1239(b) (West 2004) (providing automatic appeal, without mentioning comparative proportionality review).

Idaho Code § 19-2827(c)(3) (2004) (requiring review for inherent excessiveness only).

Mont. Code Ann. § 46-18-310 (2005) (requiring comparative proportionality review).

NRS § 177.055(2)(d) (2005) (requiring review for inherent excessiveness only).

Or. Rev. Stat. § 138.012 (2005) (providing automatic review by supreme court, without mentioning comparative proportionality review).

Wash. Rev. Code § 10.95.130(2)(b) (2002) (requiring comparative proportionality review).

See generally:

David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. Crim. L. & Criminology 661 (1983) (analyzing in detail Georgia's system of comparative proportionality review, concluding that Georgia system not consistently, rationally conducted, but could be if used systematic empirically-based procedures).

David C. Baldus et al., *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 Stan. L. Rev. 1 (1980) (demonstrating utility of quantitative methods in identifying comparatively excessive death sentences).

Robert M. Carney, Comment, *The Case for Comparative Proportionality Review*, 59 Notre Dame L. Rev. 1412 (1984) (arguing to states without comparative proportionality review that public policy and federal and state constitutional principles urge adoption of comparative proportionality review).

Bruce Gilbert, Comment, *Comparative Proportionality Review: Will the Ends, Will the*

review that public policy and federal and state constitutional principles urge adoption of comparative proportionality review).

Bruce Gilbert, Comment, *Comparative Proportionality Review: Will the Ends, Will the Means*, 18 Puget Sound L. Rev. 593 (1995) (addressing comparative proportionality review in Washington state, asserting flaws in system, and offering alternative method).

W. Ward Morrison, Jr., Comment, *Washington's Comparative Proportionality Review: Toward Effective Appellate Review of Death Penalty Cases Under the Washington State Constitution*, 64 Wash. L. Rev. 111 (1989) (critiquing Washington's mandatory comparative proportionality review procedure, arguing it has not been effectively applied in practice, and therefore violates Washington's constitutional guarantee against cruel and unusual punishment).

Note, *A Procedural Due Process Argument for Proportionality Review in Capital Sentencing*, 21 Colum. J.L. & Soc. Probs. 385 (1988) (reviewing Eighth Amendment analysis in *Pulley* and due process analysis in *Ford v. Wainright*, and arguing that Eighth Amendment creates substantive right to proportionate penalties and Fourteenth Amendment due process requires comparative proportionality review of all death sentences).

Daryl P. Rush, Note, *Constitutional Law–Safeguarding Eighth Amendment Rights with a Comparative Proportionality Review in the Imposition of the Death Penalty*, 28 How. L.J. 331 (1985) (arguing death penalty should not be imposed unless comparative proportionality review performed).

Steven M. Sprenger, Note, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*,73 Iowa L. Rev. 719 (1988) (critiquing current systems of comparative proportionality review, reviewing key opinions, purpose of proportionality review, state court interpretations of "similar cases," and offering alternate interpretation).

1.11 Double Jeopardy Considerations

1.11.1 Generally

The double jeopardy clause of the Fifth Amendment protects an individual against both multiple prosecutions and punishments for the same offense. Because of the unique nature of capital proceedings, double jeopardy issues in death penalty cases form a separate body of case law.

See generally:

William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. Rev. 411, 483–89 (1993) (including summary of double jeopardy issues in general as well as capital sentencing procedures).

1.11.2 Resentencing to Death After Appeal

In non-capital cases, because imposing one sentence does not imply an acquittal of a greater sentence, double jeopardy is not violated by an appeal of a sentence or an increase of a sentence by an appellate court. In capital cases, however, this general rule does not apply. In *Bullington v. Missouri*, 451 U.S. 430 (1981), the Supreme Court held that one who is accused of a capital crime but sentenced to life may not be sentenced to death on retrial. This rule is attributed to the unique, trial-like nature of capital sentencing proceedings. If the state carries the burden of establishing aggravating circumstances beyond a reasonable doubt in a sentencing proceeding, that proceeding is regarded as a second trial. Thus, a sentence of life imprisonment amounts to an implied acquittal for the alternative sentence of death and any attempt to impose the death sentence after that would violate double jeopardy. This analysis applies even when the initial life sentence is made in error. *Arizona v. Rumsey*, 467 U.S. 203 (1984).

In *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), the Supreme Court noted that it had held in *Bullington v. Missouri*, that the Double Jeopardy Clause applies to capital-sentencing proceedings that "have the hallmarks of the trial on guilt or innocence." In *Sattazahn,* the Court held that the relevant inquiry is not whether a defendant received a life sentence the first time around, but whether a first life sentence was an "acquittal" based on findings sufficient to establish legal entitlement to the life sentence; *i.e.*, findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt. The Court held that where, as here, a defendant who is convicted of murder and sentenced to life imprisonment succeeds in having the conviction set aside on appeal, jeopardy has not terminated, so that a life sentence imposed in connection with the initial conviction raises no double-jeopardy bar to a death sentence on retrial.

When the initial sentence is one of death rather than life imprisonment, the death sentence *may* be imposed on retrial. Even if the initial death sentence was erroneous, double jeopardy does not prevent a later death sentence. Thus, in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the Court found that the death penalty could be imposed on remand even though the initial death sentencing court improperly refused to consider mitigating evidence. Likewise, the Court did not prohibit a death sentence in *Poland v. Arizona*, 476 U.S. 147 (1986), where the first trial court imposed a capital sentence based on an unsupported aggravating circumstance.

Supreme Court:

Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) (holding that relevant inquiry for double jeopardy purposes is not whether a defendant received a life sentence the first time around, but whether a first life sentence was an "acquittal" based on findings sufficient to establish legal entitlement to the life sentence; holding that here, petitioner could not establish that the jury or the court "acquitted" him during his first capital sentencing proceeding where the verdict form returned showed the jury deadlocked 9-to-3 on whether to impose the death penalty, and it made no findings as to the alleged aggravating circumstances).

Hitchcock v. Dugger, 481 U.S. 393 (1987) (allowing death penalty on remand where initial sentencing court improperly refused to consider mitigating evidence not listed in statute).

Poland v. Arizona, 476 U.S. 147 (1986) (holding double jeopardy does not preclude death sentence where evidence insufficient to support aggravating circumstance on which initial sentencer relied, but not insufficient to support death sentence altogether, where other aggravating circumstances alleged but not relied on).

Arizona v. Rumsey, 467 U.S. 203 (1984) (following *Bullington*, holding double jeopardy prohibits death sentence on reconviction where initial sentencer misinterpreted aggravating circumstance; error of law does not change double jeopardy effects of judgment amounting to acquittal).

Bullington v. Missouri, 451 U.S. 430 (1981) (holding double jeopardy bars imposition of death sentence at retrial of capital charge where initial sentencing proceeding resulted in life sentence; trial-like nature of sentencing proceeding amounts to acquittal of death sentence).

Ninth Circuit:

Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997) (holding trial judge's rejection of aggravating circumstance in initial capital murder prosecution does not constitute "acquittal" of that circumstance for double jeopardy purposes and does not foreclose consideration of it at retrial), *cert. denied*, 523 U.S. 1082 (1998).
Cuffle v. Goldsmith, 906 F.2d 385, 390 (9th Cir. 1990) (applying *Rumsey* to hold life sentence imposed after capital sentencing proceeding triggers double jeopardy and prohibits death penalty on retrial).

Massie v. Hennessey, 875 F.2d 1386, 1389 (9th Cir. 1989) (holding double jeopardy does not apply to California death sentence where state has automatic appeal of death penalty cases, because no expectation of finality in sentence, despite defendant's objection to the mandatory appeal), *cert. denied*, 494 U.S. 1039 (1990).

Fitzpatrick v. McCormick, 869 F.2d 1247 (9th Cir.) (following *Bullington*), *cert. denied*, 493 U.S. 872 (1989).

Staatz v. Dupnik, 789 F.2d 806, 808 (9th Cir. 1986) (holding double jeopardy does not prevent retrial of defendant who has succeeded in getting first conviction set aside).

Knapp v. Cardwell, 667 F.2d 1253, 1263-65 (9th Cir.) (holding first death sentence was not "acquittal" on certain aggravating factors; distinguishing *Bullington* on grounds that first trial there resulted in life sentence and penalty phase in *Bullington* was more like a trial than Arizona's penalty phase which involves only judge), *cert. denied*, 459 U.S. 1055 (1982).

1.11.3 Sentencing for Murders Including Felonies

Although the double jeopardy clause prohibits prosecution for both felony-murder and an underlying felony, it does not prohibit prosecution for intentional murder and a felony committed as part of that same act. Moreover, where the state charges felony-murder and intentional murder, and a defendant is found guilty based on the felony-murder, double jeopardy does not prohibit the use of the intentional-murder aggravating circumstance, if applicable, at sentencing.

Supreme Court:

Schiro v. Farley, 510 U.S. 222 (1994) (holding jury verdict of guilty of felony-murder,

one of three murder counts, did not amount to acquittal of other counts and thus double jeopardy did not prohibit use of intentional-murder aggravating circumstance at sentencing).

Other Circuits:

Taylor v. Whitley, 933 F.2d 325 (5th Cir. 1991) (holding, although double jeopardy clause prohibits prosecution for both felony-murder and underlying felony, it does not prohibit prosecution for specific intent murder and armed robbery), *cert. denied*, 503 U.S. 988 (1992).

1.11.4 Sentencing to Death After Breach or Withdrawal of Plea Agreement

Double jeopardy does not prevent the imposition of a death sentence upon retrial of a defendant who has previously pled guilty to a lesser charge (not carrying the death penalty) and has subsequently withdrawn or breached the plea agreement.

Supreme Court:

Ricketts v. Adamson, 483 U.S. 1 (1987) (holding defendant sentenced to life imprisonment pursuant to plea agreement was subject to reprosecution and resentencing for capital murder because defendant waived double jeopardy defense by breaching agreement in which consequences of breach were clearly expressed in agreement).

Other Circuits:

Williams v. Kemp, 846 F.2d 1276 (11th Cir. 1988) (allowing death sentence sought after defendant voluntarily withdrew guilty plea to manslaughter), *cert. denied*, 494 U.S. 1090 (1990).

1.11.5 Prosecutions by Different Sovereigns for Same Conduct

The dual sovereignty doctrine provides that when a defendant violates the law of two sovereigns with a single act, that act constitutes two distinct offenses for double jeopardy purposes, and double jeopardy thus does not bar successive prosecutions, even capital prosecutions, for that conduct. The accused has no right to control the

order of prosecution or punishment.

Supreme Court:

Koon v. United States, 518 U.S. 81 (1996) (relying on *Heath* in deciding in a non-capital case that successive prosecutions in state and federal courts for the same underlying conduct did not violate the Double Jeopardy Clause).

Heath v. Alabama, 474 U.S. 82 (1986) (holding prosecution and death sentence in Alabama for murder for which defendant had been convicted and sentenced to death in Georgia not barred by double jeopardy).

Ninth Circuit*:*

Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997) (holding meritless petitioner's claim that Arizona cannot impose death penalty until federal sentence concluded), *cert. denied*, 523 U.S. 1082 (1998).

1.11.6 Judicial Override of Jury Life Sentence

The Supreme Court has upheld state sentencing schemes involving judicial overrides of jury-recommended sentences. Even when such judicial override involves the imposition of the death penalty over a jury recommendation of a life sentence, the double jeopardy clause is not violated. The Court has held, in *Spaziano v. Florida*, 468 U.S. 447 (1984), that since jury recommendations are not judgments, they do not trigger double jeopardy.

However, in *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. See § 4.6.1 for further discussion of *Ring*.

Supreme Court:

Ring v. Arizona, 536 U.S. 584 (2002) (holding that capital defendants are entitled to jury determination of any fact on which legislature conditions increase in their maximum punishment; also holding that *Walton* and *Apprendi* are irreconcilable and

overruling *Walton* to extent that it allowed sentencing judge, sitting without jury, to find aggravating circumstance necessary for imposition of death penalty)

Harris v. Alabama, 513 U.S. 504 (1995) (holding Alabama system of judicial override of jury recommendation of life or death does not violate Eighth Amendment by not specifying weight judge must give to jury's recommendation).

Schiro v. Farley, 510 U.S. 222 (1994) (allowing judge-imposed death sentence over jury rejection of capital punishment).

Spaziano v. Florida, 468 U.S. 447 (1984) (state law that allows judge to override jury's recommendation of life sentence does not constitute double jeopardy).

See generally:

Neil R. Lebowitz, Note, *Harris v. Alabama: Standardless Jury Override in Capital Cases Deemed Constitutional*, 7 Md. J. Contemp. Legal Issues 515 (1996) (analyzing strengths, weaknesses, implications of principles set forth in *Harris*).

Michael Mello & Ruthann Robson, *Judge over Jury: Florida's Practice of Imposing Death over Life in Capital Cases*, 13 Fla. St. U. L. Rev. 31 (1985) (analyzing Florida's policy of allowing judicial imposition of death penalty over jury recommendation of life imprisonment, reviewing *Spaziano,* policy considerations mitigating against retention of override policy).

David A. Scheffel, *Harris v. Alabama–A Portrait of Deference to the States in Capital Punishment*, 19 Thomas Jefferson L. Rev. 39 (1997) (analyzing *Harris*).

Jeffrey A. Wellek, Note, *Eighth Amendment–Trial Court May Impose Death Sentence Despite Jury's Recommendation of Life Imprisonment*, 75 J. Crim. L. & Criminology 813 (1984) (reviewing *Spaziano* and arguing Florida death penalty statute violates Eighth Amendment because question of life or death must be left to jury).

1.12 Racial Discrimination in Capital Sentencing

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court rejected Eighth and Fourteenth Amendment challenges to the Georgia capital punishment statute and its administration, based on a study ("the Baldus study") indicating that, in Georgia, persons who murder whites receive the death penalty more often than persons who

murder blacks, and that black murderers of whites receive the death penalty more often than white murderers of whites.

The Court held that for such a claim to prevail under the equal protection clause of the Fourteenth Amendment, a petitioner must prove that the decision makers *in his or her case* acted with discriminatory purpose. The Court held that the Baldus study was insufficient to support an inference that any of the decision makers in McCleskey's case acted with discriminatory purpose.

The Court further denied the claim that the Georgia capital punishment statute was cruel and unusual punishment under the Eighth Amendment because of its arbitrary and capricious application due to the influence of racial considerations on the sentencing decisions. The Court upheld the Georgia statute–already found constitutional in previous decisions–finding that the Baldus study did not prove that race entered into any capital sentencing procedures or that race was a factor in petitioner's case; the study established only a likelihood that race entered into some decisions. In concluding, the Court held that, although the Constitution does not require such disparities to be eliminated, the legislature is entitled to address the disparities with statutory mechanisms.

In response to the Court's suggestion that the matter be resolved legislatively, legislation has twice been introduced to effectively reverse *McCleskey*. In 1990 and 1994, the House voted to include the Racial Justice Act in its version of pending crime control legislation. The Racial Justice Act responded to *McCleskey* by proscribing imposition of the death penalty unless it is applied in a race-neutral manner, and by allowing a defendant to challenge a death sentence by showing that race played a statistically significant role in capital sentencing in the jurisdiction in which he or she was tried. However, Congress omitted the Racial Justice Act from the final version of the 1994 crime bill, the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 140 Cong. Rec. 8772.

Supreme Court:

United States v. Bass, 536 U.S. 862 (2002) (per curiam) (holding that defendant, who was claiming government selectively sought death penalty based on race, was not entitled to discovery of information relating to government's capital charging practices

and that district court erred in dismissing death penalty notice after government informed court it would not comply with discovery request based on defendant's evidence of purported nationwide statistics demonstrating that United States charges blacks with death-eligible offense more than twice as often as it charges whites and that United States enters into plea bargains more frequently with whites than it does with black, where such raw statistics regarding overall charges said nothing about charges brought against similarly situated defendants, and where plea bargain statistics were even less relevant, since respondent *was* offered plea bargain but declined it).

United States v. Armstrong, 517 U.S. 456 (1996) (holding in a non-capital case that in order to make a claim of selective prosecution based on race, petitioner must show that similarly situated defendants of another race could have been prosecuted but were not).

McCleskey v. Kemp, 481 U.S. 279 (1987) (holding statistical evidence of disparity in imposition of death penalty due to race of victim and of defendant insufficient to demonstrate denial of equal protection or violation of cruel and unusual punishment clause; to show denial of equal protection, defendant must prove that sentencers in his or her case acted in discriminatory manner, or that state enacted or maintained death penalty statute "because of" its racially discriminatory effect).

Ninth Circuit:

Jeffers v. Lewis, 38 F.3d 411 (9th Cir. 1994) (finding no evidence that the Arizona sentencing process discriminates against impoverished males convicted of killing males), *cert. denied*, 514 U.S. 1071 (1995).

Carriger v. Lewis, 971 F.2d 329 (9th Cir. 1992) (following *Richmond* and *McCleskey*, in holding statistical information showing increased likelihood of death penalty where murder victim is white is insufficient to establish equal protection violation), *cert. denied*, 507 U.S. 992 (1993).

Richmond v. Lewis, 948 F.2d 1473 (9th Cir. 1990) (holding evidentiary hearing properly denied because statistical evidence indicating that Arizona's administration of the death penalty is racially, sexually, and socio-economically discriminatory is insufficient to demonstrate that the decision makers in his or her case acted with discriminatory purpose), *rev'd on other grounds*, 506 U.S. 40 (1992).

Harris v. Pulley, 885 F.2d 1354 (9th Cir. 1988) (following *McCleskey* in denying statistics-based challenge to death penalty statute as violative of Fourteenth and Eighth Amendments; statistical study showing disproportionate application of death penalty along racial or gender lines is insufficient to demonstrate (1) decision makers in

particular case acted with "discriminatory purpose" or (2) racial or gender bias affected state's capital sentencing process), *cert. denied*, 493 U.S. 1051 (1990).

Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989) (holding failure to raise claim of discriminatory application of death penalty not ineffectiveness of counsel because claim is barred under *McCleskey*), *vacated on other grounds*, 500 U.S. 901 (1992).

District Courts in Ninth Circuit:

Gerlaugh v. Lewis, 898 F. Supp. 1388 (D. Ariz. 1995) (applying *McClesky*, *Richmond*, holding petitioner failed to prove that prosecution acted with discriminatory purpose in not presenting plea offer to him), *aff'd*, 129 F.3d 1027 (9th Cir. 1997), *cert. denied*, 525 U.S. 903 (1998).

Other Circuits:

Dobbs v. Zant, 963 F.2d 1403 (11th Cir. 1991) (holding backgrounds and general racial attitudes of various trial participants insufficient to show racial prejudice influenced state's decision to impose death penalty), *rev'd on other grounds*, 506 U.S. 357 (1993).
Byrd v. Armontrout, 880 F.2d 1 (8th Cir. 1989) (holding prosecution's use of peremptory challenges to achieve all white jury (against black defendant) insufficient to prove decision to seek death penalty motivated by racial prejudice; therefore, evidentiary burden under *McCleskey* to prove decision maker acted with "discriminatory purpose" not met), *cert. denied*, 494 U.S. 1019 (1990).

Griffin v. Dugger, 874 F.2d 1397 (11th Cir. 1989) (holding statistical evidence of discriminatory application of death penalty insufficient to prove prosecutor acted with discriminatory intent in commenting on race of victims), *cert. denied*, 493 U.S. 1051 (1990).

Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988) (upholding district court's denial of evidentiary hearing on claim that Florida death penalty is discriminatorily applied where victim is white because no evidence decision makers in case acted with discriminatory purpose), *cert. denied*, 488 U.S. 1034 (1989).

Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988) (rejecting petitioner's request for evidentiary hearing because, under *McCleskey*, statistical studies showing discriminatory application of death penalty are insufficient to demonstrate unconstitutional discrimination under Fourteenth Amendment or arbitrariness under Eighth Amendment), *cert. denied*, 494 U.S. 1047 (1990).

See generally:

David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 Stetson L. Rev. 133 (1986) (analyzing evidence of and reasons for racial discrimination in post *Furman* capital sentencing and proposing remedies for such discrimination).

Fredric J. Bendremer et al., Note, *McCleskey v. Kemp: Constitutional Tolerance for Racially Disparate Capital Sentencing*, 41 U. Miami L. Rev. 295 (1986) (analyzing racial disparity in capital sentencing under Eighth and Fourteenth Amendments and critiquing analysis in *McCleskey* and other decisions).

John H. Blume et al., Symposium, *How the Death Penalty Works: Empirical Studies of the Modern Capital Sentencing System: Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 Cornell L. Rev. 1771 (1998) (discussing court's reluctance to find intentional discrimination by state officials; ten years *post-McCleskey* and not one claimant has prevailed.

Stephen B. Bright, Symposium, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433 (1995) (discussing racial discrimination in capital sentencing).

Erwin Chemerinsky, Symposium, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 Santa Clara L. Rev. 519 (1995) (addressing racial discrimination in death penalty administration and need for Racial Justice Act).

M. Shanara Gilbert, *Racism and Retrenchment in Capital Sentencing: Judicial and Congressional Haste Toward the Ultimate Injustice,* 18 N.Y.U. Rev. L. & Soc. Change 51 (1990) (exploring racism in death sentencing in light of *McCleskey* and proposed 1990 Racial Justice Act).

Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 Stan. L. Rev. 27 (1984) (analyzing patterns in capital sentencing from 1976-1980 in southern states, based on race of both defendant and victim).

Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388 (1988) (analyzing *McCleskey* from community-oriented race-of-victim theory; asserting African American community denied equal protection because killers of blacks are less vigorously prosecuted).

Katherine R. Kruse, *Race, Angst and Capital Punishment: The Burger Court's Existential Struggle,* 9 Seton Hall Const. L.J. 67 (1998) (explaining the Burger Court's failure to remedy racism in the discretionary capital sentencing system; prescribing a more effective response).

1.13 Ineffective Assistance of Counsel

1.13.1 Legal Standard

A capital defendant may assert a violation of the Sixth Amendment guarantee of effective assistance of counsel based on counsel errors at both the guilt and sentencing phases of a capital trial and a violation of due process for ineffective assistance of counsel during subsequent appeals. According to *Strickland v. Washington*, 466 U.S. 668, 686 (1984), ineffective assistance of counsel exists when "counsel's conduct so undermine[s] . . . the adversarial process that the trial cannot be relied on as having produced a just result." To prevail on such a claim, a petitioner must make two showings: (1) the counsel's performance was deficient, and (2) the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.

In *Murray v. Giarratano*, 492 U.S. 1 (1989), the Supreme Court held that the right to counsel does not attach to postconviction proceedings. Thus, there is no claim for ineffective assistance of state postconviction counsel. *See infra* § 6.3.2.1. This was codified in the 1996 habeas corpus reform in the Anti-Terrorism and Effective Death Penalty Act of 1996. *See* 28 U.S.C. § 2254(i) (2000).

The Supreme Court has also held that a petitioner can waive the right to present Sixth Amendment claims on federal habeas review. In *Stewart v. LaGrand (Walter)*, 526 U.S. 115 (1999), the Court affirmed the district court and Ninth Circuit's determinations that petitioner waived his right to raise ineffective assistance of counsel claims when he chose to have trial counsel continue representation on federal collateral review and the district court required counsel to discuss all possible ineffective assistance claims with petitioner and file a status report with the court.

Supreme Court:

Stewart v. LaGrand (Walter), 526 U.S. 115 (1999) (per curiam) (holding petitioner waived Sixth Amendment claims on federal habeas review by knowingly choosing to have trial counsel continue representation).

Murray v. Giarratano, 492 U.S. 1 (1989) (holding state not constitutionally required to provide counsel for indigent death row inmates seeking state postconviction relief).

Evitts v. Lucey, 469 U.S. 387 (1985) (holding where state provides a direct criminal appeal as of right, due process clause of Fourteenth Amendment guarantees criminal defendant effective assistance of counsel on first appeal as of right).

Strickland v. Washington, 466 U.S. 668 (1984) (establishing standard for Sixth Amendment claims of ineffective assistance of counsel).

Ninth Circuit:

LaGrand (Karl) v. Stewart, 133 F.3d 1253, 1271 (9th Cir.) (concluding district court did not err limiting evidentiary hearing to first prong of *Strickland*, since testimony directed at second *Strickland* prong irrelevant without proof of deficient performance), *cert. denied*, 525 U.S. 971 (1998).

Miller v. Keeney, 882 F.2d 1428 (9th Cir. 1989) (stating that review of claims of ineffective assistance of counsel will be according to standard set out for trial counsel in *Strickland*).

Federal Statutes:

28 U.S.C. § 2254(i) (2000) (stating "the ineffectiveness or incompetence of counsel during federal or state collateral postconviction proceedings shall not be a ground for relief in a proceeding arising under § 2254.").

See generally:

Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835 (1994) (discussing reasons for pervasive inadequacy of counsel for poor, including lack of functioning adversary system, lack of indigent defense programs, limited attorney compensation, role of judges, and minimal

standard of legal representation tolerated in capital cases).

Ivan K. Fong, Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 Stan. L. Rev. 461 (1987) (stating *Strickland* failed to ensure that capital defendants receive effective assistance of counsel at sentencing; arguing that failure to investigate and present mitigating evidence at sentencing constitutes denial of Sixth Amendment right to effective assistance of counsel).

Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299 (1983) (stating standards for assessing effectiveness of counsel's performance at penalty phase of capital trial inadequate and proposing new standards).

Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 Iowa L. Rev. 433 (1993) (arguing for narrower construction of "counsel" under Sixth Amendment to encompass only attorneys qualified to wage adequate criminal defense).

Lissa Griffin, *The Right to Effective Assistance of Appellate Counsel*, 97 W. Va. L. Rev. 1 (1994) (addressing question of whether same standard for evaluating ineffective assistance of counsel should also be applied to evaluations of appellate counsel).

Gary Hengster, *Attorneys for the Damned*, 73 A.B.A. J. 56 (1987) (discussing obstacles faced by attorneys representing death row inmates, including quality of counsel, *Strickland* standard, and procedural defaults).

Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. Va. L. Rev. 863 (1996) (arguing that congressional defunding of postconviction defender organizations in 1996 will lead to denial of death row inmates' right to counsel).

John C. Jeffries, Jr., & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. Chi. L. Rev. 679 (1990) (proposing reform of law governing federal collateral review of defaulted claims).

Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 Hastings Const. L.Q. 625 (1986) (discussing several Supreme Court decisions, including *Strickland*, as limitations on claims based on ineffective assistance of counsel; generally describing under-funding of agencies providing defense counsel to indigents as endangerment to Sixth Amendment guarantee of effective assistance of counsel).

Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Postconviction Counsel: The Scope of the Constitutional Obligation to Monitor Counsel Performance*, 66 U. Pitt. L. Rev. 521 (2005) (arguing that the government must attempt to prevent counsel's conduct from interfering with the capital inmate's ability to have claims decided on the merits and suggesting that basic remedies include (1) a written or oral notification to counsel identifying the problem, followed by additional monitoring; (2) an extension of time; and (3) the removal and substitution of counsel).

Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 Harv. L. Rev. 1923 (1994) (arguing that because of uniqueness of capital trials, Eighth Amendment requires a higher standard of effective assistance of counsel in death penalty cases).

Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323 (1993) (assessing first prong of *Strickland* standard and stating capital defense attorney's failure to take action–specifically, failure to seek and introduce mitigating evidence, to seek favorable plea bargain avoiding death sentence, and to try to establish relationship of trust with defendant–usually should be viewed as deficient representation).

1.13.2 Deficiency of Counsel

To establish that an attorney's performance was deficient, the defendant must show that counsel made errors so serious that the attorney was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. As the Court held in *Strickland,* a petitioner must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

Supreme Court:

Yarborough v. Gentry, 540 U.S. 1 (2003) (per curiam) (holding in noncapital habeas case that state appellate court's determination that trial defense counsel had not performed deficiently, for Sixth Amendment purposes, in failing to highlight all potentially exculpatory evidence in his closing argument, in highlighting defendant's bad character traits while arguing that these traits were irrelevant to issues before jury

and in making only passive request that jurors reach verdict rather than demanding that they acquit, was not objectively unreasonable application of federal law, and did not warrant federal habeas relief; also holding that Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight; noting that the right to effective representation extends to closing arguments, but that tactical decisions in closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage).

Bell v. Cone, 535 U.S. 685 (2002) (holding that attorney's asserted ineffective assistance of counsel claim during sentencing phase of capital murder trial in which defendant was sentenced to death by failing to present mitigating evidence and waiving final argument were the type of errors subject to *Strickland* test; further holding that state court decision was not an unreasonable application of *Strickland* and that it was not objectively unreasonable for state court to deem counsel's performance as involving tactical decisions about which competent lawyers might disagree where counsel's final argument options were to plead for his client's life and impress on jury other, less significant facts, knowing that it would give prosecutor chance to depict his client as heartless killer just before jury began deliberations or prevent prosecutor from arguing by waiving his own summation, and where counsel had tactical reasons for not calling witnesses during sentencing phase, including fear that prosecution might elicit testimony about defendant's criminal history from witnesses; Justice Steven's dissent addressing possibility that trial counsel, who began treatment for mental illness "a couple of years after trial," was suffering from mental impairment at time of trial).

Roe v. Flores-Ortega, 528 U.S. 470 (2000) (holding that counsel is deficient failing to consult with a defendant about an appeal where either a rational defendant would want to appeal or where a defendant reasonably demonstrated to counsel an interest in appealing).

Lockhart v. Fretwell, 506 U.S. 364 (1993) (holding counsel's failure to make objection based on case later overruled by Supreme Court did not constitute prejudicial ineffective assistance of counsel under *Strickland*).
Strickland v. Washington, 466 U.S. 668 (1984) (holding claimant must establish both that counsel's performance was seriously deficient and that claimant as a result suffered prejudice in order to prevail on claim of ineffective assistance of counsel under Sixth Amendment).

Ninth Circuit:

Pirtle v. Morgan, 313 F.3d 1160 (9th Cir. 2002) (holding that habeas petitioner's counsel rendered ineffective assistance by requesting an intoxication jury instruction

and failing to request a diminished capacity instruction in light of the following facts: (1) Washington had long recognized a diminished capacity defense; (2) counsel theory was that defendant's brain was kindled from chronic drug use and that he suffered from a seizure at the time of the murders that impaired his ability to premediate; and (3) there was evidence to support a finding that he was not intoxicated at the time of the murders; noting that only issue in dispute at guilt phase was premeditation), *cert. denied*, 539 U.S. 916 (2003).

Jennings v. Woodford, 290 F.3d 1006 (9th Cir. 2002) (vacating conviction for murder and other crimes and remanding with instructions to district court to grant writ of habeas corpus unless state decided to retry petitioner and holding that there was ineffective assistance of counsel during guilt phase of trial in that counsel failed to discover and consider vast and easily obtainable information about petitioner's fragile and failing mental health; also holding that ineffective assistance prejudiced petitioner by depriving him of opportunity to help his counsel make informed judgments as to his defense and potentially to have defense presented that would have negated mental state necessary for first degree murder conviction), *cert. denied*, 539 U.S. 958 (2003).

Phillips v. Woodford, 267 F.3d 966 (9th Cir. 2001) (holding that habeas petitioner asserted colorable claim that combined prejudicial effect of his counsel's ineffective assistance in failing to present defense that victim was killed during "shoot-out" rather than presenting only his meritless alibi defense, and state's presentation of false testimony regarding existence of plea agreement with its chief witness, required setting aside findings that rendered him eligible for death sentence and entitled him to evidentiary hearing on those two claims).

LaGrand (Karl) v. Stewart, 133 F.3d 1253 (9th Cir.) (holding state not estopped from challenging petitioner's ineffective assistance of counsel claim notwithstanding attorney general submitted trial counsel's affidavit in support of habeas claim to state bar; affirming district court's denial of ineffective assistance challenging various trial strategies), *cert. denied*, 525 U.S. 971 (1998).

Bloom v. Calderon, 132 F.3d 1267 (9th Cir.) (holding that defense counsel's failure to provide defendant's experts with psychiatric information requested by experts, along with general lack of effort, was ineffective assistance), *cert. denied*, 523 U.S. 1145 (1997).

Baylor v. Estelle, 94 F.3d 1321 (9th Cir. 1996) (holding counsel in a noncapital case ineffective for failing to follow up on criminalist's report that semen sample taken from victim might not have come from defendant), *cert. denied*, 520 U.S. 1151 (1997).

Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994) (reversing district court finding of no ineffective assistance of counsel, holding instead that counsel's choice not to have defendant's mother and sister testify and to have defendant testify as alternative personality at penalty phase constitutes ineffective assistance), *cert. denied*, 513 U.S. 1120 (1995).

Lowry v. Lewis, 21 F.3d 344 (9th Cir. 1994) (finding no ineffective assistance of counsel for failing to file suppression motion where attorney researched and talked with attorneys who handled similar motions), *cert. denied*, 513 U.S. 1001 (1994).

Campbell v. Blodgett, 978 F.2d 1502, 1511–12 (9th Cir. 1992) (finding counsel not ineffective for allowing defendant to waive right to be present at jury empanelment where counsel testified that it was tactical decision in order to preserve good working relationship with defendant), *reconsideration denied*, 992 F.2d 984 (9th Cir. 1993).

Harris v. Vasquez, 913 F.2d 606, 628 (9th Cir. 1990) (finding counsel not ineffective for failing to put on psychiatric-based defense that could have conflicted with alibi defense and mitigation based on petitioner's remorse and abusive childhood).

Harris v. Pulley, 885 F.2d 1354, 1368 (9th Cir. 1988) (finding possibility that counsel's failure to introduce abnormal EEG when later EEG result was normal was tactical decision and thus counsel's conduct not deficient), *cert. denied*, 493 U.S. 1051 (1990).

Evans v. Lewis, 855 F.2d 631, 636–37 (9th Cir. 1988) (holding counsel's failure to investigate possibility of petitioner's mental problems could not be construed as trial tactic where counsel did not view available relevant documents).

Harding v. Lewis, 834 F.2d 853, 859 (9th Cir. 1987) (holding counsel's recommendation to petitioner that he represent himself at trial in order to inject fundamental error is not per se prejudicial), *cert. denied*, 488 U.S. 871 (1988).

Woratzeck v. Ricketts, 820 F.2d 1450, 1455 (9th Cir. 1987) (holding trial counsel's failure to request lesser-included offense instruction where defendant relied on alibi defense and trial counsel's decision not to call witnesses who stated that they would have had to commit perjury to say anything good about defendant were trial strategies and did not constitute ineffective assistance of counsel), *vacated on other grounds*, 486 U.S. 1051 (1988).

Other Circuits:

Groseclose v. Bell, 120 F.3d 1161 (6th Cir. 1997) (granting writ where counsel failed to

devise any defense theory, failed to subject the state's case to any adversarial testing, including foregoing cross-examination of more than half of the state's witnesses, failed to object to evidence, failed to present any defense witnesses, failed to make a closing argument, and failed to present meaningful mitigating evidence at penalty phase), *cert. denied*, 523 U.S. 1132 (1998).

Porter v. Singletary, 14 F.3d 554 (11th Cir.) (holding counsel made informed tactical decision not to introduce potentially mitigating family background evidence in order to avoid inclusion of damaging evidence of defendant's prior criminal activity), *cert. denied*, 513 U.S. 1009 (1994).

Hance v. Zant, 981 F.2d 1180 (11th Cir.) (finding counsel not ineffective for presenting psychologist's testimony of defendant's poor chance of rehabilitation from mental illness where counsel had evaluated evidence from six to eight mental health experts and chosen psychologist was only one willing to testify as to defendant's mental disorder), *cert. denied*, 510 U.S. 920 (1993).

Barnard v. Collins, 958 F.2d 634 (5th Cir. 1992) (finding counsel's tactical decision not to present mitigating evidence concerning petitioner's mental condition did not constitute ineffective assistance, absent showing that counsel would have reason to believe defendant suffered from mental defect at time of offense or trial), *cert. denied*, 506 U.S. 1057 (1993).

Smith v. Wainwright, 777 F.2d 609 (11th Cir. 1985) (requiring evidentiary hearing to determine reasonableness of counsel's failure to challenge admissibility of defendant's confessions where defendant was prejudiced by their admission), *cert. denied*, 477 U.S. 905 (1986).

1.13.2.1 Conflicts of Interest

A lawyer's conflict of interest may amount to a denial of the effective assistance of counsel guaranteed by the Sixth Amendment. Under *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980), to establish a Sixth Amendment violation based on a conflict of interest, a defendant "who raised no objection at trial must demonstrate that an actual conflict . . . adversely affected his lawyer's performance." Once an actual conflict of interest is established prejudice is presumed. Although the Sixth Amendment does not impose an affirmative duty upon a state trial court to inquire into the propriety of multiple representation in every case, the Supreme Court, in *Holloway v. Arkansas*, 435 U.S. 475 (1978), required a state court to investigate timely objections to multiple representation.

In order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known, the Supreme Court held, in *Mickens v. Taylor*, 535 U.S. 162, *reh'g denied*, 535 U.S.1074 (2002), that a defendant must establish that a conflict of interest adversely affected his or her counsel's performance. The Court held in *Mickens* that "actual conflict of interest" means precisely a conflict that affected counsel's performance, as opposed to a mere theoretical division of loyalties. A determination concerning the adequacy of counsel and conflicts of interest is a mixed question of law and fact and thus is not entitled to the presumption of correctness afforded state court findings of fact under 28 U.S.C. § 2254(e).

Supreme Court:

Mickens v. Taylor, 535 U.S. 162 (in case in which lead defense counsel had represented murder victim on criminal charges holding that to demonstrate Sixth Amendment violation where trial court failed to inquire into potential conflict of interest about which it knew or reasonably should have known, defendant had to establish that this conflict of interest adversely affected counsel's performance; rejecting proposed "automatic reversal" rule whereby if trial judge neglected duty to inquire into attorney's potential conflict of interest, defendant, to obtain reversal of judgment, need only show that lawyer was subject to conflict of interest), *reh'g denied*, 535 U.S. 1074 (2002).

Burger v. Kemp, 483 U.S. 776 (1987) (holding no conflict of interest where two partners were appointed to represent coindictees in respective trials even though partners cooperated with one another in planning and conduct of trial strategy; even single attorney representing codefendants not per se violative of Sixth Amendment; not every instance of multiple representation justifies presumption of prejudice; where actual conflict and adverse impact on representation exists, no need to show prejudice).

Cuyler v. Sullivan, 446 U.S. 335 (1980) (holding, although possibility of prejudice inheres in almost every instance of multiple representation, defendant must still establish actual conflict of interest that adversely affected counsel's performance).

Holloway v. Arkansas, 435 U.S. 475 (1978) (requiring state trial courts to investigate timely objections to multiple representation; stating that simultaneous representation of codefendants is not "per se violative of constitutional guarantees of effective assistance of counsel"; defendant may waive right to assistance of counsel unhindered by conflicts of interest, citing *Glasser v. United States*, 315 U.S. 60, 70 (1942)).

Ninth Circuit:

Daniels v. Woodford, 428 F.3d 1181 (9th Cir. 2005) (holding that when trial court denied capital habeas petitioner's motions for substitution of counsel, he was deprived of his Sixth Amendment right to conflict-free representation because there was a complete breakdown in communication between his trial counsel and him, the trial court did not conduct any inquiry into the conflict, and the motions to substitute were timely; also holding that petitioner was denied effective assistance of counsel due to: (1) the lack of communication and counsel's ineffective efforts to overcome the impasse, and (2) counsel's failure to conduct a thorough investigation into the petitioner's mental illness and possible brain damage).

Campbell v. Rice, 408 F.3d 1166 (9th Cir.) (en banc) (holding in a noncapital case that the state court's determination–that an assumed actual conflict of interest due to the fact that petitioner's attorney was being prosecuted at the same time by the same district attorney's office did not cause the attorney to render ineffective assistance–was not contrary to or an unreasonable application of clearly established federal law; also holding that any violation of petitioner's due process rights when he was excluded from the in-chambers conference where the trial court concluded that his attorney did not have a conflict was trial error subject to harmless error review and any error was harmless), *cert. denied,* 126 S. Ct. 735 (2005).

United States v. Baker, 256 F.3d 855 (9th Cir. 2001) (finding petitioner failed to demonstrate actual conflict where attorney pleaded guilty to federal fraud charges in New York, cooperated with authorities and received reduced sentence, while representing petitioner on his appeal in Los Angeles on unrelated drug charges).

Lockhart v. Terhune, 250 F.3d 1223 (9th Cir. 2001) (finding conflict of interest that adversely affected counsel's ability to represent petitioner in murder trial where counsel also represented separate client who was implicated in earlier homicide petitioner also implicated in, and state's case would have been significantly weaker if separate client had been implicated in first homicide; finding waiver inadequate to remedy conflict).

Bragg v. Galaza, 242 F.3d 1082 (9th Cir.) (finding no active representation of conflicting interest or actual adverse effect on performance where counsel agreed to represent petitioner's cousin in unrelated offense but withdrew during petitioner's trial after learning that cousin was possible witness/accomplice to petitioner's murder charge), *amended on denial of petition for reh'g*, 253 F.3d 1150 (2001).

Delgado v. Lewis, 223 F.3d 976 (9th Cir. 2000) (presuming prejudice where petitioner was represented at sentencing by co-defendant's counsel and the representation was deficient because of a conflict of interest).

Rich v. Calderon, 187 F.3d 1064 (9th Cir. 1999) (finding no economic conflict of interest where petitioner submitted affidavit of appointed trial counsel discussing financial pressures), *cert. denied*, 528 U.S. 1092 (2000).

Woratzeck v. Stewart, 118 F.3d 648 (9th Cir. 1997) (holding former defense counsel's involvement as prosecutor in subsequent capital clemency hearing not conflict of interest because prisoner has no constitutional right to clemency).

United States v. Del Muro, 87 F.3d 1078 (9th Cir. 1996) (holding court created inherent conflict of interest by forcing trial counsel to prove own ineffectiveness at evidentiary hearing on motion for new trial).

Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995) (finding no conflict of interest where counsel had only discussed literary rights agreement with defendant but had not actually entered into formal agreement; no conflict where counsel had offered to represent codefendant and key prosecution witness against defendant where defendant could not prove attorney-client relationship had adverse affect on attorney's performance at trial), *cert. denied*, 516 U.S. 1142 (1996).

Garcia v. Bunnell, 33 F.3d 1193 (9th Cir. 1994) (holding no conflict of interest created by defense counsel's acceptance of offer of employment in prosecutor's office, to begin after end of defendant's trial), *cert. denied*, 514 U.S. 1024 (1995).

Sanders v. Ratelle, 21 F.3d 1446 (9th Cir. 1994) (finding attorneys representing defendant at first and second trial were faced with impermissible conflicts of interest that adversely affected defendant's representation where first attorney initially represented defendant's brother and advised him to take Fifth Amendment in defendant's trial despite knowing brother's confession and willingness to testify, and attorney in second trial pursued weaker defenses despite awareness of brother's confession).

Fitzpatrick v. McCormick, 869 F.2d 1247, 1251–53 (9th Cir.) (finding direct conflict of interest where counsel previously represented petitioner's codefendant and failed to present evidence that might have put uncertainty into minds of jury but would have implicated codefendant), *cert. denied*, 493 U.S. 872 (1989).

Other Circuits:

Ruffin v. Kemp, 767 F.2d 748 (11th Cir. 1985) (finding petitioner entitled to habeas relief due to actual conflict of interest that adversely affected attorney's performance where appointed attorney representing codefendants attempted to work out plea bargain that would call for one defendant to testify against other).

Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975) (finding conflict of interest where one defendant stood to gain significantly by counsel adducing probative arguments damaging to cause of codefendant also represented by counsel; in establishing ineffective assistance of counsel, it is sufficient to show plausible defense foreclosed because might have prejudiced other codefendants represented by same counsel; "irrelevant or merely hypothetical" conflicts of interest do not violate Sixth Amendment).

1.13.2.2 Deficiencies for Failure to Investigate and Prepare

In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Supreme Court reiterated the strong presumption of attorney competence established by *Strickland v. Washington* but established that where a counsel's failure to investigate indicates a complete lack of trial preparation, such performance falls below the level of reasonable professional assistance and is thus constitutionally deficient.

In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Supreme Court emphasized that *Strickland v. Washington* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing, nor require defense counsel to present mitigating evidence at sentencing in every case. The *Wiggins* court held that counsel's decision not to expand their investigation beyond a presentence investigation and city department of social services report fell below prevailing professional standards since the standard practice in Maryland capital cases was to prepare a social history report.

Supreme Court:

Rompilla v. Beard, 125 S. Ct. 2456 (2005) (holding that even when a capital defendant's family members and defendant himself have suggested that no mitigating evidence is available, counsel is required to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial's sentencing phase).

Wiggins v. Smith, 539 U.S. 510 (2003) (holding in case in which counsel attempted to justify limited investigation as reflecting a tactical judgment to pursue alternate strategy to focus of petitioner's direct responsibility, that in evaluating an ineffective assistance of counsel claim, Supreme Court's principal concern is not whether counsel should have presented a mitigation case but whether the investigation supporting the decision not to

introduce mitigating evidence of petitioner's background was itself reasonable; concluding that counsel did not conduct a reasonable investigation where the decision not to expand their investigation beyond a presentence investigation report and a city department of social services record fell short of the professional standards prevailing in Maryland in 1989 in that standard practice in capital cases at that time included preparation of a social history report and funds were available to retain a forensic social worker).

Williams (Terry) v. Taylor, 529 U.S. 362 (2000) (holding petitioner's *Strickland* right to counsel was violated where trial counsel failed to conduct a thorough mitigation investigation of petitioner's childhood for sentencing trial; holding that trial counsel's *Strickland* violation was both "contrary to" and an "unreasonable application of" federal law, under § 2254(d)(1)).

Kimmelman v. Morrison, 477 U.S. 365 (1986) (finding counsel ineffective because failed to conduct pretrial discovery and thus unaware of search revealing interim evidence, and therefore failed to file timely suppression motion; adversarial testing process generally will not function properly unless counsel has done some investigation).

Ninth Circuit:

Summerlin v. Schriro, 427 F.3d 623 (9th Cir. 2005) (en banc) (on remand from Supreme Court, en banc court reversed district court's denial of pre-AEDPA habeas petition as to penalty phase and held that petitioner received ineffective assistance of counsel because his attorney "utterly failed" in his duty to investigate and develop potential mitigating evidence for presentation at penalty phase: he conducted no investigation of petitioner's family and social history; he did not speak to petitioner's family or friends; and his development of mental health defense was based solely on limited information developed at petitioner's pre-trial competency examination, which was prepared for an entirely different purpose), *petition for cert. filed.* 74 U.S.L.W. (U.S. Jan. 17, 2006) (No. 05-903)

Boyde v. Brown, 404 F.3d 1159 (9th Cir.) (in a pre-AEDPA case, holding that as to the penalty phase of a capital trial, counsel was deficient in failing to investigate mitigating childhood abuse, in failing to introduce the evidence that his limited investigation did uncover as to the petitioner's history of suffering violent physical abuse as well as the family history of sexual abuse that petitioner knew about growing up, and in failing to object to inadmissible aggravating evidence), *amended on granting of petition for reh'g*, 421 F.3d 1154 (9th Cir. 2005).

Allen v. Woodford, 395 F.3d 979 (9th Cir.) (holding that counsel's failure to prepare for the penalty phase of a capital case until one week before it began, and his resulting

failure to investigate thoroughly and present the petitioner's mitigation case, was constitutionally deficient, but that, nonetheless, the evidence in mitigation, coupled with the potential mitigating evidence produced during the federal habeas proceedings, was insufficient to outweigh the overwhelming evidence in aggravation), *cert. denied,* 126 S. Ct. 134 (2005).

Beardslee v. Woodford, 358 F.3d 560 (9th Cir. 2004) (holding that counsel's strategic decision to offer complete cooperation without investigating other potential mitigation strategies fell below constitutionally acceptable standards; holding, nevertheless, that petitioner could not show that counsel's decision actually prejudiced his penalty phase trial under *Strickland* because: (1) full cooperation did not preclude a substantial case in mitigation; (2) district court did not err in finding that petitioner himself originated the cooperation tactic; (3) counsel's decision to allow petitioner to testify about the prior homicide did not have a substantial effect on the verdict when petitioner had already admitted committing that crime; and (4) petitioner received new trial counsel, who conducted a reasonably thorough investigation).

Alcala v. Woodford, 334 F.3d 862 (9th Cir. 2003) (affirming in capital case a conditional grant of habeas petition, the court held that trial counsel's failure to present alibi defense was plainly deficient and prejudiced petitioner; noting that trial counsel at evidentiary hearing could not recall why he failed to call alibi witness, who was identified as a potential trial witness, or present business records bearing on alibi defense).

Turner v. Calderon, 281 F.3d 851 (9th Cir. 2002) (remanding for evidentiary hearing to determine whether counsel was constitutionally ineffective for failure to investigate and present evidence of petitioner's long-term drug use and his abusive and difficult childhood, which, if true, could have altered result of penalty phase of capital murder trial).

Caro v. Woodford, 280 F.3d 1247 (9th Cir.) (holding that there was ineffective assistance of counsel at penalty phase where counsel was aware of petitioner's extraordinary history of exposure to pesticides and toxic chemicals, yet counsel neither fully investigated this history nor informed experts who examined petitioner of those facts that were known to him, and counsel failed to seek out expert to assess damage done by this poisoning), *cert. denied*, 536 U.S. 951 (2002).

Silva v. Woodford, 279 F.3d 825 (9th Cir.) (granting writ of habeas corpus and holding that trial counsel was constitutionally ineffective during penalty phase of murder trial in failing to investigate defendant's background and present potentially compelling mitigating evidence), *cert. denied,* 537 U.S. 942 (2002).

Mayfield v. Woodford, 270 F.3d 915 (9th Cir. 2001) (en banc) (holding that counsel was

ineffective in penalty phase of trial in which petitioner was sentenced to death where he failed to conduct thorough investigation of petitioner's background; noting that attorney did not associate co-counsel to assist although petitioner was entitled to second attorney in capital case, he billed only 40 hours in preparation for both phases of trial, he spent less than half of defense investigation budget authorized by county, he did not consult experts in endocrinology regarding petitioner's diabetes or in toxicology regarding his substance abuse, nor did he obtain petitioner's medical records; concluding that jury might not have imposed death sentence had mitigating evidence been presented).

Ainsworth v. Woodford, 268 F.3d 868 (9th Cir. 2001) (holding that counsel's performance at penalty phase of murder trial was deficient where counsel failed to investigate and present wealth of evidence concerning habeas petitioner's troubled background and emotional problems).

Lambright v. Stewart, 241 F.3d 1201 (9th Cir. 2001) (remanding for evidentiary hearing to determine whether counsel was deficient for failure to investigate and present evidence of petitioner's psychiatric condition and social history at sentencing), *cert. denied*, 534 U.S. 1188 (2002).

Bragg v. Galaza, 242 F.3d 1082 (9th Cir.) (finding no failure to investigate based on record; denying evidentiary hearing pursuant to 28 U.S.C. 2254(e) for failure to request an evidentiary hearing in state court)*, amended on denial of petition for reh'g*, 253 F.3d 1150 (2001).

Anderson v. Calderon, 232 F.3d 1053 (9th Cir. 2000) (finding no deficient performance–but rather strategy–in counsel asking jury to convict on first degree murder but not felony murder; finding no deficiencies in counsel's death penalty defense), *cert. denied*, 534 U.S. 1036 (2001), *reh'g and reh'g en banc denied*, 276 F.3d 483.

Jackson v. Calderon, 211 F.3d 1148 (9th Cir. 2000) (finding ineffective assistance of counsel at capital penalty phase, which included failure to compile a social history of petitioner, failure to present evidence regarding petitioner's PCP addiction, failure to present medical testimony, failure to present expert evidence regarding petitioner's impaired mental condition at time of crime, and failure to investigate prior aggravating act of sodomy), *cert. denied*, 531 U.S. 1072 (2001).

Turner v. Duncan, 158 F.3d 449 (9th Cir. 1998) (finding ineffective assistance of counsel based on cumulative impact of error failing to investigate or prepare for trial).
Babbitt v. Calderon, 151 F.3d 1170 (9th Cir. 1998) (finding trial counsel's decision not to pursue additional investigation into defendant's post-traumatic syndrome disorder at guilt and sanity trials reasonable where evidence largely cumulative; finding counsel's

investigatory efforts preparing for penalty trial and presentation of mitigating evidence reasonable), *cert. denied*, 525 U.S. 1159 (1999).

Coleman v. Calderon, 150 F.3d 1105 (9th Cir.) (finding deficient performance where trial counsel never read expert report which contained evidence favorable to defendant, but finding no prejudice in light of other evidence of guilt; finding no deficiency, under circumstances, in failing to investigate physical evidence and serology evidence, or failing to request a continuance), *rev'd on other grounds*, 525 U.S. 141 (1998).

Ortiz v. Stewart, 149 F.3d 923 (9th Cir. 1998) (affirming district court's finding that counsel's alleged failure to properly prepare for sentencing or to investigate information in presentence report not ineffective where petitioner failed to show what further preparation or investigation would have shown), *cert. denied*, 526 U.S. 1123 (1999).

Brown v. Myers, 137 F.3d 1154 (9th Cir. 1998) (finding trial counsel's failure to investigate alibi claim or call alibi witnesses, coupled with sufficient inconsistencies in state's case resulted in ineffective assistance of counsel).

Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995) (finding counsel's failure to investigate defendant's childhood did not amount to ineffective assistance), *cert. denied*, 516 U.S. 1051 (1996).

Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994) (holding petitioner entitled to evidentiary hearing due to colorable showing that counsel's failure to pursue accomplice defense amounted to deficient performance at penalty phase), *cert. denied*, 513 U.S.1183 (1995), *on appeal after remand,* 133 F.3d 732 (9th Cir. 1998) (holding counsel was not ineffective).

Sanders v. Ratelle, 21 F.3d 1446 (9th Cir. 1994) (finding ineffective assistance of counsel due to counsel's failure to investigate purported confession of another suspect in the case, petitioner's brother, despite suspect's willingness to talk and counsel's pursuit of mistaken identity defense without reference to other suspect, and other weaker defenses).

Other Circuits:

Collier v. Turpin, 177 F.3d 1184 (11th Cir. 1999) (granting relief from petitioner's death sentence where trial counsel was ineffective for failing to adequately prepare and present evidence in mitigation of petitioner's sentence for killing a police officer).

Dobbs v. Turpin, 142 F.3d 1383 (11th Cir. 1998) (holding counsel ineffective at petitioner's capital sentencing proceeding for failing to investigate and present any

mitigating evidence and for making an inadequate closing argument).

Austin v. Bell, 126 F.3d 843 (6th Cir. 1997) (finding ineffective assistance of counsel where attorney failed to investigate and present any evidence during capital penalty phase, even though petitioner's friends and family were willing to testify), *cert. denied*, 523 U.S. 1079 (1998), *and cert. denied*, 523 U.S. 1088 (1998).

Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995) (holding counsel's failure to investigate evidence of brain damage of mentally retarded petitioner to be ineffective assistance of counsel), *cert. denied*, 519 U.S. 910 (1996).

State Courts:

In Re Personal Restraint of Brett, 142 Wash. 2d 868, 16 P.3d 601 (2001) (holding trial counsel ineffective during both guilt and penalty phases of capital trial where counsel knew of petitioner's mental and physical conditions yet did not locate proper records, experts, consultants or properly research mitigating evidence to maintain an adequate defense).

1.13.2.3 Failure to Present Mitigating Evidence at Sentencing

The Constitution requires that the sentencer consider any relevant mitigating evidence. Ineffective assistance of counsel under the Sixth Amendment may exist, therefore, when a defense counsel fails to adequately investigate and present such mitigating evidence.

Supreme Court:

Wiggins v. Smith, 539 U.S. 510 (2003) (holding that petitioner's defense was prejudiced where mitigating evidence counsel failed to present and discover was powerful: petitioner experienced severe privation and abuse while in custody of his alcoholic mother and physical and sexual abuse while in foster care, was homeless, and had diminished mental capacities).

Bell v. Cone, 535 U.S. 685 (2002) (holding that attorney's asserted ineffective assistance of counsel claim during sentencing phase of capital murder trial in which defendant was sentenced to death by failing to present mitigating evidence and waiving final argument were the type of errors subject to *Strickland* test; also holding that state court correctly identified *Strickland* principles as governing claim and that there was no merit to contention that state court's adjudication was contrary to court's clearly established law; further holding that state court decision was not an unreasonable application of *Strickland*

and that it was not objectively unreasonable for state court to deem counsel's performance as involving tactical decisions about which competent lawyers might disagree where counsel had tactical reasons for not calling witnesses during sentencing phase, including fear that prosecution might elicit testimony about defendant's criminal history from witnesses; Justice Steven's dissent addressing possibility that trial counsel, who began treatment for mental illness "a couple of years after trial," was suffering from mental impairment at time of trial).

Burger v. Kemp, 483 U.S. 776 (1987) (holding counsel's strategic choice not to introduce any mitigating evidence even after a less than complete investigation was supported by reasonable professional judgment when the evidence that could have been presented would not have been helpful in establishing mitigation).

Darden v. Wainwright, 477 U.S. 168, 185–87 (1986) (holding it is reasonable for counsel not to introduce any mitigating evidence and rely on plea for mercy when potential mitigating evidence would have been rebutted with extremely damaging evidence from state).

Ninth Circuit:

Summerlin v. Schriro, 427 F.3d 623 (9th Cir. 2005) (en banc) (on remand from Supreme Court, en banc court reversed district court's denial of pre-AEDPA habeas petition as to penalty phase and held that counsel was ineffective in failing to present mitigating evidence; also holding that record did not support state's argument that petitioner requested that mitigating evidence not be presented), *petition for cert. filed*, 74 U.S.L.W. (U.S. Jan. 17, 2006) (No. 05-903).

Douglas v. Woodford, 316 F.3d 1079 (9th Cir.) (holding that counsel was constitutionally ineffective in failing to investigate and present, at penalty phase of a capital murder trial, significant mitigating evidence regarding petitioner's social history and mental health, including evidence of his difficult childhood and exposure to toxic solvents; finding that even though petitioner refused to submit to further psychological testing, counsel's investigation of his mental health was deficient), *cert. denied*, 540 U.S. 810 (2003).

Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002) (holding that there was ineffective assistance of counsel at penalty phase of trial where counsel failed to investigate and present mitigating evidence of abuse petitioner witnessed and suffered as a child), *cert. denied,* 539 U.S. 958 (2003).

Caro v. Woodford, 280 F.3d 1247 (9th Cir.) (holding that there was ineffective assistance of counsel at penalty phase of trial where counsel was aware of petitioner's extraordinary

history of exposure to pesticides and toxic chemicals, yet counsel neither fully investigated this history nor informed experts who examined petitioner of those facts that were known to him, counsel failed to seek out expert to assess damage done by this poisoning, and counsel failed to present testimony at penalty phase of trial explaining effects of severe physical, emotional, and psychological abuse to which petitioner was subjected as a child), *cert. denied*, 536 U.S. 951 (2002).

Silva v. Woodford, 279 F.3d 825 (9th Cir.) (granting writ of habeas corpus and holding that trial counsel was constitutionally ineffective during penalty phase of murder trial in failing to investigate defendant's background and present potentially compelling mitigating evidence; holding that counsel had a duty to seek out all available sources of mitigating evidence, including contacting family members even if they would not be called on to testify and that counsel was deficient in failing to inform defendant about consequences of not investigating), *cert. denied,* 537 U.S. 942 (2002).

Mayfield v. Woodford, 270 F.3d 915 (9th Cir. 2001) (en banc) (holding that counsel was ineffective in penalty phase of murder trial in which petitioner was sentenced to death where he did not present and explain to jury significant mitigating evidence; noting that counsel called only one witness, a psychologist, and failed to call endocrinologist to offer testimony regarding petitioner's diabetes or toxicologist to testify regarding his substance abuse, nor did he call any friends or family members; applying test that court must weigh mitigating evidence against aggravating evidence and determine whether there was "a reasonable probability that, absent the errors, the sentencer–including an appellate court, to the extent it independently reweighs the evidence–would have concluded that the balance of aggravating and mitigating circumstances do not warrant death," court concluded that petitioner was prejudiced by counsel's deficient performance at penalty phase).

Ainsworth v. Woodford, 268 F.3d 868 (9th Cir. 2001) (holding that counsel's performance at penalty phase of murder trial was deficient where counsel failed to investigate and present wealth of evidence concerning habeas petitioner's emotional problems and troubled background including drug and alcohol abuse and suicide attempts, and failed to present to jury evidence of petitioner's positive adjustment to prison life during his previous incarceration).

Wallace v. Stewart, 184 F.3d 1112 (9th Cir. 1999) (remanding to district court for evidentiary hearing to determine whether defense counsel ineffective at capital sentencing hearing, in light of *Hendricks* and affidavits submitted to district court revealing a depressive disorder and possibly organic brain damage).

Bean v. Calderon, 163 F.3d 1073 (9th Cir. 1998) (holding counsel ineffective at capital

penalty hearing who failed to provide experts with necessary information, failed to have testing performed at request of experts, and put expert on stand without preparation or foundation, and where defendant presented evidence at habeas hearing that he suffered from post-traumatic stress disorder, was functionally mentally retarded, brain damaged from childhood experiences, unable to form intent and incompetent to stand trial), *cert. denied*, 528 U.S. 922 (1999).

Smith v. Stewart, 140 F.3d 1263 (9th Cir. 1998) (holding trial counsel ineffective by failing to offer any mitigating evidence or argument at capital sentencing, where presentence report indicated some mitigating evidence and counsel's decision was not the result of tactical consideration), *cert. denied*, 525 U.S. 929 (1998).

Correll v. Stewart, 137 F.3d 1404 (9th Cir.) (holding petitioner presented colorable claim of ineffective assistance of counsel where there was almost complete absence of investigation, development, and presentation of mitigating evidence, including evidence of petitioner's psychiatric history), *cert. denied*, 525 U.S. 984, *and cert. denied*, 525 U.S. 996 (1998).

Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995) (holding defense attorney's decision to forego insanity plea in capital prosecution does not preclude obligation to explore mental impairment resulting from physical and mental abuse as mitigating evidence at sentencing), *cert. denied*, 517 U.S. 1111 (1996).

Claibourne v. Lewis, 64 F.3d 1373 (9th Cir. 1995) (holding counsel ineffective at penalty phase for failing to prepare and present case for mitigation; evidence of mental illness, and influence of co-defendant).

Williams v. Calderon, 52 F.3d 1465 (9th Cir. 1995) (stating where mitigating evidence is presented at guilt trial and jury instructed to consider it at penalty phase, counsel is not necessarily ineffective for not presenting additional evidence at penalty phase), *cert. denied*, 516 U.S. 1124 (1996).

Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994) (holding counsel's decision not to present testimony of defendant's mother and sister was failure to present mitigating evidence constituting ineffective assistance of counsel), *cert. denied*, 513 U.S. 1120 (1995).

Paradis v. Arave, 20 F.3d 950 (9th Cir. 1994) (finding no ineffective assistance for failure to present mitigating evidence because counsel spent adequate time preparing for sentencing, competently responded to inaccuracies and ambiguities in presentence report, and presented testimony to establish defendant amenable to rehabilitation), *cert. denied*,

513 U.S. 1117 (1995).

Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir.) (finding failure to argue to jury that it should consider lingering doubt about defendant's guilt as mitigating factor not ineffective assistance because counsel could reasonably have concluded jury would not be persuaded by such an argument), *cert. denied*, 512 U.S. 1229 (1994).

Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992) (holding ineffective assistance where attorney presented no mitigating evidence despite fact that there was substantial available evidence concerning petitioner's family background, good character, and cultural difficulties), *cert. denied*, 507 U.S. 951 (1993).

Deutscher v. Whitley, 884 F.2d 1152, 1159 (9th Cir. 1989) (finding ineffective assistance for failure to investigate and present any mitigating evidence of petitioner's mental problems; since sole mitigating argument was that petitioner must have had some mental problem, counsel did not make a reasoned decision that the evidence would not be useful), *vacated on other grounds*, 500 U.S. 901 (1992).

Evans v. Lewis, 855 F.2d 631, 636 (9th Cir. 1988) (finding counsel's failure to investigate defendant's mental condition for purpose of establishing mitigating factor at sentencing phase was ineffective assistance where documents indicating defendant's history of mental problems were available to counsel and review of totality of evidence established prejudice; since counsel presented no mitigating evidence, this failure to investigate cannot be construed as a trial tactic).

Campbell v. Kincheloe, 829 F.2d 1453, 1462-64 (9th Cir. 1987) (rejecting per se rule that counsel must present mitigating evidence at sentencing; counsel not ineffective for failing to present any mitigating evidence when it would have opened door to extremely damaging rebuttal evidence from state), *cert. denied*, 488 U.S. 948 (1988).

Other Circuits:

Duvall v. Reynolds, 139 F.3d 768 (10th Cir. 1998) (differentiating between failure to present evidence and failing to investigate, and allowing more latitude for the former), *cert. denied*, 525 U.S. 933 (1998).

Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991) (holding defense counsel's failure to present mitigating evidence at sentencing was ineffective assistance, particularly in light of fact that counsel attacked defendant's character and separated himself from defendant), *cert. denied*, 503 U.S. 952 (1992).

Harris v. Dugger, 874 F.2d 756 (11th Cir.) (holding new sentencing required where each of two co-counsel testified that he believed his co-counsel had prepared for the sentencing phase, and mitigating evidence, although available, was not discovered or presented), *cert. denied*, 493 U.S. 1011 (1989).

State Courts:

People v. Snow, 30 Cal.4th 43, 65 P.3d 749, 132 Cal.Rptr.2d 271 (holding that trial court did not err in failing to appoint new defense counsel to argue to the jury on defendant's behalf during penalty phase of capital murder trial when defense counsel failed to present any mitigating evidence and then, refusing to explain why, waived argument, and defendant responded affirmatively when the court inquired whether he would accept substitute counsel where counsel's confidential declarations in the record on appeal raised a reasonable inference that defendant did not desire, and indeed would not permit, defense counsel to investigate or present any family background evidence in mitigation; also holding that the record on appeal was inadequate for resolution of the question of ineffective assistance of defense counsel and that question could only be resolved by means of a petition for a writ of habeas corpus), *cert. denied*, 540 U.S. 1076 (2003).

See generally:

Jonathan P. Tomes, *Damned if you Do, Damned if you Don't: The Use of Litigation Experts in Death Penalty Litigation*, 23 Am. J. Crim. L 359 (1997).

1.13.3 Prejudice

An error by counsel, even if professionally unreasonable, does not warrant setting aside the conviction if the error had no effect on the judgment. A defendant must establish prejudice resulting from the error. In *Strickland,* the Supreme Court held that prejudice requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." The Court in *Strickland* emphasized that the ultimate focus of an ineffective assistance of counsel inquiry "must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696.

In *Lockhart v. Fretwell*, 506 U.S. 364 (1993), the Supreme Court further clarified that to establish prejudice a defendant must show more than merely that the

outcome would have been different absent the deficiency of counsel. The Court held that a trial is not unfair or unreliable unless counsel's ineffectiveness deprived the defendant of a substantive or procedural right to which he was entitled by law. *Lockhart.* 506 U.S. at 372.

Supreme Court:

Roe v. Flores-Ortega, 528 U.S. 470 (2000) (holding prejudice established when counsel's deficient performance deprives a defendant of an appeal that he *otherwise would have taken*).

Williams (Terry) v. Taylor, 529 U.S. 362, 391-95 (2000) (stating *Lockhart's* fundamental fairness test not applicable inquiry when *Strickland* analysis shows deprivation of substantive or procedural right; holding that Lockhart's fundamental fairness test is not an additional requirement to Strickland prejudice nor does Lockhart supplant prejudice under Strickland).

Lockhart v. Fretwell, 506 U.S. 364 (1993) (holding to show prejudice under *Strickland*, defendant must demonstrate more than different outcome caused by deficient counsel; unfairness or unreliability does not result unless counsel's ineffectiveness deprives defendant of a substantive or procedural right entitled by law).

Cuyler v. Sullivan, 446 U.S. 335 (1980) (holding although possibility of prejudice inheres in almost every instance of multiple representation, defendant must still establish actual conflict of interest that adversely affected counsel's performance).

Ninth Circuit:

Mayfield v. Woodford, 270 F.3d 915, 928 (9th Cir. 2001) (en banc) (holding that *Williams v. Taylor* does not establish per se rule that death sentence must be reversed if counsel's performance at penalty phase is deficient, but rather that applying *Strickland* analysis, court must weigh mitigating evidence against aggravating evidence and determine whether there was "a reasonable probability that, absent the errors, the sentencer–including an appellate court, to the extent it independently reweighs the evidence–would have concluded that the balance of aggravating and mitigating circumstances do not warrant death").

Ainsworth v. Woodford, 268 F.3d 868 (9th Cir. 2001) (finding there to be prejudice to habeas petitioner based on counsel's deficient performance at penalty phase of murder trial where counsel failed to investigate and present wealth of evidence concerning

petitioner's troubled background and his emotional problems, and had jury been able to consider mitigating evidence, there was reasonable probability jury would have rendered verdict of life imprisonment without parole rather than death sentence). *Hasan v. Galaza*, 254 F.3d 1150 (9th Cir. 2001) (finding prima facie showing of prejudice where third party who passed note to juror in courthouse was found to be in romantic relationship with a witness for the prosecution).

Anderson v. Calderon, 232 F.3d 1053 (9th Cir. 2000) (finding no prejudice in counsel's failure to meet with petitioner in jail before the guilt phase trial where there was no evidence that the failure to do so affected the trial outcome; finding no prejudice with counsel's death penalty defense), *cert. denied*, 534 U.S. 1036 (2001), *reh'g and reh'g en banc denied*, 276 F.3d 483 (9th Cir. 2001).

Hart v. Gomez, 174 F.3d 1067 (9th Cir. 1999) (finding prejudice where defense counsel failed to introduce evidence that corroborated a key defense witness whom the jury might otherwise not believe and which evidence, if believed, would prove defendant's innocence), *reh'g granted in part* (June 15, 1999), *cert. denied*, 528 U.S. 929 (1999).

Johnson v. Baldwin, 114 F.3d 835 (9th Cir. 1997) (finding prejudice where trial counsel failed to investigate alibi defense–which investigation would have prompted counsel to advise defendant on scope of testifying–and where state's evidence very weak and co-defendant's nondeficient trial strategy resulted in acquittal).

United States v. Baramdyka, 95 F.3d 840 (9th Cir. 1996) (finding no prejudice where counsel failed to assert viable defense to charge that results in probation if defendant in same case is convicted and sentenced for more serious offense), *cert. denied*, 520 U.S. 1132 (1997).

Cooper v. Fitzharris, 586 F.2d 1325, 1333 (9th Cir. 1978) (stating prejudice to defendant may result from cumulative impact of multiple deficiencies of counsel), *cert. denied*, 440 U.S. 974 (1979).

Other Circuits:

Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997) (finding failure to investigate mental illness satisfied prejudice where defendant had extensive history of mental problems and may have been incompetent to stand trial; finding prejudice where counsel failed to investigate and present to jury another person's confession to the murder).

See generally:

Jennifer N. Foster, Note, *Lockhart v. Fretwell: Using Hindsight to Evaluate Prejudice in Claims of Ineffective Assistance of Counsel*, 72 N.C. L. Rev. 1369 (1994) (analyzing *Lockhart*, ineffective assistance of counsel in Sixth Amendment and development of prejudice requirement; arguing court's use of hindsight to evaluate prejudice departs from *Strickland* and undermines consistency in evaluation of prejudicial error).

1.13.3.1 Presumed Prejudice

In *United States v. Cronic*, 466 U.S. 648 (1984), and later in *Penson v. Ohio*, 488 U.S. 75 (1988), the Court stated that certain circumstances may create a presumption of prejudice resulting in Sixth Amendment violations. In *Penson*, the Court distinguished between two types of ineffective assistance of counsel: (1) when the deficiency consists of a failure to raise or properly brief or argue certain issues on appeal, requiring a showing of *Strickland* prejudice, and (2) when there has been complete actual or constructive denial of any assistance of counsel and prejudice is presumed. When the latter has occurred, it is presumed to result in prejudice, and a *Strickland* second prong showing of prejudice is not required. As to presumed prejudice when an "actual conflict of interest" is established, *see* § 1.13.2.1, *supra*.

Supreme Court:

Florida v. Nixon, 543 U.S. 175 (2004) (holding that counsel's failure to obtain defendant's express consent to a strategy of conceding guilt in a capital trial does not automatically render counsel's performance deficient, and that counsel's effectiveness should not be evaluated under the *Cronic* standard, but under *the Strickland* standard).

Penson v. Ohio, 488 U.S. 75 (1988) (holding prejudice will be presumed if there has been actual or constructive denial of assistance of counsel at trial or on appeal, and thus *Strickland* prejudice standard not required; noting that appellate counsel had been granted leave to withdraw at time court of appeals considered merits of appeal, leaving petitioner entirely without assistance of counsel on appeal).

United States v. Cronic, 466 U.S. 648 (1984) (acknowledging exception to general rule requiring showing of prejudice where surrounding circumstances make it so unlikely that any lawyer could perform effectively at trial that it justifies presumption of ineffectiveness without inquiring into actual performance, such as when there is complete

complete denial of counsel or if counsel entirely fails to subject prosecution's case to meaningful adversarial testing resulting in petitioner's denial of right to effective cross-examination).

Ninth Circuit:

Crandell v. Bunnell, 144 F.3d 1213 (9th Cir. 1998) (presuming prejudice where petitioner was forced to choose between self-representation and representation by an attorney who refused to investigate or establish a relationship with petitioner).

Gerlaugh v. Stewart, 129 F.3d 1027 (9th Cir. 1997) (finding failure to plead for leniency at sentencing not structural error), *cert. denied*, 525 U.S. 903 (1998).

United States v. Horodner, 993 F.2d 191 (9th Cir. 1993) (holding counsel's untimely filing of notice of appeal is presumed prejudice).

United States v. Baldwin, 987 F.2d 1432, 1437-38 (9th Cir. 1993) (holding no presumed prejudice where defense attorney conceded client's lack of defense to court during pretrial conference in presence of prosecutor but not jury), *cert. denied*, 508 U.S. 967 (1993).

Lozada v. Deeds, 964 F.2d 956, 958 (9th Cir. 1992) (holding prejudice is presumed where defense counsel failed to file notice of appeal despite client's instructions).

United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991) (finding presumed prejudice where defense counsel concedes during closing argument that no reasonable doubt exists as to only factual issues in dispute; attorney conduct was more than negligent representation, but rather constituted abandonment of defense of client at critical stage of proceedings).

United States v. Birtle, 792 F.2d 846, 848 (9th Cir. 1986) (holding failure of counsel to appear at oral argument or file a reply brief not so essential to fundamental fairness of appellate process as to constitute presumed prejudice).

Javor v. United States, 724 F.2d 831, 834 (9th Cir. 1984) (holding that defense attorney sleeping through substantial portion of trial is inherently prejudicial conduct, thus no separate showing of prejudice necessary).

District Courts in Ninth Circuit:

Coleman v. Ignacio, 164 F.R.D. 679 (D. Nev. 1996) (finding presumed prejudice where

assistance of counsel altogether denied).

Other Circuits:

Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001) (declining to adopt per se rule that any sleeping by defense counsel during trial merits presumption of prejudice but holding that repeated unconsciousness of defendant's counsel through not insubstantial portions of critical guilt-innocence phase of capital murder trial warranted presumption of prejudice; rejecting argument that *Cronic* calls for presumption of prejudice relating to absence of counsel during critical stage of trial only when state action causes such absence), *cert. denied*, 535 U.S. 1120 (2002).

Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994) (holding where defendant told lawyer to appeal and lawyer did not, then defendant was deprived of counsel altogether, constituting per se violation of Sixth Amendment).

Lombard v. Lynaugh, 868 F.2d 1475, 1480 (5th Cir. 1989) (presuming prejudice under *Penson* where appellate counsel filed two-page brief failing to raise indisputably nonfrivolous issues apparent in record and stating appeal lacked merit).

1.13.3.2 Prejudice Due to Failure to Investigate

Ninth Circuit:

Jones v. Wood, 207 F.3d 557 (9th Cir. 2000) (finding prejudice where trial counsel failed to investigate and present substantial circumstantial evidence of another person committing crime in case based on circumstantial evidence).

Lord v. Wood, 184 F.3d 1083 (9th Cir. 1999) (finding prejudice where trial attorneys failed to call three alibi witnesses without personally interviewing witnesses and government's case not strong enough to make error harmless).

Gerlaugh v. Stewart, 129 F.3d 1027 (9th Cir. 1997) (finding no prejudice where counsel declined to pursue psychological testing for sentencing purpose after petitioner objected to such tactic during guilt phase and where postconviction evidence revealed a sociopath disorder but evidence had countervailing tactical drawbacks), *cert. denied*, 525 U.S. 903 (1998).

Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992) (holding petitioner prejudiced by counsel's failure to investigate and present any mitigating evidence at sentencing phase

in light of evidence concerning defendant's good character, strong family relationship, cultural difficulties, and that he was an honor student), *cert. denied*, 507 U.S. 951 (1993).

Deutscher v. Whitley, 884 F.2d 1152, 1161 (9th Cir. 1989) (holding petitioner was prejudiced by counsel's failure to investigate and present any mitigating evidence of petitioner's mental problems), *vacated on other grounds*, 500 U.S. 901 (1992).

Evans v. Lewis, 855 F.2d 631, 637-39 (9th Cir. 1988) (holding counsel's failure to investigate petitioner's mental problems prejudiced petitioner because at petitioner's resentencing psychiatrists were unable to give an opinion with a reasonable degree of certainty due to lapse of time between crime and examination).

1.14 Clemency Hearings

In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the Court held that Ohio's clemency procedure was constitutional. Chief Justice Rehnquist, joined by Justices Scalia, Kennedy, and Thomas, opined that no due process right exists in the executive's clemency authority. Justices O'Connor, Souter, Ginsburg, Breyer, and Stevens agreed that minimal due process safeguards apply in clemency hearings. Justice Stevens, who wrote separately, concurred with the Sixth Circuit that the case should be remanded for a hearing on whether petitioner received due process. The Court unanimously agreed that the voluntary interview portion of Ohio's executive clemency procedure does not violate the Fifth Amendment right against self-incrimination.

In *Woratzeck v. Arizona Board of Executive Clemency*, 117 F.3d 400 (9th Cir. 1997), the Ninth Circuit held that Arizona clemency laws do not create a constitutionally protected liberty interest. However, the court recognized a limited procedural due process right in the clemency hearing as an integral part of the state's criminal justice procedure and heard petitioner's § 1983 cause of action. The court held that due process is violated only when clemency hearing procedures "shock the conscience" and concluded that Woratzeck's hearing was not constitutionally deficient. The court stated that Woratzeck and his witnesses had opportunity to testify on Woratzeck's behalf and to expose challenged participation of former defense attorneys now employed as county attorneys.

Supreme Court:

Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998) (plurality opinion) (holding Ohio's clemency procedure does not violate due process; conducting voluntary interviews does not violate prisoners' Fifth Amendment rights).

Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981) (holding Connecticut's commutation statute does not create a constitutional liberty interest; nor does the failure to provide plaintiff with a statement of reasons for denying commutation violate his due process rights).

Ninth Circuit:

Wilson v. United States Dist. Court for the N. Dist. of Cal. (Siripongs), 161 F.3d 1185 (9th Cir. 1998) (holding, in mandamus action, that district court did not err in granting a TRO based on condemned's assertion that governor's failure to notify capital defense counsel regarding scope of issues to be considered in clemency hearing violates due process).

Woratzeck v. Stewart, 118 F.3d 648 (9th Cir. 1997) (holding claim regarding constitutionality of clemency proceeding not cognizable under AEDPA because there is no constitutional right to clemency).

Woratzeck v. Arizona Bd. of Clemency, 117 F.3d 400 (9th Cir. 1997) (per curiam) (holding Arizona clemency laws do not create a constitutionally protected liberty interest, but defendant has a procedural due process right in the hearing; holding § 1983 proper vehicle for raising due process claim; holding due process violated only if clemency hearing procedures "shock the conscience;" holding that Woratzeck's hearing not constitutionally deficient).

1.15 Public Access to Executions

The Supreme Court has not ruled on the extent of the public's access to executions. However, the Ninth Circuit has held that restrictions on the public's viewing of lethal injections at San Quentin Prison in California until after prison administrations had inserted IV lines and left the execution chamber were an exaggerated, unreasonable response to prison official's legitimate concerns for the safety of prison staff and violates the public's First Amendment right to view executions from the moment the inmate is escorted into the execution chamber. *California First Amendment Coalition v.*

Woodford, 299 F.3d 868 (9th Cir. 2002).

The Oregon Supreme Court similarly struck down prison rules that limited public viewing of an execution to the lethal injection itself. *Oregon Newspaper Publishers Ass'n v. Oregon Dep't of Corrections*, 329 Or. 115, 988 P.2d 359 (1999). The court based its ruling on the interpretation of Or. Rev. Stat. § 137.473 (1999), which allows viewers to "be present at the execution." The court construed "the execution" to encompass preinjection procedures including connecting monitoring equipment to the prisoner, placing the prisoner in restraints, and inserting the catheter in the prisoner.

The court also ruled that § 137.473 does not grant to the prison the authority to impose nondisclosure restrictions on witnesses whom the superintendent is statutorily required to invite. The superintendent is required to invite one or more physicians, the attorney general, and a county sheriff. Because the court's holding essentially requires the department of corrections to rewrite its rules, the court declined to rule on whether the nondisclosure restrictions as applied to the capital prisoner's invited guests are unconstitutional.

Ninth Circuit:

California First Amendment Coalition v. Woodford, 299 F.3d 868 (9th Cir. 2002) (holding prison procedure limiting public viewing of lethal injection execution to time after IV was inserted into condemned inmate was exaggerated, unreasonable response to prison official's legitimate concerns for safety of prison staff and violates public's First Amendment right to view executions; affirming permanent injunction prohibiting defendants from prohibiting uninterrupted viewing of executions from moment condemned inmate enters execution chamber until condemned inmate is declared dead).

Other Circuits:

Lawson v. Dixon, 25 F.3d. 1040 (4th Cir. 1994) (unpublished) (affirming district court's dismissal of declaratory and injunctive complaint alleging First and Fourteenth Amendment right to videotape execution).

Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977) (reversing district court ruling that press has First Amendment right to televise executions), *cert. denied*, 438 U.S. 914

(1979).

District Courts in the Ninth Circuit:

KQED v. Vasquez, No. C-90-1383 RHS, 1995 WL 489485 (N.D. Cal. Aug. 1, 1991) (ruling press had right to be present at Harris execution in California but no right to film it).

State Courts:

Oregon Newspaper Publishers Ass'n v. Oregon Dep't of Corrections, 329 Or. 115, 988 P.2d 359 (1999) (holding witnesses to execution have statutory right to view preinjection procedures; holding non-disclosure restrictions cannot be applied to viewers statutorily invited by superintendent).

Halquist v. Department of Corrections, 113 Wash. 2d 818, 783 P.2d 1065 (1989) (en banc) (denying journalist and independent television and radio producer right to videotape execution in Washington state).

See generally:

Jeff Angeja, Note, *Televising California's Death Penalty: Is there a Constitutional Right to Broadcast Executions,* 43 Hastings L.J. 1489 (1992) (arguing broadcast media has constitutional right to televise executions).

John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 Fed. Com. L.J. 355 (1993) (considering relationship between private execution laws and press and general public, concluding that private execution statutes are unconstitutional under existing authority).

Pamela A. MacLean, *Judge Gives Press Right to See Execution*, Los Angeles Daily J., Nov. 4, 1996, at A1 (reporting ruling in California First Amendment Coalition v. Calderon, No. 96-1291 by Northern District of California Judge Walker that First Amendment requires reporters must be allowed to observe execution by lethal injection from time needles inserted).

Neil E. Nussbaum, *"Film at Eleven . . ."–Does the Press Have the Right to Attend and Videotape Executions?*, 20 N.C. Cent. L.J. 121 (1992) (analyzing KQED decision, suggesting why First Amendment might require removal of restriction on videotaping).

Jeff I. Richards & R. Bruce Easter, *Retrospective Forum: The Robert Alton Harris Execution: Televising Executions: The High Tech Alternative to Public Hangings,* 40 UCLA L. Rev. 381 (1992) (examining current prohibition on televising executions and weighing arguments).

Gil Santamarina, *The Case For Televised Executions*, 11 Cardozo Arts & Ent. L.J. 101 (1992) (reviewing televised execution cases and arguing First Amendment right to broadcast).

Jerome T. Tao, Note, *First Amendment Analysis of State Regulations Prohibiting The Filming of Prisoner Executions*, 60 Geo. Wash. L. Rev. 1042 (1992) (reviewing constitutional issues re: televised executions, arguing prohibitions against filming executions should be analyzed as content-based restrictions on First Amendment freedoms and thus unconstitutional).

1.16 Standard of Review

The standard of review used to determine the merits of a federal constitutional claim depends on whether the claim is being reviewed by an appellate or habeas court.

1.16.1 Direct vs. Collateral Review of Trial Error

In *Chapman v. California*, 386 U.S. 18 (1967), the Supreme Court held that the standard for determining whether a verdict must be set aside because of a federal constitutional error is whether the error "was harmless beyond a reasonable doubt." In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Supreme Court limited the *Chapman* harmless error standard to direct review of constitutional error and announced a different harmless error standard for collateral habeas corpus review. *Brecht* adopted the standard set forth in *Kotteakos v. United States*, 328 U.S. 750 (1946), which is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 776. The *Brecht* Court reasoned that the *Kotteakos* harmless error standard is better tailored to the nature and purpose of collateral review because application of a less onerous harmless error standard on collateral review promotes the considerations underlying habeas jurisprudence. The Court did not decide whether this less onerous harmless error standard also applies where the federal court is the first to determine that a constitutional error has occurred, although some circuits have since

addressed that question.

In *O'Neal v. McAninch*, 513 U.S. 432 (1995), the Court further refined the *Brecht* harmless error standard holding that this standard does not place the burden of proof upon the petitioner to show that a trial error substantially affected the verdict. Rather, where the issue is evenly balanced and the judge has doubts about whether the error had "substantial and injurious effect" on the jury's verdict, then the judge must treat the error as if it were not harmless and must rule for the petitioner.

In *California v. Roy*, 519 U.S. 2 (1996), the Supreme Court ruled that the Ninth Circuit's application of a modified *O'Neal* harmless error standard ("the omission is harmless only if review of the facts found by the jury establishes that the jury necessarily found the omitted element") was too strict and remanded the case for further consideration in light of *Brecht* and *O'Neal*.

Supreme Court:

Calderon v. Coleman, 525 U.S. 141 (1998) (per curiam) (holding Ninth Circuit erred by failing to apply *Brecht* standard of review on habeas writ regarding sentencing instruction, applying *Boyle* standard of review instead, which finds constitutional error if there is a "reasonable likelihood" jury interpreted instruction to prevent consideration of constitutionally relevant evidence).

California v. Roy, 519 U.S. 2 (1996) (vacating and remanding Ninth Circuit en banc decision reversing murder convictions because of jury instruction error, ruling that Ninth Circuit incorrectly used stricter harmless error standard than that established in *Brecht* and *O'Neal*; remanded for consideration in light of those cases).

O'Neal v. McAninch, 513 U.S. 432 (1995) (rejecting Sixth Circuit interpretation of *Brecht* as shifting burden of proof of trial error to petitioner; holding where a federal habeas court finds a constitutional trial error and is in "grave doubt" about whether it had a substantial and injurious effect on verdict, error is not harmless).

Brecht v. Abrahamson, 507 U.S. 619 (1993) (holding standard for determining whether habeas relief is warranted for state error in federal constitution is whether the error had a substantial and injurious effect or influence on the jury's verdict).

Chapman v. California, 386 U.S. 18 (1967) (establishing harmless beyond a reasonable doubt standard for review of constitutional errors).

Kotteakos v. United States, 328 U.S. 750, 776 (1946) (setting forth harmless error standard of whether error had "substantial or injurious effect or influence on jury's verdict").

Ninth Circuit:

United States v. Montalvo, 331 F.3d 1052 (9th Cir. 2003) (holding in noncapital habeas case that *Brecht* harmless error standard applies to habeas cases under 28 U.S.C. § 2255 as well as to cases under § 2254).

Mancuso v. Olivarez, 292 F.3d 939 (9th Cir. 2002) (holding that reviewing court must determine independently whether trial error had substantial and injurious effect, without consideration of burdens of proof).

Lambright v. Stewart, 191 F.3d 1181 (9th Cir. 1999) (en banc) (holding court did not need to reach whether constitutional error would have been structural or would have been subjected to harmless error review where court held that there is no per se constitutional error in the use of dual juries either in general or in this specific case), *cert. denied*, 534 U.S. 1188 (2002).

Tapia v. Roe, 189 F.3d 1052 (9th Cir. 1999) (holding court did not need to reach whether proper standard of review was the substantial and injurious effect or influence on the jury's verdict standard under *Brecht* or the harmless beyond a reasonable doubt standard under *Chapman* where claim had not been reviewed on direct appeal and was presented for the first time on habeas corpus because the claim failed under both standards).

Mach v. Stewart, 137 F.3d 630 (9th Cir. 1998) (deciding that potential jurors' statements which may have prejudiced entire panel constituted structural error, but not expressly holding so since the error was clearly not harmless even under *Brecht*).

Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997) (applying abuse of discretion standard on habeas where petitioner challenged impartiality of judge who presided over retrial where parties did not argue applicability of § 2254(d) (now § 2254(e)(1)), recognizing standard less vigorous than *Brecht* standard), *cert. denied*, 523 U.S. 1082 (1998).

Other Circuits:

Cox v. Norris, 133 F.3d 565 (8th Cir. 1997) (affirming view articulated in *Harrington v. State of Iowa*), *cert. denied*, 525 U.S. 834 (1998).

Hogue v. Johnson, 131 F.3d 466 (5th Cir. 1997) (holding that the *Brecht* standard applies on federal habeas review regardless of whether the states used the *Chapman* standard), *cert. denied*, 523 U.S. 1014 (1998).

Curtis v. Duval, 124 F.3d 1 (1st Cir. 1997) (applying *Brecht* standard even though state courts failed to use *Chapman* analysis).

Arnold v. Evatt, 113 F.3d 1352 (4th Cir. 1997) (subjecting jury viewing of crime scene without defense counsel's presence to harmless error analysis under *Brecht* even though state courts did not review for harmless error under *Chapman*), *cert. denied sub nom. Arnold v. Moore*, 522 U.S. 1058 (1998).

Harrington v. State of Iowa, 109 F.3d 1275 (8th Cir. 1998) (applying *Chapman* standard of harmless error analysis where it was unclear if state courts conducted harmless error review).

Sherman v. Smith, 89 F.3d 1134 (4th Cir. 1996) (en banc) (holding *Brecht* standard for harmless error review applies in habeas corpus and other collateral proceedings even when state court on direct review failed to find error harmless beyond reasonable doubt under stricter *Chapman* standard).

Singletary v. Smith, 61 F.3d 815 (11th Cir. 1995) (applying *O'Neal*, finding *Hitchcock* error had substantial effect on verdict where court had "grave doubts" regarding impact of error), *cert. denied*, 516 U.S. 1140 (1996).

Smith v. Dixon, 14 F.3d 956 (4th Cir.) (en banc) (applying *Brecht* standard in habeas corpus proceeding where state court had conducted no harmless error analysis at all because it found no error), *cert. denied*, 513 U.S. 841 (1994).

See generally:

Jennie Anest, Note, *Brecht v. Abrahamson and Harmless Error: The Court Continues to Narrow Federal Habeas Corpus*, 38 How. L.J. 201 (1994) (analyzing *Brecht* and *Chapman* standards and possibility of exception to *Brecht* standard).

James A. Carey, Jr., Note, *Habeas Corpus–Harmless Error Rule–Proper Harmless Error Standard on Habeas Review of Fifth Amendment Violations is Whether the Error Had "Substantial or Injurious Effect" on the Jury's Determination of Petitioner's Guilt*, 24 Seton Hall L. Rev. 1636 (1994) (analyzing *Brecht v. Abrahamson* in light of historical and modern harmless error jurisprudence).

Matthew T. Martens, *Survey of Developments in North Carolina and the Fourth Circuit, 1994, Criminal Law: Smith v. Dixon: Was it Really Harmless?*, 73 N.C. L. Rev. 2351 (1995) (analyzing *Smith v. Dixon*).

1.16.2 Trial Error vs. Structural Error

In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Supreme Court distinguished "trial errors" from "structural" errors in the context of constitutional rights violations stating that the former are subject to harmless error analysis but the latter requires automatic reversal. A "trial error" occurs during a case's presentation to the trier of fact and "may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission is harmless beyond a reasonable doubt." A structural defect, on the other hand, "affects the framework within which the trial proceeds" and therefore defies harmless error analysis. Thus, the *Brecht* distinction between harmless error standards applicable on direct or collateral review applies only to "trial errors" and is irrelevant to structural defects.

Supreme Court:

Mitchell v. Esparza, 540 U.S. 12 (2003) (per curiam) (holding that precedent did not support Sixth Circuit Court of Appeal's conclusion that the failure of the state to charge in an indictment for aggravated murder in the course of committing aggravated robbery that defendant was a "principal" was the functional equivalent of "dispensing with the reasonable doubt requirement," as prohibited by *Sullivan v. Louisiana*).

Sullivan v. Louisiana, 508 U.S. 275 (1993) (holding constitutionally deficient reasonable doubt instruction is structural defect requiring automatic reversal, not harmless error analysis).

Arizona v. Fulminante, 499 U.S. 279 (1991) (distinguishing trial error–error in the trial process itself–which is subject to harmless error analysis, from structural defect–affecting the framework within which the trial proceeds–which requires automatic reversal; holding involuntary confession is only trial error).

Rose v. Clark, 478 U.S. 570 (1986) (describing structural defect as an error such that the "criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally

fair").

Vasquez v. Hillery, 474 U.S. 254 (1986) (involving structural defect of unlawful exclusion of members of defendant's race from grand jury).

Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984) (involving structural defect regarding right to public trial).

McKaskle v. Wiggins, 465 U.S. 168, 177–78, n.8 (1984) (involving structural defect regarding right to self-representation at trial).

Gideon v. Wainright, 372 U.S. 335 (1963) (involving structural defect of total deprivation of the right to counsel at trial).

Tumey v. Ohio, 273 U.S. 510 (1927) (involving structural defect of biased, non-impartial judge).

Ninth Circuit:

Rich v. Calderon, 187 F.3d 1064 (9th Cir. 1999) (declining to extend *Vasquez v. Hillery* holding to apply to any source of pretrial bias), *cert. denied sub nom. Rich v. Woodford*, 528 U.S. 1092 (2000).

Mach v. Stewart, 137 F.3d 630 (9th Cir. 1998) (deciding that potential jurors statements which may have prejudiced entire panel constituted structural error, but not expressly holding so since the error was clearly not harmless even under *Brecht*).

Simmons v. Blodgett, 110 F.3d 39 (9th Cir.) (applying *O'Neal*, finding no showing that constitutional error occurred and thus no relief where factual issue of existence of constitutional trial error stands in "virtual equipoise"), *cert. denied*, 522 U.S. 892 (1997).

Rice v. Wood, 77 F.3d 1138 (9th Cir.) (holding trial court's acceptance of jury's death verdict in defendant's absence constitutes "structural defect" in proceedings, requiring automatic reversal), *cert. denied*, 519 U.S. 873 (1996).

Suniga v. Bunnell, 998 F.2d 664 (9th Cir. 1993) (holding jury instruction error was structural defect, not subject to harmless error analysis).

Hays v. Arave, 977 F.2d 475 (9th Cir. 1992) (stating "unconstitutional in abstentia sentencing is a structural error" that cannot be affirmed on the basis of harmless error).

Bland v. California Dep't of Corrections, 20 F.3d 1469, 1478 (9th Cir.) (applying *Brecht* harmless error standard in reviewing claim of Sixth Amendment deprivation of counsel), *cert. denied*, 513 U.S. 947 (1994).

District Courts in Ninth Circuit:

Chivars v. Borg, No. C-91-4350-CAL, 1994 WL 28016 (N.D. Cal. Jan. 20, 1994) (holding *Strickland* standard, not *Brecht*, is appropriate standard for evaluating ineffective assistance of counsel claims on habeas), *aff'd*, 34 F.3d 1071 (9th Cir. 1994), *and cert. denied*, 513 U.S. 1166 (1995).

Other Circuits:

Tankleff v. Senkowski, 135 F.3d 235 (2d Cir. 1998) (holding that *Batson/Powers* claim is structural error not subject to harmless error review).

Tuggle v. Netherland, 79 F.3d 1386 (4th Cir.) (applying *Brecht* harmless error standard to *Ake* error), *cert. denied*, 519 U.S. 894 (1996).

Ford v. Norris, 67 F.3d 162 (8th Cir. 1995) (holding constitutional error in racial discrimination in jury selection is structural defect not subject to harmless error analysis).

See generally:

David Bowman, Note, *A Matter of Life and Death: Revising the Harmless Error Standard for Habeas Corpus Proceedings*, 72 Wash. L. Rev. 567 (1997) (analyzing obstacles to petitioner's establishing magnitude of error sufficient for reversal under new harmless error doctrine and difficulties lower courts face in applying new doctrine).

1.16.3 Appellate Review of Federal Habeas Corpus

The circuit court reviews *de novo* the denial of a state prisoner's petition for federal habeas corpus, pursuant to 28 U.S.C. § 2254 (1998). *Eslaminia v. White*, 136 F.3d 1234, 1236 (9th Cir. 1998).

See also § 6.3.1 for discussion of AEDPA's standard of review when reviewing a state court decision reached on the merits.

1.17 *Ex Post Facto* and Related Due Process Considerations

The constitutional prohibition of *ex post facto* laws is particularly relevant in death penalty law where state statutes have been rewritten so often. A law is *ex post facto* when it is retroactively applied and not ameliorative–but rather disadvantageous–to the offender.

In *Dobbert v. Florida*, 432 U.S. 282 (1977), the Supreme Court held that procedural changes in the law are not *ex post facto*. Specifically, *Dobbert* held that a change in Florida's statute–altering the methods used in determining whether the death penalty is to be imposed but not changing the amount of punishment for the crime–was both procedural and ameliorative and therefore not *ex post facto*. In contrast, the Fourth Circuit found *ex post facto* the retroactive application of a statute allowing certain juvenile defendants to be tried as adults because it increased the potential punishment to include the death penalty. *United States v. Juvenile Male*, 819 F.2d 468 (4th Cir. 1987).

Although the *ex post facto* prohibition literally applies only to substantive legislation, the Supreme Court has incorporated its principles into the due process clauses of the Fifth and Fourteenth Amendments so that application of procedural changes also may be unconstitutional. Thus, in *Coleman v. McCormick*, 874 F.2d 1280, 1286–89 (9th Cir. 1989), the Ninth Circuit held that it was unconstitutional to resentence a defendant under a state's new bifurcated sentencing scheme after the court tried and sentenced the defendant pursuant to a mandatory death penalty statute that was later held unconstitutional. Although the statutory change was procedural, resentencing would violate due process because the defendant was given no notice that the evidence used in the original guilt phase would be used at resentencing.

Supreme Court:

Dobbert v. Florida, 432 U.S. 282 (1977) (upholding death sentence of inmate who committed crime just before state death penalty statute held unconstitutional but was convicted and sentenced under newly enacted constitutional statute; finding no *ex post facto* because changes in statute were procedural as well as ameliorative; existence of death penalty statute at time of offense served as "operative fact" that death sentence might be penalty imposed and thus gave sufficient notice to avoid offending *ex post*

facto clause).

Ninth Circuit:

Murtishaw v. Woodford, 255 F.3d 926 (9th Cir. 2001) (holding that there was ex post facto violation requiring reversal of death sentence where jury was instructed on 1978 California death penalty statute, rather than the 1977 statute, in effect at time of crime; 1978 statute was more onerous than 1977 statute, which permitted jury discretion to reject death penalty even if it found that aggravating factors outweighed mitigating factors; under 1978 statute, jury did not have this discretion), *cert. denied,* 535 U.S. 935 (2002).

Vickers v. Stewart, 144 F.3d 613 (9th Cir. 1998) (holding that giving a prisoner the option to choose lethal gas as a method of execution where he had been sentenced before the adoption of lethal injection did not make the death penalty more burdensome and therefore was not an *ex post facto* violation), *cert. denied*, 525 U.S. 1073 (1999).

Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir.) (holding, where defendant's death sentence reversed by state supreme court decision which state supreme court later overruled, retroactive application of overruling opinion on remand not *ex post facto* because law applied same as law at time of offense), *cert. denied*, 512 U.S. 1229 (1994).

Toomey v. Bunnell, 898 F.2d 741 (9th Cir.) (holding change in state criminal procedure, pursuant to state constitutional amendment not ex post facto violation), *cert. denied*, 498 U.S. 960 (1990).

Coleman v. McCormick, 874 F.2d 1280, 1286–89 (9th Cir.) (holding, although procedural change, resentencing defendant under new bifurcated sentencing scheme, where defendant originally tried under Montana's mandatory death penalty statute later held unconstitutional, violates due process because no notice that guilt phase evidence would be used at resentencing), *cert. denied*, 493 U.S. 944 (1989).

Knapp v. Cardwell, 667 F.2d 1253, 1262-63 (9th Cir.) (following *Dobbert*, holding that since change in Arizona statute was procedural and ameliorative, no *ex post facto* violation), *cert. denied*, 459 U.S. 1055 (1982).

Other Circuits:

United States v. Juvenile Male, 819 F.2d 468 (4th Cir. 1987) (holding retroactive application of statute allowing certain juvenile defendants to be tried as adults,

increased potential punishment–including death penalty–*ex post facto* violation).

See generally:

Robert Woll, Note, *The Death Penalty and Federalism: Eighth Amendment Constraints on the Allocation of State Decisionmaking Power*, 35 Stan. L. Rev. 787, 823-26 (1983) (reviewing effects of *Dobbert* on resentencing defendants to death under newly enacted death penalty statutes, after defendant already tried under unconstitutional statute).

1.18 Retroactivity of New Law

1.18.1 Retroactivity of New Constitutional Rules of Criminal Procedure

Addressing perceived inconsistencies in its prior rulings, the Supreme Court ruled, in *Teague v. Lane*, 489 U.S. 288 (1989), that "new" constitutional rules of criminal procedure will not be applied retroactively to cases on collateral review unless they fall within two narrow exceptions. Cases pending on direct review, or otherwise not yet final, however, are not so restricted. A "new rule" is one that "breaks new ground or imposes a new obligation on the States or the Federal Government" or one whose "result was not dictated by precedent existing at the time the defendant's conviction became final." Although *Teague* itself was not a capital case, the Court has held that its holding applies to capital as well as noncapital cases.

In *Butler v. McKellar*, 494 U.S. 407 (1990), the Court explained that "the 'new rule' principle validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." To facilitate this purpose, the Court, expanded the new rule definition to include any rule whose result state courts would not have felt "compelled" by existing precedent to reach. *Saffle v. Parks*, 494 U. S. 484 (1990). However, the Court has noted that even where precedent "informs," "controls," "governs," or is "within the logical compass" of precedent, the result is not necessarily "compelled" by precedent and is therefore a new rule. *Id.* In *Coe v. Thurman*, 922 F.2d 528 (9th Cir. 1990), the Ninth Circuit explained that *Teague's* limitation applies only to new rules imposing an obligation on the state. Thus, a threshold issue such as the court's ability to consider an unexhausted claim is not subject to analysis under *Teague*.

The two exceptions to the *Teague* rule are: (1) rules placing certain kinds of primary, private individual conduct beyond the power of the criminal law to proscribe, and (2) procedures implicit in the concept of ordered liberty without which the likelihood of an accurate conviction is seriously diminished. Such rules *would* apply retroactively. Although no Supreme Court case to date has satisfied either criteria, the Court *has* had occasion to comment on the nature of the exceptions. In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court noted that the first exception should also apply to rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense." In that case, the Court indicated that if it had announced a new rule that mentally retarded defendants could not be sentenced to death (whereas it found in fact to the contrary), then such a rule would satisfy the first exception. Subsequently, the Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that executions of mentally retarded individuals convicted of capital crimes are cruel and unusual punishment prohibited by the Eighth Amendment. See § 1.6. In *Sawyer v. Smith*, 497 U.S. 227 (1990), the Court explained that in order for a new rule to satisfy the second exception it not only must improve the accuracy of a trial but also "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding."

In *Collins v. Youngblood*, 497 U.S. 37 (1990), the Court held that the *Teague* rule is not jurisdictional. Therefore, the Court need not raise the retroactivity issue *sua sponte*. In *Lockhart v. Fretwell*, 506 U.S. 364 (1993), the Supreme Court held that while the state may use *Teague* to deny a habeas petitioner the benefit of retroactive application of new rules, a habeas petitioner on the other hand *may not* invoke *Teague* to challenge the state's retroactive application of new rules. The habeas petitioner is barred from such use of *Teague*, the Court reasoned, because *Teague's* purpose is to protect the state's interest in the finality of criminal convictions and its reliance on the constitutional standards prevailing at the time of the original proceedings. These are interests which the habeas petitioner does not have. Thus, only the state may object to the retroactive application of a new constitutional rule of criminal procedure to an old case.

The Supreme Court held in, *Horn v. Banks,* 536 U.S. 266 (2002) (per curiam), that, in addition to performing any analysis required by the AEDPA, a

threshold *Teague* analysis is required in federal habeas corpus proceedings whenever the state advances a *Teague* argument, even if the state supreme court did not consider the issue of retroactivity of the rule.

Supreme Court:

Horn v. Banks, 536 U.S. 266 (2002) (per curiam) (holding that federal court considering habeas petition, in addition to performing any analysis required by AEDPA, must conduct threshold *Teague* analysis whenever state advances *Teague* argument, even though here state supreme court had evaluated claim that penalty phase jury instructions and verdict forms were improper under *Mills v. Maryland*, 486 U.S. 367 (1988), without considering retroactivity of *Mills).*

Tyler v. Cain, 533 U.S. 656, 666-67*, reh'g denied*, 533 U.S. 970 (2001) (noting that standard for determining whether error is structural is not coextensive with second *Teague* exception and that a holding that error is structural does not logically dictate conclusion that second *Teague* exception has been met).

Stewart v. LaGrand (Walter), 526 U.S. 115 (1999) (indicating that proposed rule prohibiting capital defendant from waiving Eighth Amendment protections would violate *Teague*).

O'Dell v. Netherland, 521 U.S. 151 (1997) (holding *Simmons v. South Carolina* rule that capital defendant must be permitted to inform sentencing jury of parole-ineligibility if prosecution argues defendant presents future danger is "new rule" under *Teague*).

Lambrix v. Singletary, 520 U.S. 518 (1997) (holding rule in *Espinosa v. Florida*, 505 U.S. 1079 (1992)–if a weighing state requires the sentencing trial judge to give deference to a jury's advisory recommendation, neither the judge nor the jury is constitutionally permitted to weigh invalid aggravating circumstances–is *Teague*-barred; also holding that federal habeas court should ordinarily rule on procedural bar before undertaking *Teague* inquiry).

Graham v. Collins, 506 U.S. 461 (1993) (applying *Teague* in light of *Butler*, *Saffle*, and *Penry* to bar claim that Texas sentencing scheme unconstitutionally prevented consideration of mitigation, because reasonable jurists at time would not have felt compelled to find scheme unconstitutional, and thus claim sought is new rule, not within exceptions, and thus not retroactive).

Lockhart v. Fretwell, 506 U.S. 364 (1993) (holding habeas petitioner may not invoke

Teague to challenge state's retroactive application of new rule because petitioner challenging decision on collateral review has no interest in finality of state court convictions).

Stringer v. Black, 503 U.S. 222 (1992) (holding petitioner may rely on cases announced after death sentence became final since they did not announce new rules under *Teague*).

Sawyer v. Smith, 497 U.S. 227 (1990) (holding *Caldwell* announced new rule under *Teague* and was therefore unavailable to petitioner, reasoning even if precedent informed, controlled, or governed result in *Caldwell*, the result was not necessarily compelled; second *Teague* exception inapplicable because to qualify for exception, new rule must not only improve accuracy of trial but also "alter our understanding of the *bedrock procedural elements*" essential to the fairness of a proceeding).

Collins v. Youngblood, 497 U.S. 37 (1990) (holding, although grounded in federalism considerations, *Teague* rule is not jurisdictional, and thus court need not raise it *sua sponte*).

Saffle v. Parks, 494 U.S. 484 (1990) (interpreting *Teague* to mean rule is new if state court hearing petitioner's claim at time conviction became final would not have felt "compelled" by existing precedent to adopt it).

Butler v. McKellar, 494 U.S. 407 (1990) (holding *Arizona v. Roberson* (regarding police-initiated interrogation) announced a new rule under *Teague* and was therefore unavailable to petitioner; that *Roberson* was controlled by or within logical compass of precedent is not conclusive for purpose of new rule determination–if reasonable disagreement exists between courts, then result not dictated by precedent).

Penry v. Lynaugh, 492 U.S. 302 (1989) (applying *Teague* principles in capital sentencing context and holding that first *Teague* exception also applies to rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense").

Teague v. Lane, 489 U.S. 288 (1989) (holding a new constitutional rule of criminal procedure may not be retroactively applied to cases on collateral review, including case announcing new rule, unless it concerns procedures implicit in the concept of ordered liberty or places certain kinds of private individual conduct beyond the power of the criminal law to proscribe; new rule is one whose result "was not *dictated* by precedent existing when defendant's conviction became final").

Ninth Circuit:

Gretzler v. Stewart, 112 F.3d 992 (9th Cir.1997) (holding rule in *Ake v. Oklahoma*, 470 U.S. 68 (1985)– that state must provide competent psychiatrist to assist in trial defense when a defendant demonstrates that sanity at time of offense will be significant factor at trial–new rule not falling within *Teague* exceptions; holding rule announced in *Edwards v. Arizona*, 451 U.S. 477 (1981), did not apply to petitioner's collateral constitutional claim because Gretzler's conviction was final prior to the *Edwards* decision, notwithstanding that state supreme court remanded Gretzler for resentencing and the Supreme Court denied certiorari after it decided *Edwards*), *cert. denied*, 522 U.S. 1081 (1998).

Snook v. Wood, 89 F.3d 605 (9th Cir. 1996) (holding rule that court must conduct in-court colloquy with defendant regarding dangers of self-representation is not "new rule" under *Teague*).

Beam v. Paskett, 966 F.2d 1563 (9th Cir. 1992) (holding rule that Eighth Amendment bars consideration of nonviolent sexual history as aggravating factor may be retroactively applied under *Teague* because it prohibits a certain kind of punishment for a class of defendants based on their status or offense and therefore falls under the second exception), *cert. denied*, 511 U.S. 1060 (1994).

Harris v. Vasquez, 949 F.2d 1497 (9th Cir. 1990) (holding petitioner's proposed rule, entitling petitioner to collateral review on defense selected trial psychiatrist's competence, not dictated by precedent existing when his conviction became final and does not fall within *Teague* exceptions), *cert. denied*, 503 U.S. 910 (1992).

Greenawalt v. Ricketts, 943 F.2d 1020 (9th Cir. 1991) (holding petitioner seeking benefit of rule, whose result was not dictated by precedent but rather was extension of precedent about which reasonable courts might differ, was new rule under *Teague*), *cert. denied*, 506 U.S. 888 (1992).

Coe v. Thurman, 922 F.2d 528 (9th Cir. 1990) (holding rule allowing petitioner to seek federal habeas relief, based on state's untimely hearing of appeal, during pendency of state court appeal is not "new rule" under *Teague* because rule imposes no obligation on the state).

Jackson v. Ylst, 921 F.2d 882 (9th Cir. 1990) (holding precedent does not dictate right to appointment of expert on eyewitness identification and to substitution of counsel and it therefore is a new rule under *Teague*).

District Courts in Ninth Circuit

Odle v. Vasquez, 754 F. Supp. 749 (N.D. Cal. 1990) (holding where state does not challenge petitioner's claims as new rules, court will not consider question *sua sponte*, citing *Collins*).

Other Circuits:

Humphrey v. Cain, 138 F.3d 552 (5th Cir.) (en banc) (holding that *Cage* rule–a constitutionally deficient reasonable doubt instruction violates the Due Process Clause–fits into the second *Teague* exception and therefore can be applied retroactively to cases on collateral review), *cert. denied*, 525 U.S. 935, *and cert. denied*, 525 U.S. 943 (1998).

Adams v. Aiken, 41 F.3d 175 (4th Cir. 1994) (holding rule that constitutionally deficient reasonable doubt instruction violates due process should apply retroactively under *Teague* second exception), *cert. denied*, 515 U.S. 1124 (1995).

Nutter v. White, 39 F.3d 1154 (11th Cir. 1994) (holding *Cage* rule–a constitutionally deficient reasonable doubt instruction violates the Due Process Clause–announces a new rule of law falling within *Teague's* second exception).

Smith v. Black, 904 F.2d 950, 981–87 (5th Cir. 1990) (interpreting Supreme Court's holdings to mean, where *Teague* issue and a procedural default issue are presented, better practice is to review *Teague* issue first), *vacated on other grounds*, 503 U.S. 930 (1992).

Hall v. Kelso, 892 F.2d 1541, 1543 n.1 (11th Cir. 1990) (noting cases governing claims of improper burden-shifting not barred by *Teague* because burden-shifting error is "bedrock" constitutional principle that diminishes the likelihood of accurate conviction and therefore falls under second *Teague* exception).

Collins v. Zant, 892 F.2d 1502, 1510-12 (11th Cir.) (deciding abuse of writ issues before addressing retroactivity of case regarding police interrogation under *Teague*), *cert. denied*, 498 U.S. 881 (1990).

See generally:

Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts after Teague v. Lane*, 69 N.C. L. Rev. 371 (1991) (analyzing impact of *Teague* and its progeny on lower court decisions and observing developing complications for prisoners

seeking habeas review).

Susan Bandes, *Taking Justice To Its Logical Extreme: A Comment On Teague v. Lane*, 66 S. Cal. L. Rev. 2453 (1993) (critiquing *Teague* and examining how *Teague* and its progeny have changed nature of federal habeas jurisdiction).

Lori Bienstock, Note, *Federal Habeas Corpus: The New Standard of Retroactivity*, 57 Brooklyn L. Rev 865 (1991) (analyzing impact of *Teague* on availability of habeas relief for capital offenders and urging legislative action to aid capital prisoners seeking relief when new constitutional rule renders their convictions or sentences illegal).

John Blume & William Pratt, *The Changing Face of Retroactivity*, 58 UMKC L. Rev. 581 (1990) (addressing several retroactivity questions left unanswered by *Teague*).

Ellen E. Boshkoff, *Resolving Retroactivity after Teague v. Lane*, 65 Ind. L.J. 651 (1990) (arguing against *Teague*'s use of categorical approach to resolve retroactivity question in habeas cases because it fails to accommodate concerns of inaccuracy in individual cases).

Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part Two)*, 30 U. Rich. L. Rev. 303 (1996) (discussing issues related to pre-Anti-Terrorism and Effective Death Penalty Act of 1996 retroactivity in habeas corpus proceedings and procedural default).

Patrick E. Higginbotham, *Notes On Teague*, 66 S. Cal. L. Rev. 2433 (1993) (analyzing *Teague*'s impact on availability of habeas relief).

David F. Latherow, *Graham v. Collins: A Return to Arbitrary Sentencing*, 20 Ohio N.U. L. Rev. 1075 (1994) (critiquing *Graham v. Collins*).

Gilbert S. Merritt, *Access to the Federal Courts in Habeas Corpus Cases*, 58 Tenn. L. Rev. 145 (1990) (criticizing *Teague* decision to treat new rule analysis as threshold question).

Linda Meyer, "*Nothing We Say Matters": Teague and New Rules*, 61 U. Chi. L. Rev. 423 (1994) (critiquing *Teague,* arguing "new rule" doctrine poses dangers to legitimacy of traditional adjudicative process).

1.18.1.1 Application to Federal Cases

Several circuits have held that the finality concerns behind the *Teague* retroactivity

doctrine apply equally strongly in federal prisoners' collateral challenges as it does in state collateral challenges. Thus, these circuits have concluded that *Teague* applies to federal prisoners.

The Ninth Circuit is unsettled on the issue. In *Walter v. United States*, 969 F.2d 814 (9th Cir. 1992), it reiterated that there has been no specific ruling on the applicability of *Teague* to federal prisoners, although in *United States v. Judge*, 944 F.2d 523, 525 (9th Cir. 1991), it applied *Teague* to one such case with no comment. One district court in the Ninth Circuit, however, in *Ferguson v. United States*, 911 F. Supp. 424 (C.D. Cal. 1995), has specifically held that *Teague* applies to federal prisoners "because of the opposite side of comity."

Supreme Court:

Bousley v. United States, 523 U.S. 614 (1998) (holding *Teague's* limitation on collateral review applies only to procedural rules and is inapplicable to Court's decision as to meaning of a federal criminal statute).

Ninth Circuit:

United States v. Kinslow, 5 F.3d 542 (9th Cir. 1993) (unpublished) (stating "we have not yet determined whether the holding in *Teague v. Lane* applies in § 2255 cases" and declining to make determination), *cert. denied*, 510 U.S. 1205 (1994).

Walter v. United States, 969 F.2d 814, 817 (9th Cir. 1992) (declining to decide whether *Teague* is applicable to § 2255 cases).

United States v. Judge, 944 F.2d 523, 525 (9th Cir. 1991) (applying *Teague* with no comment), *cert. denied*, 504 U.S. 927 (1992).

District Courts in Ninth Circuit:

Ferguson v. United States, 911 F. Supp. 424 (C.D. Cal. 1995) (holding *Teague* nonretroactive rule applies to federal prisoners as well as state).

Other Circuits:

United States v. Rich, 141 F.3d 550 (5th Cir. 1998) (concluding, in the course of

denying petitioner leave to file a second § 2255 motion for failure to satisfy the AEDPA's successor requirements, that *Kyle v. Whitley*, 514 U.S. 419 (1995), did not announce a new rule of constitutional law), *cert. denied*, 526 U.S. 1011 (1999).

United States v. Martinez, 139 F.3d 412 (4th Cir. 1998) (holding that *Teague* applies to federal prisoners' actions for collateral relief under 28 U.S.C. § 2255), *cert. denied*, 525 U.S. 1073 (1999).

United States v. McLamb, 77 F.3d 472 (4th Cir. 1996) (unpublished) (stating that *Teague* does not apply to retroactive application on collateral review of decision regarding reach of federal statute or sentencing guidelines).

United States v. McKie, 73 F.3d 1149 (D.C. Cir. 1996) (applying *Teague* threshold analysis in federal drug case).

United States v. Dashney, 52 F.3d 298 (10th Cir. 1995) (assuming *Teague* applies to federal prisoners, but declining to apply it in instant case because statutory construction involved).

Van Daalwyk v. United States, 21 F.3d 179, 180 (7th Cir. 1994) (concluding *Teague* applies to federal prisoners).

Gilberti v. United States, 917 F.2d 92, 94 (2d Cir. 1990) (holding *Teague* principle of retroactivity applies to collateral review of federal as well as state convictions).

1.18.1.2 AEDPA's § 2254(e)'s Restriction on *Teague* Analysis

When a federal habeas petitioner has failed to develop the factual basis of a claim in state court, 28 U.S.C. § 2254(e)(2) allows a federal court to hold an evidentiary hearing to develop factual findings in two limited circumstances. The first is essentially newly-discovered evidence and the second is a *Teague*-type analysis: Petitioner must establish that the claim relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. Contrary to § 2254(e), *Teague* did not limit application of the retroactivity test to the Supreme Court.

Supreme Court:

Horn v. Banks, 536 U.S. 266 (2002) (per curiam) (holding that federal court

considering habeas petition, in addition to performing any analysis required by AEDPA, must conduct threshold *Teague* analysis whenever state advances *Teague* argument*)*.

Federal Statutes:

28 U.S.C. § 2254(e)(2) (2000)

1.18.2 Retroactivity of New Statutes

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court set forth a standard for determining the retroactivity of a new statute where there is an absence of clear congressional intent. In such a circumstance, the court determines whether application of the particular statutory provision would have a "retroactive effect." If so, the statute should not be applied retrospectively to a case pending at the time of enactment.

The Ninth Circuit has used the term "retrospective" to describe the application of a statute to events preceding its enactment. "Retroactive," as in the phrase "retroactive effect," is used to describe the prohibited effect described in *Landgraf*, preventing application of the statute. Thus, "a retrospective statute is retroactive– i.e. has retroactive effect–if it attaches new legal consequences to prior acts so as to justify the presumption against retrospective application." *United States v. $814,254.76 in United States Currency*, 51 F.3d 207, 210 n.3 (9th Cir. 1995). Court opinions, however, are not consistent in their usage of these terms.

A statute has "retroactive effect" when its application would attach "new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. If a new statute "impair[s] the rights a party possessed when he acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed," it will not be applied retroactively. *Id*. at 280. Provisions that are substantive in nature generally have prohibited retroactive effect; however, procedural provisions, as a general rule, are applied retroactively, unless their application would result in manifest injustice.

Application of *Landgraf* has been especially important in implementing the

habeas corpus changes in the AEDPA; however, it is not clear whether *Landgraf's* retroactivity analysis should be applied to cases filed after the effective date of the AEDPA.

Chapter 154 of Title 28 of the United States Code (28 U.S.C. §§ 2261-2266) specifically provides that its provisions apply to cases pending on or after the date of enactment of the AEDPA , but Chapter 153 (28 U.S.C. §§ 2241–2255) is silent as to its effective date. In *Lindh v. Murphy*, 521 U.S. 320 (1997), the Supreme Court held that the negative implication of Chapter 154 retrospective application provision means that new provisions of Chapter 153 apply only to cases filed after the AEDPA became effective.

Supreme Court:

Lindh v. Murphy, 521 U.S. 320 (1997) (holding negative implication of Chapter 154 retrospective application provisions means that new provisions of Chapter 153 apply only to cases filed after the AEDPA became effective).

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) (setting forth standard for retroactivity of new statutes; companion case to *Landgraf*).

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (setting forth standard for retroactivity of new statutes).

1.19 Frivolous and Non-Frivolous Appeals

Supreme Court:

Smith v. Robbins, 528 U.S. 259 (2000) (holding that California's procedure–allowing appellate counsel, when they find only frivolous appellate issues, to submit letter briefs stating that counsel found no issues but asking the court to independently search the record–does not violate the Fourteenth Amendment).

Anders v. California, 386 U.S. 738 (1967) (holding that counsel appointed for direct review must either file appeal or submit brief in some detail showing that no non-frivolous appellate issues exist).

CHAPTER 2

PRETRIAL AND PRELIMINARY STAGE ISSUES

2. PRETRIAL AND PRELIMINARY STAGE ISSUES

2.1 Prosecutor's Decision to Seek Death Sentence

Generally, prosecutors have wide discretion deciding when to seek the death penalty. In *Campbell v. Kincheloe*, 829 F.2d 1453, 1465 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988), the Ninth Circuit rejected petitioner's argument that Washington's death penalty statute vests unbridled discretion in its prosecutors to decide when to seek the death penalty and held the statute constitutional. The death penalty statute requires a prosecutor to have "reason to believe that there are not sufficient mitigating circumstances to merit leniency" before seeking the death penalty. Additionally, the Ninth Circuit has held that where the circumstances surrounding a prosecutor's decision to seek the death penalty create the appearance of vindictiveness, the burden shifts to the prosecution to present evidence that its decision was based on legitimate grounds. *Adamson v. Ricketts*, 865 F.2d 1011, 1017 (9th Cir. 1988) (en banc), *cert. denied*, 497 U.S. 1031 (1990).

In federal death penalty prosecutions, 18 U.S.C. § 3593(a) requires that the government provide notice to the defendant of its intention to seek the death penalty within "a reasonable time before trial." This notice must include the statutory and nonstatutory factors the government intends to prove as the basis for the penalty. Formerly, 21 U.S.C. § 848(h) contained similar provisions, but this subsection was repealed in 2006.

Ninth Circuit:

Adamson v. Ricketts, 865 F.2d 1011, 1017 (9th Cir. 1988) (en banc) (following Ninth Circuit precedent that where circumstances surrounding prosecutor's decision to seek death penalty create appearance of vindictiveness, court will assume prosecutorial vindictiveness and burden shifts to prosecution to rebut with independent reasons or intervening circumstances demonstrating legitimate purpose for prosecutor's decision), *cert. denied*, 497 U.S. 1031 (1990).

Campbell v. Kincheloe, 829 F.2d 1453, 1465 (9th Cir. 1987) (holding prosecutorial

discretion to seek death sentence sufficiently guided by Washington statute that requires reason to believe there are insufficient mitigating circumstances to merit leniency), *cert. denied*, 488 U.S. 948 (1988).

Federal Statutes:

18 U.S.C. § 3593(a) (2000) (describing notice by the government detailing aggravating circumstances that may justify the death penalty).

21 U.S.C. § 848(h) (2000) [repealed].

See generally:

Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 Fordham Urb. L.J. 767 (1999) (arguing for the imposition of controls over the exercise of prosecutorial discretion in the decision whether to seek the death penalty).

John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 Fordham L. Rev. 2571 (1997) (discussing death penalty law and practical impact of prosecutorial discretion to seek death penalty).

F. Thomas Schornhorst, *Preliminary Screening of Prosecutorial Access to Death Qualified Juries: A Missing Constitutional Link*, 62 Ind. L.J. 295 (1987) (urging screening process requiring prosecutors to show legitimate interest in seeking death penalty before death qualification of jury begins).

2.2 Right to Counsel and Right to Waive Counsel

The Sixth Amendment guarantee of assistance of counsel exists not only at trial but at "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218, 226 (1967).

Custodial interrogation is considered a critical stage, carrying not only the right to counsel, but also, as evidenced by *Miranda v. Arizona*, 384 U.S. 436 (1966), the right to be warned prior to questioning of the right to have counsel present during questioning. The Supreme Court reinforced this assertion in *Edwards v. Arizona*, 451

U.S. 477 (1981), holding that once an accused requests counsel, the police may not reinitiate questioning until counsel has been provided. In *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Supreme Court held that *Edwards* protection does not cease once the accused has consulted with counsel; rather, once counsel is requested, officials may not reinitiate interrogation without counsel present regardless of whether the accused consults with counsel.

Concomitant to the Sixth Amendment right to counsel, the Supreme Court held that a defendant in a state criminal trial has a constitutional right to proceed *without counsel* when the defendant voluntarily and intelligently elects to do so. *Faretta v. California*, 422 U.S. 806 (1975). The Court indicated that the extent of the defendant's legal knowledge was irrelevant to the determination of the defendant's knowing exercise of this right. For federal cases, 28 U.S.C. § 1654 (2000) guarantees parties the right to plead and conduct their own cases in federal courts. In *Godinez v. Moran*, 509 U.S. 389 (1993), the Supreme Court, reversing the Ninth Circuit, held that the standard for competency to waive the right to counsel is no higher than the standard for competency to stand trial. However, the criteria for waiving counsel in custodial interrogation are more exacting. *See generally Moran v. Burbine*, 475 U.S. 412 (1986); *Patterson v. Illinois*, 487 U.S. 285 (1988); *Duckworth v. Eagan*, 492 U.S. 195 (1989).

The Ninth Circuit has reversed a federal conviction because the trial judge failed to adequately warn a § 2255 petitioner of the dangers of self-representation, even though the judge told the defendant that there were dangers with self-representation. Although the court declined to articulate a minimum *Faretta* warning, it did set forth an example of an adequate warning. *United States v. Hayes*, 231 F.3d 1132 (2000).

While it has been argued that the special procedural demands of capital cases warrant appointing counsel over a defendant's objections, courts have not yet distinguished between capital and noncapital cases with respect to the defendant's right to counsel or right to waive counsel.

Supreme Court:

Kane v. Garcia Espitia, 126 S. Ct. 407 (2005) (per curiam) (holding in a noncapital case that there is no clearly established right under federal law to law library access by a *pro se* defendant).

Godinez v. Moran, 509 U.S. 389 (1993) (holding competency standard for waiving right to counsel is same as standard for standing trial; competency required of defendant is competency to waive right, not competency to represent self).

Minnick v. Mississippi, 498 U.S. 146 (1990) (holding when accused requests counsel, interrogation must cease, and officials may not reinitiate interrogation without counsel present whether or not accused has consulted with attorney).

Edwards v. Arizona, 451 U.S. 477 (1981) (holding once accused requests counsel, police may not reinitiate questioning until counsel has been provided).

Faretta v. California, 422 U.S. 806 (1975) (holding defendant in state criminal trial has right to proceed without counsel if voluntarily and intelligently elects to do so).

United States v. Wade, 388 U.S. 218 (1967) (holding right to assistance of counsel exists not only at trial but at "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate the accused's right to a fair trial").

Miranda v. Arizona, 384 U.S. 436 (1966) (holding that interrogator must warn person prior to questioning that he or she has right, inter alia, to have counsel present during questioning).

Ninth Circuit:

Ghent v. Woodford, 279 F.3d 1121 (9th Cir. 2002) (remanding to district court with instructions to grant writ of habeas corpus with respect to finding of special circumstances and imposition of death sentence where psychiatrist's testimony in special circumstances retrial in violation of petitioner's Miranda rights constituted prejudicial error)

Sandoval v. Calderon, 241 F.3d 765 (9th Cir. 2001) (holding trial judge did not err in relying on counsel's representation and not engaging in colloquy with petitioner, that petitioner would give up his Faretta request in exchange for library privileges), *cert. denied*, 534 U.S. 847 (2001).

United States v. Hayes, 231 F.3d 1132 (9th Cir. 2000) (granting relief in a § 2255 proceeding, holding that the trial court did not warn the defendant of the dangers of self-representation when the defendant requested same).

United States v. Garrett, 179 F.3d 1143 (9th Cir.) (holding district court did not abuse its discretion denying petitioner's motion to continue trial for new attorney to prepare

when defendant had previously fired two attorneys and insisted on proceeding *pro se* and district judge had informed defendant he would not grant additional continuances), *cert. denied*, 528 U.S. 978 (1999).

Moore v. Calderon, 108 F.3d 261 (9th Cir.) (following *Faretta*, finding violation of Sixth Amendment right to self-representation in trial court's failure to acquiesce to timely "knowing and intelligent" request for self-representation), *cert. denied*, 521 U.S. 1111 (1997).

Moran v. Godinez, 57 F.3d 690 (9th Cir. 1994) (holding state trial court's failure to hold competency hearing where there was doubt as to defendant's competence to waive counsel at change-of-plea hearing violated defendant's constitutional rights, but violation was cured by state court's postconviction retrospective hearing three years later which found defendant competently, knowingly, and willingly waived counsel and finding is fairly supported by record), *cert. denied*, 516 U.S. 976 (1995).

Peters v. Gunn, 33 F.3d 1190 (9th Cir. 1994) (holding trial court's finding that defendant would not be able to do "competent" job representing himself was improper basis for denying defendant's motion for self-representation; lack of legal qualifications alone cannot be a basis for refusing a defendant's *pro se* request).

Harding v. Lewis, 834 F.2d 853 (9th Cir. 1987) (holding trial court need not hold hearing on defendant's competency to waive counsel unless court has or should have a good faith doubt about defendant's ability to understand nature and consequences of waiver, or to participate intelligently in proceedings), *cert. denied*, 488 U.S. 871 (1988).

United States v. Smith, 780 F.2d 810, 811 (9th Cir. 1987) (holding constitutional right of self-representation is waived if it is not timely and unequivocally asserted).

United States v. Harris, 683 F.2d 322, 324 (9th Cir. 1982) (holding criminal defendant must be aware of nature of charges against him, possible penalties, and dangers and disadvantages of self-representation, in order for decision to waive counsel to be knowing and intelligent).

United States v. Kelley, 539 F.2d 1199, 1201-02 (9th Cir.) (holding right to waive counsel and represent self does not include right to assistance of non-lawyer), *cert. denied*, 429 U.S. 963 (1976).

District Courts in Ninth Circuit:

Frierson v. Calderon, 968 F. Supp. 497 (C.D. Cal. 1997) (holding that defendant does not have right to self-representation merely to delay trial).

Sager v. Maass, 907 F. Supp. 1412 (D. Or. 1995) (holding trial court's failure to warn petitioner about dangers of self-representation is reversible error), *aff'd*, 84 F.3d 1212 (9th Cir. 1996).

Federal Statutes:

28 U.S.C. § 1654 (2000) (guaranteeing parties right to plead and conduct their own cases in federal courts).

State Courts:

Gallego v. State, 117 Nev. 348, 23 P.3d 227 (2001) (finding trial court did not abuse its discretion refusing to allow capital defendant to represent himself at sentencing retrial based on defendant's pretrial behavior).

People v. Marshall, 15 Cal. 4th 1, 931 P.2d 262, 61 Cal. Rptr. 2d 84 (1997) (holding motion for self-representation can be denied when defendant is ambivalent, insincere, or interested only in delay).

See generally:

Frederic Paul Gallun, Note, *The Sixth Amendment Paradox: Recent Developments on the Right to Waive Counsel Under Faretta*, 23 New Eng. J. on Crim. & Civ. Confinement 559 (1997) (analyzing recent jurisprudence on defendant's waiver of right to counsel).

Eric Rieder, *The Right of Self-Representation in the Capital Case*, 85 Colum. L. Rev. 130 (1985) (seeking to reconcile the right of self-representation with the special procedural demands of capital cases).

2.3 Pre-Trial Publicity and Venue

In *Irvin v. Dowd*, 366 U.S. 717 (1961), the Supreme Court held that if prejudicial pretrial publicity jeopardizes a defendant's right to a fair trial by an impartial jury, the trial judge should grant a defendant's motion for a change of venue. According to the

Court's decision in *Murphy v. Florida*, 421 U.S. 794 (1975), a defendant may challenge a trial court's denial of a change of venue by showing that pretrial publicity created either "actual prejudice" or "inherent prejudice" among the jurors. A showing of actual prejudice focuses on the voir dire responses of the jurors, as in *Irvin*, and establishes actual prejudice if the responses demonstrate actual juror partiality or hostility that cannot be laid aside.

To establish inherent or presumed prejudice, on the other hand, the focus is on the content, volume, and distribution of the publicity regardless of voir dire responses. In *Rideau v. Louisiana*, 373 U.S. 723 (1963), the Supreme Court concluded that where highly prejudicial publicity may deprive the defendant of a fair trial, the Court will apply the inherent prejudice test. In *Patton v. Yount*, 467 U.S. 1025 (1984), the Court indicated that the inherent prejudice test is applied only in cases where extreme and inflammatory publicity is distributed immediately prior to trial, creating a "huge . . . wave of public passion." *Id*. at 1033 (quoting *Irvin v. Dowd*, 366 U.S. 717, 728 (1961)). Otherwise, the inquiry is limited to the actual prejudice standard.

Supreme Court:

Mu'Min v. Virginia, 500 U.S. 415 (1991) (holding trial court need not question prospective jurors about specific content of exposure to news reports; accused is only entitled to know whether juror can remain impartial; trial court's finding of juror impartiality may be overturned only for manifest error).

Patton v. Yount, 467 U.S. 1025 (1984) (holding passage of time between first and second state murder trials rebutted presumption of prejudice created by adverse pretrial publicity that existed at time of first trial).

Murphy v. Florida, 421 U.S. 794 (1975) (noting defendant must show trial setting was "inherently prejudicial" or that jury selection process "permits inference of actual prejudice").

Rideau v. Louisiana, 373 U.S. 723 (1963) (holding that due process requires change of venue where impartial jury cannot be seated due to pervasive prejudicial pretrial publicity).

Irvin v. Dowd, 366 U.S. 717 (1961) (holding defendant entitled to change of venue where pretrial publicity had tainted jury pool).

Ninth Circuit:

Rich v. Calderon, 187 F.3d 1064 (9th Cir. 1999) (holding petitioner waived claim that indictment tainted by pretrial publicity where petitioner failed to object to jury venire following change in venue), *cert. denied sub nom.*, *Rich v. Woodford*, 528 U.S. 1092 (2000)

Fetterly v. Paskett, 163 F.3d 1144 (9th Cir. 1998) (holding, in capital murder prosecution, a change of venue is not necessarily required despite extensive pretrial publicity which focused mainly on factual aspect of charge).

Ainsworth v. Calderon, 152 F.3d 1223 (9th Cir. 1998) (finding no presumptive or actual prejudice in capital petitioner's change of venue challenge).

Gallego v. McDaniel, 124 F.3d 1065 (9th Cir. 1997) (holding petitioner carries burden of showing presumptive prejudice due to pretrial publicity), *cert. denied*, 524 U.S. 917 (1998), *and cert. denied*, 524 U.S. 922 (1998).

Thompson v. Borg, 74 F.3d 1571 (9th Cir.) (holding that awkwardly phrased comment regarding knowledge that defendant previously pled guilty by venireman during jury selection does not amount to pretrial publicity), *cert. denied*, 519 U.S. 889 (1996).

Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993) (holding prejudice could not be presumed from pretrial publicity to require change of venue because news coverage, including details of murder and defendant's criminal history, was factual rather than inflammatory and most of publicity occurred six months before jury selection; no actual prejudice from pretrial publicity even though almost all jurors had heard or read about case prior to trial), *cert. denied*, 510 U.S. 1191 (1994).

Greenawalt v. Ricketts, 943 F.2d 1020 (9th Cir. 1991) (following *Austed,* holding district court on habeas has no *sua sponte* duty to order all exhibits relevant to pretrial publicity unless petitioner demonstrates inability to do so), *cert. denied*, 506 U.S. 888 (1992).

Harris v. Pulley, 885 F.2d 1354, 1359-65 (9th Cir. 1988) (holding community prejudice insufficiently inflammatory to deny defendant a fair trial; actual prejudice not demonstrated by mere showing of exposure to pretrial publicity, and no actual prejudice demonstrated in voir dire), *cert. denied*, 493 U.S. 1051 (1990).

Austad v. Risley, 761 F.2d 1348, 1354 (9th Cir.) (en banc) (holding petitioner must produce pretrial publicity exhibits on own unless proves inability to do so), *cert.*

denied, 474 U.S. 856 (1985).

District Courts in Ninth Circuit:

LaGrand v. Lewis, 883 F. Supp. 451 (D. Ariz. 1995) (holding where effect of printed media coverage of crimes was not to inflame comity passions but rather to inform public of local government bodies, prejudice is not presumed), *aff'd sub nom. LaGrand (Karl) v. Stewart*, 133 F.3d 1253 (9th Cir.), *and cert. denied*, 525 U.S. 971 (1998).

Bonin v. Vasquez, 794 F. Supp. 957 (C.D. Cal. 1992) (holding denial of change of venue motion due to extensive pretrial publicity by review of criteria including gravity of offense, community population, status of defendant and victims, and volume of media coverage did not deprive defendant of right to fair trial), *aff'd*, 59 F.3d 815 (9th Cir. 1995), *and cert. denied*, 516 U.S. 1051 (1996).

Fetterly v. Paskett, 744 F. Supp. 966 (D. Idaho 1990) (holding that need not show actual prejudice if media coverage invoked such a probability of prejudice that failure to change venue inherently lacking in due process), *cert. denied*, 506 U.S. 1002 (1992).

See generally:

Sophia R. Friedman, Note, *Sixth Amendment–The Right to an Impartial Jury: How Extensive Must Voir Dire Questioning Be?*, 82 J. Crim. L. & Criminology 920 (1992) (arguing that majority opinion in *Mu'Min* failed to adequately address issue of whether defendant's Sixth and Fourteenth Amendment rights were compromised).

Stephen Jones and Holly Hillerman, *McVeigh, McJustice, and McMedia,* 1998 U. Chi. Legal F. 53 (1998) (focusing on First, Fifth and Sixth Amendment issues relating to the change of venue resulting from pretrial publicity, the media's access to sealed documents, restrictions on extra judicial statements, broadcasting of hearings and special arrangements for press during trial).

Robert S. Stephen, Note, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a "Media Circus,"* 26 Suffolk U. L. Rev. 1063 (1992) (analyzing trial court devices used to balance interests of defendant, state, and media in highly publicized criminal cases).

Michael J. Whellan, Note, *What's Happened to Due Process Among the States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings*, 17 Am. J. Crim. L. 175 (1990) (examining various standards state court judges apply in determining whether pretrial publicity justifies change of venue and proposing uniform

standard).

2.4 Competency to Stand Trial

As established in *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam), a defendant is not competent to stand trial if he or she lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding–and a rational as well as factual understanding of the proceedings against him." In *Medina v. California*, 505 U.S. 437 (1992), the Supreme Court held that a state may legislate the presumption that defendants are competent to stand trial and require defendants to bear the burden of proving that they are not. In *Cooper v. Oklahoma*, 517 U.S. 348 (1996), the Supreme Court further clarified that a state may not set the standard for such proof at "clear and convincing evidence." The Court stated that such a rule allows the state to try a defendant who is "more likely than not" incompetent to stand trial and thus violates due process.

Supreme Court:

Cooper v. Oklahoma, 517 U.S. 348 (1996) (holding Oklahoma's procedural rule requiring defendant to prove incompetency to stand trial by "clear and convincing evidence" is too onerous a burden and violates due process).

Medina v. California, 505 U.S. 437 (1992) (holding due process clause permits state to require that a defendant claiming incompetence to stand trial bear burden of proving so by preponderance of evidence).

Dusky v. United States, 362 U.S. 402 (1960) (per curiam) (stating defendant is incompetent to stand trial if he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding–and a rational as well as factual understanding of the proceedings against him").

Ninth Circuit:

Deere v. Woodford , 339 F.3d 1084 (9th Cir. 2003) (holding in capital case in which the AEDPA did not apply that petitioner was entitled to an evidentiary hearing because he presented sufficient facts, including the post-plea declarations of a psychologist and a psychiatrist, to create a real and substantial doubt as to his competency to stand trial at

the time he entered guilty plea), *as amended on denial of rehearing*.

Odle v. Woodford, 534 U.S. 888 (9th Cir.) (holding trial court erred in failing to conduct competency hearing, notwithstanding that no one questioned petitioner's competency over the course of two years of pretrial proceedings and a month-long trial, where record showed petitioner had suffered from massive head trauma, was missing part of his brain and exhibited psychotic behavior; instructing state to either hold retroactive competency hearing or set aside capital conviction), *cert. denied,* 534 U.S. 888 (2001).

Amaya-Ruiz v. Stewart, 121 F.3d 486 (9th Cir. 1997) (stating that due process requires a state trial court to *sua sponte* inquire into defendant's competency if a reasonable judge would have a bona fide doubt as to defendant's competency), *cert. denied*, 522 U.S. 1130 (1998).

Miles v. Stainer, 108 F.3d 1109 (9th Cir. 1997) (holding, in a noncapital case, that standard of competency to plead guilty is equivalent to that needed to stand trial).

Moran v. Godinez, 57 F.3d 690, 695 (9th Cir. 1994) (stating trial court must hold hearing before allowing defendant to waive constitutional rights if court doubts defendant's competency), *cert. denied*, 516 U.S. 976 (1995).

Hernandez v. Ylst, 930 F.2d 714 (9th Cir. 1991) (articulating standard for incompetency to stand trial).

2.5 Psychiatric and Other Expert Assistance

To ensure that the ability to defend against criminal charges does not depend on a defendant's wealth, the Supreme Court held that the Constitution requires a trial court to appoint a psychiatric expert to assist an indigent capital defendant when sanity will be a "significant factor" in determining the defendant's guilt (*e.g.*, to establish an insanity defense or to challenge competency to stand trial) or sentence (*e.g.*, to rebut a claim of future dangerousness). *Ake v. Oklahoma,* 470 U.S. 68 (1985). The Court considered three factors in determining that Ake was entitled to psychiatric assistance: (1) the private interest affected by the action of the state, (2) the governmental interest affected if the safeguard is to be provided, and (3) the probable value of additional or substitute safeguards sought and risk of erroneous deprivation if the safeguards are not provided. *Id*. at 77. In meeting the threshold "significant factor" requirement, a

defendant must make some showing beyond merely pleading insanity that a psychiatric expert is necessary.

Although addressed by some lower courts, the Supreme Court has not directly ruled whether the *Ake* entitlement extends to requests for the assistance of nonpsychiatric experts, such as ballistics experts. The only Supreme Court case to address the issue, *Caldwell v. Mississippi*, 472 U.S. 320 (1985), disposed of the issue in a footnote by finding an insufficient showing of reasonableness of the requested experts, and thus avoided establishing a necessary showing which would entitle an indigent defendant to such nonpsychiatric experts.

The Ninth Circuit has made several specific interpretations of the *Ake* right to expert assistance. In *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990), the court held that *Ake* requires more than evaluation by a "neutral" court psychiatrist, but rather the right to use the services of a psychiatrist in whatever capacity defendant finds appropriate, including participating in partisan decisions of what claims to assert. In *Harris v. Vasquez*, 949 F.2d 1497, 1516 (9th Cir. 1990), *cert. denied*, 503 U.S. 910 (1992), the Ninth Circuit held that *Ake* was complied with when the trial court provided adequate funds for the defense to choose its own psychiatric doctors, notwithstanding a collateral challenge to the doctors' competency.

More recently, the Ninth Circuit held that the prosecution's compelled disclosure of a defense-requested psychiatric evaluation to rebut an insanity defense did not violate *Ake*. The court reasoned that the right to psychiatric assistance does not protect against disclosure of an evaluation performed at the defense's request that has an adverse effect of a mental status defense. *Pawlyk v. Wood*, 248 F.3d 815 (9th Cir. 2001), *cert. denied*, 534 U.S. 1085 (2002).

Supreme Court:

Caldwell v. Mississippi, 472 U.S. 320 (1985) (holding since only undeveloped assertions of benefit for requested psychiatric and other expert assistance, no due process violation in trial court's denial of requests).

Ake v. Oklahoma, 470 U.S. 68 (1985) (holding due process violated by denial of expert psychiatric assistance to indigent defendant where sanity was at issue in both guilt and sentencing phases of trial).

Ninth Circuit:

Pawlyk v. Wood, 248 F.3d 815 (9th Cir. 2001) (holding that the prosecution's compelled disclosure of a defense-requested psychiatric evaluation to rebut insanity defense did not violate *Ake)*, *cert. denied*, 534 U.S. 1085 (2002).

Chaney v. Stewart, 156 F.3d 921 (9th Cir. 1998) (holding defendant does not have state constitutional liberty interest in expert psychiatric assistance at sentencing. But see Reinhardt, J, dissent, finding liberty interest created by Arizona statute).

Vickers v. Stewart, 144 F.3d 613 (9th Cir. 1998) (holding that trial court's denial of request for out-of-state testing for temporal lobe epilepsy did not violate *Ake*), *cert. denied*, 525 U.S. 1073 (1999).

Gretzler v. Stewart, 112 F.3d 992 (9th Cir. 1997) (holding *Ake* established a new rule under *Teague* and was not retroactively applicable; holding alternatively no showing that sanity was significant factor at trial and therefore trial court did not violate due process in failing to appoint independent psychiatrist to assist capital defendant in preparing insanity defense), *cert. denied,* 522 U.S. 1081 (1998).

Harris v. Vasquez, 949 F.2d 1497 (9th Cir. 1990) (holding *Ake* does not extend to challenge defense psychiatrist's competency where court provided adequate funding for doctor who was selected by defense; declining to adopt new rule allowing for collateral attack on trial psychiatrist's competency), *cert. denied*, 503 U.S. 910 (1992).

Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990) (holding *Ake* includes right to partisan psychiatric assistance).

District Courts in Ninth Circuit:

Bloom v. Vasquez, 840 F. Supp. 1362 (C.D. Cal. 1993) (following *Harris*, holding *Ake* does not provide legal basis for challenging, in federal habeas, competency of defense trial psychiatrist), *rev'd*, 132 F.3d 1267 (9th Cir. 1997), *and cert. denied*, 516 U.S. 1124 (1998).

Williams v. Vasquez, 817 F. Supp. 1443 (E.D. Cal. 1993) (following *Harris*), *aff'd by* 52 F.3d 1465 (9th Cir. 1995), *cert. denied*, 516 U.S. 1124 (1996).

Other Circuits:

Moore v. Reynolds, 153 F.3d 1086 (10th Cir. 1998) (holding that due process requires appointment of mental health expert during sentencing phase if defendant established his mental condition could have been a mitigating factor), *cert. denied*, 526 U.S. 1025 (1999).

Stewart v. Angelone, 149 F.3d 1170 (4th Cir.) (unpublished) (holding that *Ake* does not guarantee the right to effective assistance of psychiatric experts), *cert. denied*, 524 U.S. 978 (1998).

Goodwin v. Johnson, 132 F.3d 162 (5th Cir. 1997) (holding that defendant is entitled to expert psychiatric assistance only when state makes an issue of mental state and future dangerousness with psychiatric testimony, and refusing to adopt petitioner's view that *Ake* required experts whenever future dangerousness could be considered an issue).

See generally:

Mark P. Goodman, *The Right to a Partisan Psychiatric Expert: Might Indigency Preclude Insanity?*, 61 N.Y.U. L. Rev. 703 (1986) (arguing that, due to unpredictability of psychiatric diagnoses in criminal trials, *Ake* right to psychiatric assistance must include right to partisan psychiatrist to aid in defense, or else meaningless).

David A. Harris, *Ake Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent*, 68 N.C. L. Rev. 763 (1990) (arguing lower court restrictive interpretation of *Ake* violates due process, disadvantaging indigent defendants; urging that indigent defendant who presents evidence of reasonable need for psychiatric assistance should be entitled to private psychiatrist of own choice, paid for but not controlled by state).

Donna H. Lee, *In the Wake of Ake v. Oklahoma: An Indigent Criminal Defendant's Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. Rev. 154 (1992) (arguing constitutional requirement of *ex parte* proceedings in implementing *Ake* right to expert assistance, despite discretion left to states).

Michael J. Lorenger, *Ake v. Oklahoma and Harmless Error: The Case for a Pre Se Rule of Reversal*, 81 Va. L. Rev. 521 (1995) (analyzing *Ake* and Supreme Court harmless error jurisprudence, and concluding that *Ake* violations demand automatic reversal, not harmless error analysis).

Michael J. Todd, *Criminal Procedure–Due Process and Indigent Defendants:*

Extending Fundamental Fairness to Include the Right to Expert Assistance, 29 How. L.J. 609 (1986) (tracing expansion of indigent defendant's due process rights, examining due process balancing test used in *Ake*, and determining future course of indigent's right to expert assistance).

John M. West, *Expert Services and the Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma*, 84 Mich. L. Rev. 1326 (1986) (defining boundaries of indigent criminal defendant's right to expert assistance, in light of *Ake*, arguing *Ake* right should extend as far as right to counsel).

A. Michelle Willis, *Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-Ake Criminal Justice System*, 37 Emory L.J. 997 (1988) (arguing *Ake* should be read to provide indigent defendants constitutional right to state-provided nonpsychiatric expert assistance and suggests alternative showing of need for *Ake* rights eliminating potential for misapplication inherent in current *Ake* version).

2.5.1 Retroactivity of *Ake v. Oklahoma*

In 1997, the Ninth Circuit analyzed *Ake* pursuant to *Teague v. Lane*, 489 U.S. 288 (1989), to determine *Ake's* retroactive applicability to cases on collateral review. In *Gretzler v. Stewart*, 112 F.3d 992 (9th Cir. 1997), *cert. denied,* 522 U.S. 1081 (1998), the court held that *Ake* announced a new constitutional rule of criminal procedure and was not applicable to cases which were final before *Ake* was decided. *Id*. at 999. Judge Pregerson dissented, however, arguing for relief on collateral review. He considered *Ake's* rule a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of petitioner's trial.

Ninth Circuit

Chaney v. Stewart, 156 F.3d 921 (9th Cir. 1998) (holding defendant's *Ake*-based sentencing challenge *Teague*-barred).

Gretzler v. Stewart, 112 F.3d 992 (9th Cir. 1997) (holding that *Ake* is a new rule and does not fall within the *Teague* exceptions), *cert. denied*, 522 U.S. 1081 (1998).

Harris v. Vasquez, 949 F.2d 1497 (9th Cir. 1990) (holding *Ake* claim of entitlement to psychiatric assistance not retroactive under *Teague*), *cert. denied*, 503 U.S. 910 (1992).

Jackson v. Ylst, 921 F.2d 882 (9th Cir. 1990) (holding recognition of a right to appointment of an expert on eyewitness identification not retroactive under *Teague*).

2.5.2 Harmless Error Applicable

Although *Ake* does not require a specific showing of prejudice, several circuits have held that an *Ake* violation is subject to harmless error analysis.

Ninth Circuit:

Chaney v. Stewart, 156 F.3d 921 (9th Cir. 1998) (holding that denial of defendant's request for psychiatric or neurological expert is subject to harmless error analysis).

Other Circuits:

Castro v. Ward, 138 F.3d 810 (10th Cir.) (reaffirming *Brewer*), *cert. denied*, 525 U.S. 971 (1998).

Tuggle v. Netherland, 79 F.3d 1386 (4th Cir.) (concluding *Ake* error is subject to harmless error analysis under *Brecht*), *cert. denied*, 519 U.S. 894 (1996).

Brewer v. Reynolds, 51 F.3d 1519 (10th Cir. 1995) (holding *Ake* violations subject to harmless error analysis), *cert. denied*, 459 U.S. 1150 (1996).

Starr v. Lockhart, 23 F.3d 1280 (8th Cir.) (concluding *Ake* violations are subject to harmless error analysis), *cert. denied*, 513 U.S. 995 (1994).

2.6 Jury Selection Issues

2.6.1 Voir Dire Procedure Generally

In *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501 (1984), the Court extended the guarantee of public criminal proceedings to include death qualification voir dire proceedings. In *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994), the Ninth Circuit held that a capital defendant's rights were not violated when he knowingly and voluntarily waived his right to be present during jury impanelment. In *Knox v. Collins*, 928 F.2d

657 (5th Cir. 1991), the Fifth Circuit held that the voir dire procedure, in which the judge told prospective jurors that he would instruct on the definition of a life sentence, interfered with the capital defendant's ability to constitutionally exercise his peremptory challenges where counsel selected jurors relying on the judge's representation and the court refused to give the applicable instruction.

In *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995), the Fifth Circuit ruled that the trial court did not err when it refused to allow counsel to question each prospective juror individually about the death penalty. In *Flores*, the trial judge questioned the prospective jurors about capital punishment during group voir dire, questioned individuals privately whose group answers indicated a problem, and allowed counsel three hours to freely question the venire. Similarly, the Fourth and Tenth Circuits have held that inquiry into each prospective juror's views on the specific mitigating factors in the case is not required as long as the voir dire is adequate to detect those in the venire who would automatically vote for the death penalty.

Supreme Court:

Press-Enterprise Co. v. Superior Ct., 464 U.S. 501 (1984) (stating voir dire in capital case must be public absent showing of need for closure).

Ninth Circuit:

Campbell v. Wood, 18 F.3d 662 (9th Cir.) (holding defendant's absence from jury impanelment not unconstitutional where defendant knowingly and voluntarily waived right to be present), *cert. denied*, 511 U.S. 1119 (1994).

Other Circuits:

United States v. Tipton, 90 F.3d 861 (4th Cir. 1996) (holding inquiry into each prospective juror's views on mitigating factors not necessary where voir dire adequately detected those in venire who would automatically vote for death penalty), *cert. denied*, 520 U.S. 1253 (1997).

United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996) (holding inquiry into each prospective juror's views on mitigating factors not necessary where voir dire adequately detected those in venire who would automatically vote for death penalty),

cert. denied, 520 U.S. 1213 (1997).

United States v. Flores, 63 F.3d 1342 (5th Cir. 1995) (holding individual voir dire of jurors who expressed opposition to death penalty in group voir dire not necessary where court questioned jurors further, in private, and answers indicated that information on voir dire was free flowing), *cert. denied*, 519 U.S. 825 (1996).

Knox v. Collins, 928 F.2d 657 (5th Cir. 1991) (holding voir dire procedure that effectively impairs defendant's ability to exercise peremptory challenges intelligently is ground for penalty reversal, irrespective of prejudice), *cert. denied*, 510 U.S. 1061 (1994).

State Courts:

People v. Heard, 31 Cal. 4th 946, 75 P.3d, 4 Cal.Rptr.3d 131 (2003) (reversing a judgment as to the sentence of death and remanding for a new penalty trial before a properly selected jury because the trial court erred and was unwarranted in excusing a juror for cause, despite the juror's written response in a jury questionnaire that indicated he thought imprisonment for life without possibility of parole represented a "worse" punishment than death where, after the trial court explained to the juror during voir dire that California law considers death the more serious punishment and that the death penalty can be imposed under California law only if the aggravating circumstances outweigh the mitigating circumstances, the juror stated he would do "whatever the law states"; under the U.S. Supreme Court cases of *Gray v. Mississippi* and *Davis v. Minnesota*, this type of error is not subject to harmless error analysis, but must be considered reversible per se with regard to any ensuing death penalty judgment), *cert. denied,* 541 U.S. 910 (2004).

State v. Simonson, 329 Or. 288, 986 P.2d 566 (1999) (holding trial court did not abuse discretion in failing to dismiss jurors on sentencing venire who heard potential juror reference defendant's death sentence previously being overturned), *cert. denied*, 528 U.S. 1090 (2000).

2.6.1.1 Individual Voir Dire

Ninth Circuit:

Fields v. Brown, 431 F.3d 1186 (9th Cir. 2005) (holding that capital habeas petitioner's claim that a juror was impliedly biased was not barred by the rule of *Teague v. Lane* but that bias could not be inferred as a matter of law solely because juror was the spouse of a rape victim and petitioner's charged crimes

included that offense; also concluding that juror did not intentionally mislead the trial court on voir dire when he said his wife had been assaulted, beaten, and robbed two years ago and did not reveal that she was raped and kidnapped, and that juror was not actually biased).

Dyer v. Calderon, 139 F.3d 970 (9th Cir.) (en banc) (presuming bias from similarities between the killing of a juror's family member and the facts surrounding the charge against capital defendant as well as lack of truthful answers to voir dire questions), *cert. denied*, 525 U.S. 1033 (1998).

2.6.2 Jury Impartial to Death Penalty–"Death Qualified" and "Life Qualified"

Prior to 1968, jurors could be struck for cause from a capital jury if they exhibited any feelings against the death penalty. In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Court strictly limited the challenges for cause of potential jurors with reservations about the death penalty based on a defendant's Sixth Amendment right to an impartial jury made up of a fair cross section of the community. The *Witherspoon* Court ruled that a judge could not exclude every potential juror with reservations about the death penalty. Instead, the Court stated that a court may exclude only those extreme opponents who would vote against the capital punishment in all cases regardless of the evidence presented.

In *Adams v. Texas*, 448 U.S. 38 (1980), the Court confirmed that the *Witherspoon* rule still applied in the post-*Furman* era of death penalty statutes and provided a new formulation of the rule. In *Adams*, the Court stated that a capital punishment opponent may not be challenged for cause unless his views would "prevent or substantially impair" his ability to carry out his duties as a juror. In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Supreme Court confirmed the *Adams* formulation as the proper rule and clarified that the stricter standard set forth in *Witherspoon* is not the proper basis for excluding death-scrupled jurors. Under *Witt,* a potential juror's views about the death penalty may not be the basis for a challenge for cause unless those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id*. at 424 (quoting *Adams v. Texas*, 448 U.S. at 45).

In 1992, the Supreme Court ruled that a defendant has a right to "life-qualified" jurors capable of sentencing life imprisonment just as the state has a right to

"death qualified" jurors capable of sentencing death. In *Morgan v. Illinois*, 504 U.S. 719 (1992), the Court held that a state trial court may not refuse to permit inquiry into whether a potential juror will automatically vote for the death penalty upon a conviction of the defendant as the basis for a challenge for cause.

Supreme Court:

Morgan v. Illinois, 504 U.S. 719 (1992) (holding state trial court may not refuse inquiry into whether potential juror would automatically impose death penalty upon conviction of defendant).

Darden v. Wainwright, 477 U.S. 168 (1986) (applying *Witt* to uphold exclusion of juror because of attitudes about death penalty; discussing scope of federal appellate review).

Wainwright v. Witt, 469 U.S. 412 (1985) (holding proper standard for determining when prospective juror may be excluded for cause because of capital punishment views is whether juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath;" state court's determination to excuse juror for cause is finding of fact subject to presumption of correctness accorded by former 28 U.S.C. § 2254(d) (now § 2254(e)(1)).

Adams v. Texas, 448 U.S. 38 (1980) (applying *Witherspoon* post-*Furman*, stating that juror cannot be struck for cause unless views on capital punishment would "prevent or substantially impair" performance of jury duties).

Davis v. Georgia, 429 U.S. 122 (1976) (per curiam) (holding death sentence unconstitutional where a single juror excluded in violation of *Witherspoon*).

Witherspoon v. Illinois, 391 U.S. 510 (1968) (holding right to impartial jury requires juror with reservations about death penalty may be excluded for cause only if "unmistakably clear" that juror would automatically vote against death sentence or that juror could not be impartial on the issue of guilt).

Ninth Circuit:

Brown v. Lambert, 431 F.3d 661 (9th Cir. 2005) (holding that two jurors were properly dismissed for cause due to their views on the death penalty, but that another juror was excluded for insufficient reasons, and not on the ground that his views would prevent or substantially impair the performance of his duties, as required by *Witherspoon v.*

Illinois, where state court did not find that the juror would be unable to follow instructions, and the juror ultimately stated he could consider the death penalty in an appropriate case; also holding that prejudice was presumed, and so the death sentence could not stand).

Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994) (following *Ross*; actual jury impaneled was impartial, no due process violation for loss of peremptories to excuse jurors not excluded for cause, even assuming court used improper *Witherspoon* standard), *cert. denied*, 513 U.S. 1183 (1995).

State Courts:

People v. Cash, 28 Cal.4th 703, 50 P.3d 332, 122 Cal.Rptr.2d 545 (2002) (reversing a death sentence and holding that trial court erred in prohibiting defense counsel from inquiring during death-qualification voir dire whether prospective jurors would automatically vote for death penalty if defendant had previously committed another murder where that fact was likely to be of great significance to prospective jurors because defendant had been convicted of prior murders of his grandparents as a juvenile).

See generally:

John C. Belt, *Morgan v. Illinois: The Right to Balance Capital Sentencing Juries as to their Views on the Death Sentence is Finally Granted to Defendants*, 24 N.M. L. Rev. 145 (1994) (exploring history of "death qualification" and "life qualification" of juries, progression of law of jury impartiality in capital cases, and focusing on latest case, *Morgan*).

Patrick J. Callans, Note, *Sixth Amendment–Assembling a Jury Willing to Impose the Death Penalty: A New Disregard for a Capital Defendant's Rights*, 76 J. Crim. L. & Criminology 1027 (1985) (analyzing *Witt* in light of prior cases, concluding coherent standard of *Witt* abandons *Witherspoon*'s safeguards for defendant's right to impartial jury).

James M. Carr, Note, *At Witt's End: The Continuing Quandary of Jury Selection in Capital Cases*, 39 Stan. L. Rev. 427 (1987) (discussing death qualification procedure, evolution from *Witherspoon* to *Witt*, and arguing it provides lack of clear guidelines for capital jury selection process).

Christopher R. Drahozal, Comment, *Wainright v. Witt and Death-Qualified Juries: A Changed Standard But an Unchanged Result*, 71 Iowa L. Rev. 1187 (1986) (analyzing

Witt, criticizing relaxed standard but concluding it will have little practical impact).

Stanton S. Krauss, *The Witherspoon Doctrine at Witt's End: Death Qualification Reexamined*, 24 Am. Crim. L. Rev. 1 (1986) (analyzing *Witherspoon* in light of *Witt*).

Valerie T. Rosenson, Note, *Wainwright v. Witt: The Court Casts a False Light Backward*, 66 B.U. L. Rev. 311 (1986) (analyzing *Witt*, in light of background cases and practical implications on capital defendants' access to habeas corpus review, and arguing states should provide additional safeguards for defendants' rights after *Witt*).

2.6.2.1 Harmless Error Analysis Not Applicable

In *Gray v. Mississippi*, 481 U.S. 648 (1987), the Supreme Court stated that the nature of the jury selection process requires that the harmless error standard not apply to reviews of *Witherspoon/Witt* violations where a court erroneously *excludes* a juror who qualifies as impartial under *Witt*. Where a court erroneously *fails to exclude* a juror, however, the Court has used a harmless error type analysis. In *Ross v. Oklahoma*, 487 U.S. 81 (1988), the Court held that where a trial court mistakenly fails to exclude a juror who does not qualify as impartial under *Witt*, the crucial issue is whether the jury that actually sat was impartial.

Supreme Court:

United States v. Martinez-Salazar, 528 U.S. 304 (2000) (following *Ross* and finding no due process error where trial court in federal prosecution erroneously failed to remove for cause a juror later removed by a defense peremptory challenge because defendant convicted by an impartial jury).

Ross v. Oklahoma, 487 U.S. 81 (1988) (holding trial court's erroneous failure to remove juror for cause not violation of defendant's due process rights because no showing that ultimate jury which actually sat was not impartial).

Gray v. Mississippi, 481 U.S. 648 (1987) (holding exclusion of juror in violation of *Witherspoon* is not subject to harmless error analysis even if prosecutor did not utilize all peremptory challenges, and even if trial court erroneously denied prosecutor's *Witherspoon* challenge of another juror).

Ninth Circuit:

Poland v. Stewart, 169 F.3d 573 (9th Cir. 1999) (holding trial court's denial of challenges for cause did not violate Sixth Amendment where no prejudice shown), *cert. denied*, 528 U.S. 845 (1999).

See generally:

Ross v. Oklahoma: A Strike Against Peremptory Challenges, 1990 Wis. L. Rev. 219 (1990) (discussing *Ross*'s departure from precedent, describing Court's blurred distinction between peremptory and for cause challenges, and arguing for constitutional protection of peremptory challenges).

Ross v. Oklahoma: A Reversal of the Reversible Error Standard in Death Qualification Cases, 38 Cath. U.L. Rev. 881 (1989) (analyzing history and development of for cause and peremptory challenges, focusing on capital cases, comparing *Gray* and *Ross*, and concluding *Gray* provides better protection of capital defendants' constitutional rights).

2.6.2.2 Remedy for *Witherspoon* Violations

Although not completely clear, the plurality in *Gray*, along with a separate opinion by Justice Powell, seems to hold that a *Witherspoon* violation requires only that the death sentence, and not the conviction, be vacated. This conclusion is further supported by the Court's ruling that *Witherspoon/Witt* errors entitle defendant to relief only if a death sentence was imposed. In *Bumper v. North Carolina*, 391 U.S. 543 (1968), the Court held that *Witherspoon* does not govern cases where life imprisonment instead of death was the sentence.

Supreme Court:

Gray v. Mississippi, 481 U.S. 648 (1987) (granting relief from death sentence in case with *Witherspoon* violation).

Bumper v. North Carolina, 391 U.S. 543 (1968) (holding appellant may not complain of *Witherspoon* error where jury recommends life imprisonment rather than death penalty).

Ninth Circuit:

Jacobson v. California, 431 F.2d 1017 (9th Cir. 1970) (citing *Bumper*, denying relief based on *Witherspoon* claim because sentence of death commuted to life imprisonment by Governor; not addressing applicability of *Witherspoon* violation to overturn conviction because claim not presented).

2.6.2.3 Conviction-Prone Juries at Guilt Phase

In *Lockhart v. McCree*, 476 U.S. 402 (1986), the Supreme Court addressed an issue left unresolved in *Witherspoon*: whether death qualification created a jury more prone to conviction at the guilt phase so that it violates a defendant's right to an impartial jury. In *McCree*, the Court rejected the argument that death qualification of jurors prior to the guilt phase of a bifurcated trial violated defendant's Sixth Amendment right to an impartial jury selected from a fair cross-section of the community. Even assuming that *Witherspoon* exclusions produce juries which may be more "conviction-prone" than "non-death-qualified" juries, the Court held that the practice of death qualification does not violate the fair cross-section requirement. In *McCree*, the Court also explained that the fair-cross section requirement applies only to jury venires and does not require that the petit jury actually chosen reflect the composition of the community at large.

Supreme Court:

Buchanan v. Kentucky, 483 U.S. 402 (1987) (holding that death qualified jury in joint trial of capital and non-capital defendants did not violate the Sixth Amendment right to an impartial jury).

Lockhart v. McCree, 476 U.S. 162 (1986) (holding removal of jurors under *Witherspoon* does not violate Sixth Amendment right to an impartial jury or to jury drawn from fair cross-section of community notwithstanding argument that resulting jury was "prosecution prone").

Ninth Circuit:

Furman v. Wood, 190 F.3d 1002 (9th Cir. 1999) (clarifying that the death qualification of a jury does not affect the rights of defendant who is not eligible for the death penalty).

Harris v. Pulley, 885 F.2d 1354 (9th Cir. 1988) (following and applying *McCree*, in rejecting claim of violation of right to fair and impartial jury based on conviction-proneness), *cert. denied*, 493 U.S. 1051 (1990).

Evans v. Lewis, 855 F.2d 631, 635 (9th Cir. 1988) (following *McCree* in holding fair cross-section requirement applies only to venire panels, not to petit juries).

See generally:

Jane Byrne, Note, *Lockhart v. McCree: Conviction-Proneness and the Constitutionality of Death-Qualified Juries*, 36 Cath. U. L. Rev. 287 (1986) (reviewing history of concept of jury impartiality and cross-section of community, Supreme Court treatment of *Witherspoon*-excludables, and *McCree*'s impact on case law attempting to establish conviction-proneness).

Maury A. Hubbard III, Note, *Lockhart v. McCree: Death Qualification of Jury Prior to Guilt Phase of Bifurcated Capital Trial Held Constitutional*, 66 N.C. L. Rev. 183 (1987) (analyzing *McCree* reasoning in light of prior Sixth Amendment decisions, concluding that Court issued unnecessarily broad opinion which will undermine Sixth Amendment rights of capital and non-capital defendants).

Rick Seltzer, et al., *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example*, 29 How. L.J. 571 (1986) (critically examining *McCree*, in light of social science data, arguing ruling incorrect because of Court's inability to accurately interpret and apply social science data).

John A. Wasleff, Note, *Lockhart v. McCree: Death Qualification As a Determinant of the Impartiality and Representativeness of a Jury in Death Penalty Cases*, 72 Cornell L. Rev. 1075 (1987) (arguing Court correctly decided *McCree*, preserving important procedural corollary to implementation of state death penalty laws; even if Court had concluded differently on cross-section and impartiality issues, balance of interests between state and defendant would compel same result).

Barbara J. Whisler, Note, *Sixth Amendment–Death Qualification of the Jury: Process is Permissible Where Defendant Does Not Face Death Penalty*, 78 J. Crim. L. & Criminology 954 (1988) (reviewing *Buchanan*, arguing it is unwarranted expansion of state's right to death qualify, infringing on defendants' Sixth Amendment rights).

2.6.3 Inquiry into Racial Attitudes of Jurors

In *Turner v. Murray*, 476 U.S. 28 (1986), the Court held that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. The Court reasoned that a capital case presents a special circumstance warranting this intrusion into a state trial court's conduct of voir dire because "the range of discretion entrusted to a jury in a capital sentencing hearing [allows] a unique opportunity for racial prejudice to operate but remain undetected." *Id*. at 35.

A defendant must specifically request or instigate such questioning of the jury venire. Should a state trial court refuse a request to question prospective jurors on racial prejudice, thereby failing to adequately protect a capital defendant's constitutional right to an impartial jury, the death sentence must be vacated. The court, however, need not however mandate a retrial on the issue of guilt.

Supreme Court:

Turner v. Murray, 476 U.S. 28 (1986) (holding Sixth and Fourteenth Amendments guarantee defendant accused of interracial crime right to have prospective jurors informed of race of victim and questioned on issue of racial bias; remedy for denial of that right is vacation of the death sentence but not conviction).

See generally:

Stephen B. Bright, *Challenging Racial Discrimination in Capital Cases,* 21 Champion, Feb. 1997 at 19 (examining issues of racial discrimination that frequently arise in capital cases).

Nancy L. Alvarez, Comment, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry*, 33 Hastings L.J. 959 (1982) (addressing, prior to *Turner*, issue of racial inquiry on voir dire, discussing prior Supreme Court cases, and urging clear constitutional standard be adopted requiring such inquiry in criminal cases where juror panel of different race than defendant).

2.6.4 Discriminatorily Motivated Peremptory Challenges

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court held that the Equal

Protection Clause prohibits a prosecutor from using peremptory challenges to exclude potential jurors solely on account of their race or on the assumption that black jurors as a group are unable to impartially consider the case against a black defendant. *Batson* overturned *Swain v. Alabama*, 380 U.S. 202 (1965), which required a defendant to show discrimination through exclusion of black jurors in repeated cases in addition to defendant's case.

Under *Batson*, in order to contest the discriminatory use of peremptory challenges by the prosecution, a defendant must establish a prima facie case of discrimination by showing circumstances indicating that the exclusion of jurors was based on their race. These circumstances include but are not limited to a pattern of striking members of a certain racial group, or voir dire questions that reveal the prosecutor's intent to strike solely for racial reasons. Once a defendant puts forth a prima facie case, the prosecutor must come forward with "clear and reasonably specific" neutral explanations for the peremptory strikes. In *Purkett v. Elem*, 514 U.S. 265 (1995), the Supreme Court further clarified that a *Batson* analysis must follow three steps in sequence: (1) the opponent of the peremptory challenge makes a prima facie showing of racial discrimination, (2) the burden of proof then shifts to the proponent of the strike to present a race-neutral explanation, noting that unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race-neutral, and (3) the court then determines whether the opponent of the strike has proved purposeful discrimination. In *Johnson v. California*, 125 S. Ct. 2410 (2005), the Supreme Court held that the objector, in order to establish a prima facie case under *Batson*, is not required to show that it is more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias.

In 1991, the Court decided *Powers v. Ohio*, 499 U.S. 400 (1991), which expanded the *Batson* rule to cases where the defendant and excluded jurors are not of the same race. *Georgia v. McCollum*, 505 U.S. 42 (1992) extended *Batson*'s equal protection rationale to prohibit the use of racially discriminatory peremptory challenges by criminal defendants. In 1994, the Court extended the *Batson* prohibition to peremptory strikes based on the gender of a potential juror. *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

The Ninth Circuit has held en banc that a trial court's determination of the

first prong of *Batson*–the prima facie showing of racial discrimination–is reviewed deferentially in a federal habeas proceeding. *Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999) (en banc). This ruling is consistent with the appellate standard of review in other jurisdictions.

Supreme Court:

Rice v. Collins, 126 S. Ct. 969 (2006) (holding that on direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error, (2) under AEDPA, however, a federal habeas court must find the state-court conclusion "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," and thus (3) a federal habeas court can only grant a habeas petition if it was unreasonable to credit a prosecutor's race-neutral explanations for the *Batson* challenge).

Johnson v. California, 125 S. Ct. 2410 (2005) (holding that the objector, in order to establish a prima facie case under *Batson,* is not required to show that it is more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias; resolving a conflict between decisions of the California Supreme Court and the Ninth Circuit, the Court agreed with the Ninth Circuit and said that it did not intend the first step in *Batson* to be so onerous that a defendant would have to persuade the judge--on the basis of all the facts, some of which are impossible for the defendant to know with certainty--that the challenge was more likely than not the product of purposeful discrimination).

Miller-El v. Dretke, 125 S. Ct. 2317 (2005) (holding that a capital habeas petitioner was entitled to prevail on his *Batson* claim in a case in which 91% of eligible African-American venire members were struck; also holding that if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination; noting that here (1) at least two of the blacks on venire panel were ostensibly acceptable to prosecutors seeking the death penalty, and that prosecutors' chosen race-neutral reasons for the strikes did not hold up; (2) district attorney's office had, for decades, followed a specific policy of systematically excluding black people from juries; (3) prosecutors' notes of the race of each panel member showed that they took their cues from a jury selection manual that included racial stereotypes; and (4) different questions were asked of black prospective jurors than of white ones).

Miller-El v. Cockrell, 537 U.S. 322 (2003) (holding that jurists of reason could have

debated whether prosecution's use of peremptory strikes against African-American prospective jurors was a result of purposeful discrimination, and therefore petitioner was entitled to a COA; noting that the statistical evidence that prosecution used peremptory strikes to exclude 91 percent of the eligible African-American venire members and that 10 of the 14 peremptory strikes used by the prosecution were used against African-Americans raised some debate as to whether prosecution acted with race-based reason).

Purkett v. Elem, 514 U.S. 765 (1995) (insisting on sequence of each *Batson* "step": (1) opponent of peremptory challenge has made prima facie case of racial discrimination, (2) burden of production shifts to proponent of strike to present race-neutral explanation, (3) trial court determines whether opponent of strike has proved purposeful discrimination; reversing Eighth Circuit's combining of second and third steps, noting unless explanation reveals inherent evidence of discrimination, it is deemed race-neutral).

Davis v. Minnesota, 511 U.S. 1115 (1994) (denying certiorari for Minnesota Supreme Court's ruling, in *State v. Davis*, 504 N.W.2d 767 (1993), that *Batson* does not extend to peremptory strikes based on religion).

J.E.B. v. Alabama, 511 U.S. 127 (1994) (holding Fourteenth Amendment equal protection prohibits peremptory challenges on basis of gender as well as race because under heightened scrutiny analysis, peremptory challenge discrimination does not further state's legitimate interest in fair and impartial trial).

Georgia v. McCollum, 505 U.S. 42 (1992) (holding Fourteenth Amendment equal protection prohibits state criminal defendant from purposeful racial discrimination through peremptory challenges).

Hernandez v. New York, 500 U.S. 352 (1991) (stating that once a prosecutor has offered a race-neutral explanation for peremptory challenges and trial court has ruled on ultimate question of intentional discrimination, the preliminary issue of whether defendant has made a prima facie showing becomes moot).

Powers v. Ohio, 499 U.S. 400 (1991) (modifying *Batson,* 476 U.S. 79 (1986); holding defendant may object to prosecutor's race-based peremptory challenges to jurors whether or not defendant and excluded juror share same race).

Batson v. Kentucky, 476 U.S. 79 (1986) (holding equal protection prohibits peremptory exclusion of jurors based on race; where defendant establishes prima facie case of purposeful discrimination by showing that: (1) defendant is member of cognizable

racial group; (2) group's members have been excluded from defendant's jury by prosecutor's peremptory challenges; and (3) circumstances of case raise inference that exclusion was based on race, burden shifts to prosecutor to justify exclusion).

Swain v. Alabama, 380 U.S. 202 (1965) (holding prima facie case of purposeful discrimination established only where defendant shows systematic exclusion of blacks from juries by the prosecution in case after case, over period of time), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986).

Ninth Circuit:

Williams v. Woodford, 384 F.3d 567 (9th Cir. 2004) (holding that capital habeas petitioner failed to make the "substantial showing of the denial of a constitutional right" necessary to warrant a COA on a *Batson* claim because he did not make a *prima facie* showing of a violation; noting that statistical facts like a high proportion of African-Americans struck and a disproportionate rate of strikes against African-Americans can establish a pattern of exclusion on the basis of race that gives rise to a *prima facie Batson* violation, the court said that here it was impossible to say whether any statistical disparity existed that might support an inference of discrimination since, despite alleging that the prosecutor used peremptory challenges to strike the only two African-American females as prospective jurors and used one peremptory challenge to strike an African-American male as an alternate juror, petitioner did not allege, and the record does not disclose, facts like how many African-Americans (apparently men, if any) sat on the jury, how many African-Americans were in the venire, and how large the venire was), *reh'g and reh'g en banc denied*, 396 F.3d 1059 (9th Cir. 2005).

Cooperwood v. Cambra, 245 F.3d 1042 (9th Cir.) (holding in noncapital case that whenever state court used incorrect "strong likelihood" standard rather than the *Batson* "reasonable inference" test that peremptory challenge was based on race, rule of deference to state court decision would not be applied, and court would review issue de novo; concluding that male African-American defendant failed to establish prima facie *Batson* violation in peremptory strike of male African-American prospective juror without voir dire where two prior excused jurors were white and jury ultimately included two African-American women, as well as three Asian Americans and one Pacific Islander), *cert. denied*, 534 U.S. 900 (2001).

Tolbert v. Gomez, 190 F.3d 985 (9th Cir. 1999) (holding petitioner failed to establish a prima facie *Batson* violation where prosecutor exercised peremptory challenge against black man who approached bench during voir dire to inquire why race was not being discussed in trial of black co-defendants).

Tolbert v. Page, 182 F.3d 677 (9th Cir. 1999) (en banc) (holding a trial court's determination of the first prong of *Batson* is reviewed deferentially, not *de novo*, in a federal habeas proceeding).

Ricardo v. Rardin, 189 F.3d 474 (9th Cir.) (unpublished) (finding *Batson* violation where prosecutor's explanations were tainted by racial references making them not race-neutral as a matter of law), *cert. denied*, 528 U.S. 1047 (1999).

Windham v. Merkle, 163 F.3d 1092 (1998) (finding no race-related *Batson* violation where prosecutor, who, after accepting three black jurors, challenged three black women because he wanted more men on jury and at time of objection, nine of twelve jurors in box were women).

Turner v. Marshall, 121 F.3d 1248 (9th Cir. 1997) (ruling that prosecutor's stated reason for dismissing black juror was "pretextual" where prosecution did not dismiss white female juror with similar reservations), *cert. denied*, 522 U.S. 1153 (1998).

Johnson v. Campbell, 92 F.3d 951 (9th Cir. 1996) (holding district court did not err in refusing to question challenged juror about sexual orientation or to permit *Batson* hearing where there was no showing of purposeful discrimination).

United States v. Collins, 90 F.3d 1420 (9th Cir. 1996) (holding prosecutor's use of two peremptory challenges on Hispanic jurors not purposeful discrimination based on explanation that jurors behaved strangely).

United States v. Contreras-Contreras, 83 F.3d 1103 (9th Cir. 1996) (holding prosecution's volunteered explanation for exercising peremptory challenge on African-American juror does not preserve issue for appeal where defense fails to object at voir dire or during trial; also finding no error to accept explanation of recent jury service as race-neutral explanation for strike), *cert. denied*, 519 U.S. 903 (1996).

Turner v. Marshall, 63 F.3d 807 (9th Cir. 1995) (finding prima facie evidence of *Batson* violation; fact that prosecutor did not attempt to remove all black jurors weighs against *Batson* claim, but is not dispositive; declining to address issue of "black males" as protected *Batson* class), *cert. denied*, 522 U.S. 1153 (1998), *and overruled en banc on other grounds by Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999).

United States v. Santiago-Martinez, 58 F.3d 422 (9th Cir. 1995) (holding equal protection analysis of *Batson* does not apply to prohibit peremptory strikes based on obesity), *cert. denied*, 516 U.S. 1044 (1996).

Burks v. Borg, 27 F.3d 1424 (9th Cir. 1994) (deferring to trial court's *Batson* finding as long as no erroneous reading of the law), *cert. denied*, 513 U.S. 1160 (1995).

United States v. Omoruyi, 7 F.3d 880 (9th Cir. 1993) (holding peremptory challenges based on marital status do not violate *Batson*).

Montiel v. City of Los Angeles, 2 F.3d 335 (9th Cir. 1993) (holding when plaintiff raised *Batson* objection to defendant's peremptory challenge of black juror, district court should have conducted *Batson* inquiry).

United States v. Changco, 1 F.3d 837 (9th Cir.) (holding passivity, inattentiveness, inability to relate to other jurors, and demonstrated lack of proficiency in English are sufficiently race-neutral reasons to rebut prima facie *Batson* showing), *cert. denied*, 510 U.S. 1019 (1993).

Palmer v. Estelle, 985 F.2d 456 (9th Cir.) (holding prosecutor's acceptance of minorities on jury is valid but not dispositive consideration in determining *Batson* violation), *cert. denied*, 509 U.S. 928 (1993).

United States v. De Gross, 960 F.2d 1433 (9th Cir. 1992) (holding, prior to *J.E.B. v. Alabama*, that gender-based discriminatory peremptory challenges violate equal protection).

United States v. Bishop, 959 F.2d 820 (9th Cir. 1992) (holding impression of bias based on low-income and social status is not race-neutral reason sufficient to rebut prima facie *Batson* showing).

United States v. Chinchilla, 874 F.2d 695 (9th Cir. 1989) (overturning trial court finding of no *Batson* violation where comparison between answers of prospective jurors struck and those not struck undermines prosecutor's credibility).

United States v. Lewis, 837 F.2d 415, 417 (9th Cir.) (stating trial court's finding of discriminatory intent rests largely upon credibility and is entitled to deference), *cert. denied*, 488 U.S. 923 (1988).

United States v. Thompson, 827 F.2d 1254, 1257-59 (9th Cir. 1987) (holding, while *Batson* did not formulate procedures for dealing with defendant's objection, judge may not adopt procedures such as *ex parte* procedures that impair defendant's right to due process; objections may be timely even if made after the jury is sworn).

See generally:

Raymond J. Broderick, *Why the Peremptory Challenge Should be Abolished*, 65 Temp. L. Rev. 369 (1992) (arguing peremptory challenge offensive to federal constitution and basic concepts of justice).

Cameron M. Currie, *Gender-Based Peremptory Strikes: A Post-J.E.B. Analysis*, 7-Feb. S.C. Law. 14 (1996) (tracing Supreme Court law of discriminatory peremptory challenges and analyzing impact of *J.E.B*).

Michael J. Desmond, *Limiting A Defendant's Peremptory Challenges: Georgia v. McCollum and the Problematic Extension of Equal Protection*, 42 Cath. U. L. Rev. 389 (1993) (analyzing role of peremptory challenge, discriminatory abuse and limitations by Supreme Court, focusing on shortcomings of *Batson* and *McCollum* remedies).

Nancy D. Dillard, *The Death Knell of the Insurmountable Burden: Batson v. Kentucky*, 31 St. Louis U. L.J. 473 (1987) (analyzing *Batson* in light of *Swain*).

Eric K. Ferraro, *United States v. De Gross: The Ninth Circuit Expands Restrictions on a Criminal Defendant's Right to Exercise Peremptory Challenges*, 23 Golden Gate U. L. Rev. 109 (1993) (reviewing Ninth Circuit *De Gross* decision in light of related cases).

Michele A. Gemskie, *Fourteenth Amendment–Peremptory Challenges by Defendants and the Equal Protection Clause*, 83 J. Crim. L. & Criminology 920 (1993) (reviewing and analyzing *McCollum*).

Dave Harbeck, *Eliminating Unconstitutional Juries: Applying United States v. De Gross to All Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges,* 77 Minn. L. Rev. 689 (1993) (analyzing Ninth Circuit *De Gross* case, endorsing holding as solution to discrimination in jury selection process while maintaining peremptory challenges, arguing it should extend to any group warranting intermediate or strict scrutiny under traditional equal protection principles).

Susan Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 Tul. L. Rev. 1807 (1993) (discussing *Batson* line of cases as Court's response to problem of racism in criminal justice system, addressing new focus on prospective jurors' rights, and discussing practical impact).

Barbara L. Horwitz, *The Extinction of the Peremptory Challenge: What Will the Jury System Lose by its Demise?,* 61 U. Cin. L. Rev. 1391 (1993) (examining peremptory

challenge, its weakening through *Batson* and progeny, and arguing equal protection concerns do not outweigh protections to litigants offered by peremptory challenge).

Scott W. Howe, *Juror Neutrality or An Impartiality Array? A Structural Theory of the Impartial Jury Mandate*, 70 Notre Dame L. Rev. 1173 (1995) (analyzing Supreme Court jury impartiality doctrine as a whole, and suggesting theory for integrating the decisions as a logical and conceptual whole).

Brian A. Howie, *A Remedy Without a Wrong: J.E.B. and the Extension of Batson to Sex-Based Peremptory Challenges*, 52 Wash. & Lee L. Rev. 1725 (1995) (analyzing and criticizing *J.E.B.* opinion).

Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich. L. Rev. 63 (1993) (reviewing effect of jury discrimination on jury decisions, arguing for possible solutions).

Jason Laeser, *Jurors and Litigants Beware–Savvy Attorneys are Prepared to Strike: Has Purkett v. Elem Signaled the Demise of the Peremptory Challenge at the Federal And State Levels*?, 52 U. Miami L. Rev. 635 (1998) (illustrating that peremptory challenges are still being used for discriminatory purposes, undermining the intent of *Batson*).

Barat S. McClain, *Turner's Acceptance of Limited Voir Dire Renders Batson's Equal Protection a Hollow Promise*, 65 Chi.-Kent L. Rev. 273 (1989) (analyzing Court's equal protection decisions relating to petit jury selection and to peremptory challenges, noting inconsistencies).

Sherrie J. O'Brien, *J.E.B. v. Alabama ex rel. T.B.: The Collapse of the Peremptory Challenge*, 14 St. Louis U. Publ. L. Rev. 655 (1995) (discussing *J.E.B*. and evolving law of peremptory challenges, and concluding *J.E.B*. effectively eliminates the peremptory challenge).

J. Christopher Peters, *Georgia v. McCollum*: *It's Strike Three for Peremptory Challenges, But is it the Bottom of the Ninth?*, 53 La. L. Rev. 1723 (1993) (analyzing *McCollum* and impact on future exercise of peremptory challenges).

Salvatore Picariello, *Fourteenth Amendment–Peremptory Challenges–The Equal Protection Clause of the Fourteenth Amendment Prohibits a Criminal Defendant's Exercise of Racially Peremptory Challenges–Georgia v. McCollum*, 23 Seton Hall L. Rev. 1160 (1993) (reviewing *McCollum*).

Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 Wis. L. Rev. 761 (1993) (arguing against Supreme Court decision effectively permitting arbitrary exclusion of all Spanish-speaking potential jurors where witness will testify in Spanish).

William C. Slusser, David Hricik, & Matthew P. Eastus, *Batson, J.E.B. and Purkett: A Step-By-Step Guide to Making and Challenging Peremptory Challenges in Federal Court*, 37 S. Tex. L. Rev. 127 (1996) (outlining practical steps to take to follow recent Supreme Court law on peremptory challenges).

Joel H. Swift, *The Unconventional Equal Protection Jurisprudence of Jury Selection*, 16 N. Ill. U. L. Rev. 295 (1996) (analyzing Supreme Court jurisprudence on equal protection and jury selection and arguing that conventional doctrine has not been applicable to determination of prima facie case of "purposeful discrimination").

Joshua E. Swift, *Batson's Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 Cornell L. Rev. 336 (1993) (arguing once prima facie case of discrimination established, only allowable peremptory challenges are hard-data exclusions evincing "substantial nexus" between juror's statements and facts of case; urging Court to disallow soft-data exclusions).

David A. Sutphen, *True Lies: The Role of Pretext Evidence under Batson v. Kentucky in the Wake of St. Mary's Honor Center v. Hicks*, 94 Mich. L. Rev. 488 (1995) (addressing standard of proof analysis for proof of pretext in peremptory strike validity challenges, focusing on burden-shifting framework in post-*Batson* cases).

2.6.4.1 Retroactivity of *Batson v. Kentucky*

In *Allen v. Hardy*, 478 U.S. 255 (1986), the Supreme Court held that the *Batson* rule is not applicable to cases on collateral habeas review. Cases pending on direct review or otherwise not yet final, however, are entitled to retroactive application of *Batson*. *Griffith v. Kentucky*, 479 U.S. 314 (1987). In *Ford v. Georgia*, 498 U.S. 411 (1991), the Court further held that since *Batson* did not change the nature of the violation recognized in *Swain* but rather only the quantum of proof necessary to substantiate a claim, an allegation of an equal protection violation under *Swain* necessarily triggers an equal protection violation under *Batson.*

Supreme Court:

Trevino v. Texas, 503 U.S. 562 (1992) (holding case on direct review when *Batson* announced is entitled to *Batson* rule; defendant filed pretrial motion to prevent prosecutor from using peremptory challenges on basis of race and claimed historical pattern of discriminatory use of peremptory challenges and made express references to *Swain*).

Ford v. Georgia, 498 U.S. 411 (1991) (holding since *Batson* did not change nature of violation recognized in *Swain* but only the quantum of proof necessary to substantiate a claim; allegation of an equal protection violation under *Swain* necessarily states an equal protection violation under *Batson*).

Teague v. Lane, 489 U.S. 288 (1989) (reaffirming *Allen v. Hardy* and holding that *Batson* claim not available to petitioner whose conviction was final when *Batson* was decided).

Griffith v. Kentucky, 479 U.S. 314 (1987) (holding *Batson* retroactive to cases pending on direct review or not yet final when decision announced; does not overrule *Hardy* regarding retroactivity to habeas cases).

Allen v. Hardy, 478 U.S. 255 (1986) (holding *Batson* not retroactive to cases pending on habeas review when decision announced; decisions explicitly overruling past precedent almost automatically nonretroactive).

Ninth Circuit:

Nevius v. Sumner, 852 F.2d 463 (9th Cir. 1988) (holding, where *Batson* does not apply because conviction is final, conviction may be set aside under *Swain* if prosecutor voluntarily places on record the reasons for peremptory challenges), *cert. denied*, 490 U.S. 1059 (1989).

2.6.4.2 Harmless Error not Applicable

The Supreme Court found that the constitutional violation in *Batson* was structural error, warranting automatic reversal.

Supreme Court:

Dawson v. Delaware, 503 U.S. 159 (1992) (Blackmun, J., concurring) (noting Court declined to apply harmless error analysis in *Batson)*.

Ninth Circuit:

Vansickel v. White, 166 F.3d 953 (9th Cir.) (acknowledging that petitioner's federal due process right violated by denial of half of the peremptory challenges to which petitioner entitled under state law but holding, on federal habeas review of state prosecution, petitioner unable to show cause and prejudice on procedurally defaulted claim; dissent arguing prejudice should be presumed), *cert. denied*, 528 U.S. 965 (1999).

United States v. Annigoni, 96 F.3d 1132 (9th Cir. 1996) (en banc) (holding erroneous denial of defendant's right of peremptory challenge requires automatic reversal, not subject to harmless error analysis; following pre-*Batson* case law regarding erroneous denial of peremptory challenge; rejecting argument that peremptory challenges be eliminated altogether; vacating panel opinion holding opposite).

2.7 Grand Juries

Supreme Court:

Campbell v. Louisiana, 523 U.S. 392 (1998) (holding that a defendant had to object to race-based exclusion of grand jury foremen on Equal Protection grounds even if the defendant is not of the same race as the excluded foremen).

Vasquez v. Hillery, 474 U.S. 254 (1986) (holding that intentional discrimination in the selection of a grand jury is "a grave constitutional trespass," which can not be remedied by harmless error review).

CHAPTER 3

GUILT PHASE ISSUES

3. GUILT PHASE ISSUES

3.1 Standard of Collateral Review for Constitutional Trial Errors

The Supreme Court has held that a federal court can grant habeas relief on a constitutional trial error claim only if the error had a "substantial or injurious effect" on the jury's verdict in deciding whether a constitutional trial error is harmless. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). The Court further refined the harmlessness standard of *Brecht*, holding that the standard does not place the burden of proof upon the petitioner to show that a trial error substantially affected the verdict. Rather, where the issue is evenly balanced and the judge has doubts about whether the error had a "substantial and injurious effect" on the jury's verdict, then the judge must treat the error as if it were not harmless. *O'Neal v. McAninch*, 513 U.S. 432 (1995). In *California v. Roy*, 519 U.S. 2 (1996), the Supreme Court ruled that the Ninth Circuit's application of a modified *O'Neal* harmless error standard ("the omission is harmless only if review of the facts found by the jury establishes that the jury necessarily found the omitted element") was too strict and remanded the case for further consideration in light of *Brecht* and *O'Neal*.

Sections 1.16 and 4.9.3 of this handbook cover thoroughly the standard for collateral review for constitutional trial errors.

3.2 Prosecutor's Duty to Disclose Exculpatory Evidence; Knowing Presentation of False Evidence

In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Supreme Court held that if the state fails to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), the conviction cannot stand if there is a reasonable probability that the evidence, considered cumulatively, would have produced a different result at trial. The Court in *Kyles* also held that once a habeas petitioner establishes the "reasonable probability" of a different result, the error cannot subsequently be found harmless under *Brecht*. *Kyles*, 514 U.S. at 436.

Supreme Court:

Banks v. Dretke, 540 U.S. 668 (2004) (holding in capital case that the state's suppression of evidence of witness's informant status constituted "cause" for petitioner's failure to present such evidence in support of *Brady* claim at state post-conviction proceeding where petitioner had reasonably relied on prosecution's pretrial promise to disclose all *Brady* material and state had denied that witness was informant).

Strickler v. Greene, 527 U.S. 263 (1999) (applying *Kyles* standard and finding petitioner failed to show a reasonable probability that capital conviction and sentence would have been different if non-disclosed exculpatory evidence were available at trial.)

Kyles v. Whitley, 514 U.S. 419 (1995) (holding conviction cannot stand if net effect of state-withheld exculpatory evidence raises reasonable probability that disclosure would have produced different result at trial).

Ninth Circuit:

Hayes v. Brown, 399 F.3d 972 (9th Cir. 2005) (en banc) (holding under pre-AEDPA law, that the prosecutor's knowing presentation of false evidence and failure to correct the record regarding the dismissal of charges against a witness violated capital habeas petitioner's due process rights even where the witness was unaware of the agreement to dismiss the charges and thus did not commit perjury; remanding for the district court to grant the habeas writ, the court also held that (1) the application of the constitutional prohibition against the knowing presentation of false evidence, as distinguished from the prohibition against suborning perjury, was not barred under *Teague v. Lane*, 489 U.S. 288 (1989), because this rule was not "new"; and (2) the false testimony was "material" because there was a reasonable likelihood that it could have affected the judgment of the jury, and there was no need for a separate harmless error analysis under *Brecht v. Abrahamson*, 507 U.S. 619 (1993)).

Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002) (holding that even if testimony of prosecution witness was manipulated, to be entitled to relief on ground of prosecutorial misconduct petitioner would need to show a "reasonable likelihood that the false testimony could have affected the judgment of the jury"), *cert. denied*, 539 U.S. 958 (2003).

Killian v. Poole, 282 F.3d 1204 (9th Cir. 2002) (quoting *Strickland* as to standard of prejudice and holding in noncapital case that habeas relief was warranted for failure of prosecution to disclose evidence discrediting key prosecution witness; also holding that

even if failure to disclose impeachment evidence, perjury by key prosecution witness, and prosecutor's comments on privileged conduct were not each sufficient to justify habeas relief, cumulative effect required it), *cert. denied*, 537 U.S. 1179 (2003).

Paradis v. Arave, 240 F.3d 1169 (9th Cir. 2001) (finding *Brady* violation and granting habeas relief where state failed to disclose notes of prosecutor taken at meeting with sheriff's officer discussing autopsy at which officer was present; nondisclosure of notes, which could have lead to discovery of admissible evidence, put defense team at substantial disadvantage).

Downs v. Hoyt, 232 F.3d 1031 (9th Cir. 2000) (finding no prosecutorial misconduct where prosecutor failed to turn over investigative materials that were discovered in the federal habeas proceeding; finding materials might have provided leads but denying habeas relief because petitioner could not show that production would have created a reasonable probability of a different result).

United States v. Cooper, 173 F.3d 1192 (9th Cir.) (stating that to show *Brady* error, the petitioner must show that the evidence (1) was exculpatory, (2) should have been but was not produced, and (3) was material to guilt or innocence), *cert. denied*, 528 U.S. 1019 (1999).

Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (en banc) (finding *Brady* violation where state failed to disclose key witness's department of corrections' file to defense in capital prosecution and witness's credibility was key to case), *cert. denied*, 523 U.S. 1133 (1998).

District Courts in Ninth Circuit:

Williams v. Calderon, 48 F. Supp. 2d 979 (C. D. Cal. 1998) (granting summary judgment for state where petitioner presented no evidence that state's witness had deal in exchange for testimony and even if deal existed, petitioner failed to establish that disclosure would have resulted in different outcome).

See generally:

Cynthia L. Corcoran, *Prosecutors Must Disclose Exculpatory Information When the Net Effect of the Suppressed Evidence Makes* It *Reasonably Probable That Disclosure Would Have Produced a Different Result–Kyles v. Whitley,* 26 Seton Hall L. Rev. 832 (1995) (examines application of *Brady* Doctrine and suggests change in standard by which petitioner could prove a *Brady* violation).

Ty Howton, *Kyles v. Whitley: Death or Declaration*?, 86 J. Crim. L. & Criminology 1461 (1996) (arguing that Supreme Court granted certiorari in *Kyles* not to review 5th Circuit's "materiality" standard, but rather to consider whether innocent man was sentenced to death, and consequently confused "materiality" standard for future courts).

Joseph R. Weeks, *No Wrong Without a Remedy: The Effect of the Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence,* 22 Okla. City. U. L. Rev. 833 (1997) (examines application of Brady Doctrine and suggests change in standard by which petitioner could prove a Brady violation)

3.3 Prosecutor's Inappropriate Statements

The Supreme Court has held that inappropriate statements by a prosecuting attorney–particularly during closing argument–may warrant reversal. In *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), the Court held that in federal habeas actions, improper jury argument by the state does not present a claim of constitutional magnitude unless it is so prejudicial that the petitioner's trial was fundamentally unfair within the meaning of the Fourteenth Amendment's Due Process Clause. To establish prejudice, the petitioner must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that, in all probability, but for the remarks, no conviction would have occurred. Thus, in *Darden v. Wainwright*, 477 U.S. 168, 182 (1986), the Court rejected a claim of prosecutorial misconduct where the prosecutor's comments "did not manipulate or misstate the evidence, nor . . . implicate other specific rights of the accused, such as the right to counsel or to remain silent." In addition, the Court noted that the weight of the evidence against the defendant was heavy, reducing the likelihood that the jury's decision was influenced by the prosecutor's argument. *Id.*

Supreme Court:

Portuondo v. Agard, 529 U.S. 61 (2000) (reversing second circuit and holding, in a noncapital case, that prosecutor's comments that defendant's presence allowed him to tailor his testimony did not violate rights to confrontation, to testify, and to due process).

Greer v. Miller, 483 U.S. 756 (1987) (holding prosecutor's improper question did not constitute due process violation because not of sufficient significance to deny defendant's right to fair trial).

Darden v. Wainwright, 477 U.S. 168 (1986) (holding prosecutor's closing argument at guilt phase, sharing personal views that defendant is an "animal," does not warrant habeas relief because does not render trial fundamentally unfair).

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) (holding improper prosecutorial comment during closing argument of guilt phase of trial not basis for federal habeas relief unless prejudice amounting to denial of constitutional due process is shown).

Griffin v. California, 380 U.S. 609 (1965) (prohibiting prosecutor from commenting on defendant's decision not to testify).

Berger v. United States, 295 U.S. 78 (1935) (reversing conviction for improper prosecutorial argument).

Ninth Circuit:

Drayden v. White, 232 F.3d 704 (9th Cir. 2000) (holding that there was prosecutorial misconduct where prosecutor during closing argument recited soliloquy in deceased victim's voice, but that misconduct did not rise to a due process violation because remarks did not render trial fundamentally unfair), *cert. denied*, 532 U.S. 984 (2001).

Furman v. Wood, 190 F.3d 1002 (9th Cir. 1999) (rejecting habeas claim for relief because although some of prosecutor's comments were improper, jury was told comments were not evidence, and evidence against defendant was strong).

Ortiz-Sandoval v. Gomez, 81 F.3d 891 (9th Cir. 1996) (denying relief because, although prosecutor's closing argument was improper, it did not render trial fundamentally unfair).

Hardnett v. Marshall, 25 F.3d 875 (9th Cir. 1994) (holding improper to introduce testimony of witness who could not be cross-examined because self-incrimination privilege invoked, but harmless on the facts), *cert. denied*, 513 U.S. 1130 (1995).

Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993) (holding prosecutor's sole comment on defendant's failure to testify not sufficiently harmful to constitute constitutional error), *cert. denied*, 510 U.S. 1191 (1994).

Northern Mariana Islands v. Mendiola, 976 F.2d 475 (9th Cir. 1992) (finding prosecutor's comments regarding defendant's future dangerousness improper prosecutorial conduct at guilt phase where evidence against defendant not strong).

Blazak v. Ricketts, 971 F.2d 1408 (9th Cir. 1992) (finding prosecutor's repeated references to defense as "phony," during closing argument, unconstitutional prosecutorial misconduct).

Nevius v. Sumner, 852 F.2d 463, 470 (9th Cir. 1988) (holding prosecutor's emotion-choked voice and expression of personal opinions may have approached misconduct but insufficient prejudice shown), *cert. denied*, 490 U.S. 1059 (1989).

Lincoln v. Sunn, 807 F.2d 805 (9th Cir. 1987) (holding prosecutor's comments regarding defendant's failure to testify mandate reversal if: they are extensive, stress an inference of guilt from the silence and there is evidence that could have supported acquittal).

District Courts in Ninth Circuit:

Bonin v. Vasquez, 794 F. Supp. 957 (C.D. Cal. 1992) (holding not misconduct for prosecutor to intentionally elicit testimony that petitioner admitted killing twenty young males in addition the killings he was charged with), *aff'd,* 59 F.3d 815 (9th Cir.1995), *cert. denied*, 516 U.S. 1051 (1996).

Other Circuits:

United States v. Cannon, 88 F.3d 1495 (8th Cir. 1996) (holding prosecutor's reference to African-Americans as "bad people" and calling attention to fact that defendants were not locals was improper).

Brecheen v. Reynolds, 41 F.3d 1343 (10th Cir. 1994) (holding prosecutor's "improper appeals to societal alarm" and requests for "vengeance for the community to set an example" were unwarranted but not violation of due process), *cert. denied*, 515 U.S. 1135 (1995).

Drew v. Collins, 964 F.2d 411 (5th Cir. 1992) (holding not constitutional violation where prosecutor asked jury to return a verdict quickly to avoid insulting the victim's family), *cert. denied*, 509 U.S. 925 (1993).

Felde v. Blackburn, 795 F.2d 400 (5th Cir. 1986) (holding no prosecutorial misconduct in prosecution's references to evidence not in record, and warning defendant might escape if found not guilty by reason of insanity), *cert. denied*, 484 U.S. 873 (1987).

3.4 Prosecutor's Decision to Grant Witness Immunity

A criminal defendant is not entitled to compel the government to grant immunity to a witness. *United States v. Shirley*, 884 F.2d 1130, 1133 (9th Cir. 1989). However, this general rule does not apply when a prosecutor's refusal to grant immunity to a defense witness intentionally distorts the fact finding process and denies the defendant a fair trial. *United States v. Lord*, 711 F.2d 887 (9th Cir. 1983).

Ninth Circuit:

United States v. Westerdahl, 945 F.2d 1083 (9th Cir. 1991) (stating *Lord* does not require a showing that testimony is either exculpatory or essential to defense).

United States v. Shirley, 884 F.2d 1130, 1133 (9th Cir. 1989) (stating general rule that a criminal defendant is not entitled to compel the government to grant immunity to a witness).

Jeffers v. Ricketts, 832 F.2d 476, 479 (9th Cir. 1987) (following *Lord*, finding no *prima facie* case of relevance and distortion in prosecution's refusal to grant immunity to defense witness), *rev'd on other grounds*, 497 U.S. 764 (1990).

United States v. Lord, 711 F.2d 887 (9th Cir. 1983) (holding that prosecution's denial of immunity to defense witness amounts to due process violation where testimony was relevant to defense and prosecutor acted with deliberate intention of distorting fact finding process).

See generally:

Sheree Strom Carson, Note, *Walking the Thin Line in Otey v. Stenberg: Did the AG's Dual Role of Arbiter and Prosecutor Shock the Conscience?*, 73 Neb. L. Rev. 483 (1994) (analyzing *Otey* dissent and procedural vs. substantive due process claims).

Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case studies in an Emerging Jurisprudence,* 71 Temp. L. Rev. 887 (1998) (discussing prosecutor's exercise of power in cases that go to trial).

3.5 Jury Instructions

3.5.1 In General; Burden-Shifting Instructions

In re Winship, 397 U.S. 358 (1970), established the principle that the Fourteenth Amendment requires the government to prove every element of a criminal offense beyond a reasonable doubt. Since then, the Supreme Court has held that instructions requiring the jury to presume intent are unconstitutional because they relieve the government of its burden to prove intent as an element of the crime. Therefore, an instruction reading "the law presumes that a person intends the ordinary consequences of his or her voluntary acts" violates due process in a case where intent is an element of the crime charged. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

Whether an instruction on presumption violates due process depends largely on whether the presumption is permissive or mandatory. A permissive presumption or inference allows, but does not require, the jury to infer an element from proof by the prosecutor of the basic element and places no burden of proof on the defendant. In other words, the state must still convince the jury that the suggested conclusion should be inferred based on the evidence. In *Francis v. Franklin*, 471 U.S. 307 (1985), the Supreme Court stated that a permissive inference violates due process only if the suggested conclusion is not one that reason and common sense justify in light of the facts proved to the jury.

A mandatory presumption, on the other hand, requires the jury to infer the presumed fact if the state proves certain predicate facts. Such a presumption may be either conclusive or rebuttable. Since the decision in *Francis*, however, this distinction appears to have little significance. The *Francis* Court held that a rebuttable, mandatory presumption violates due process because such an instruction unconstitutionally shifts the burden of persuasion to the defendant.

Supreme Court:

Yates v. Aiken, 484 U.S. 211 (1988) (holding instruction that intent is implied or presumed from use of deadly weapon unconstitutional *Sandstrom* error).

Francis v. Franklin, 471 U.S. 307 (1985) (holding due process bars jury instruction

stating that the acts of a person of sound mind are rebuttably presumed to be the product of the person's will because it constitutes a mandatory rebuttable presumption shifting burden of persuasion to defendant on the element of intent).

Sandstrom v. Montana, 442 U.S. 510 (1979) (holding jury instruction that "the law presumes a person intends the ordinary consequences of his [or her] voluntary acts" violates Fourteenth Amendment due process rights by creating a mandatory presumption which unconstitutionally shifts burden of proof to defendant).

Ulster County Ct. v. Allen, 442 U.S. 140 (1979) (holding validity of permissive statutory presumption must be evaluated in light of facts of individual case; permissive presumption that illegal gun in car was possessed by all occupants of vehicle was reasonable under circumstances of case).

In re Winship, 397 U.S. 358 (1970) (holding that Constitution requires government to prove every element of criminal offense beyond reasonable doubt).

Ninth Circuit:

Houston v. Roe, 177 F.3d 901 (9th Cir. 1999) (holding California jury instruction 8.81.15, addressing special circumstance lying in wait, does not require defendant to prove a gap between lying in wait and the killing and, thereby, does not unconstitutionally shift the prosecution's burden of proof), *cert. denied*, 528 U.S. 1159 (2000).

Windham v. Merkle, 163 F.3d 1092 (9th Cir. 1998) (holding jury instruction regarding vicarious liability imposed on an aider/abettor for acts of his cohorts that are the natural and probable consequence of the originally contemplated crime does not create a mandatory presumption).

Leavitt v. Vasquez, 875 F.2d 260 (9th Cir.) (following *Willard*, holding instruction re: intent and aiding and abetting, which California Supreme Court held unconstitutional, not *Sandstrom* error because due process does not require aiding and abetting charge contain distinct instruction re: specific intent), *cert. denied*, 493 U.S. 866 (1989).

Dickey v. Lewis, 859 F.2d 1365, 1369 (9th Cir. 1988) (holding instruction that intent may be presumed from use of deadly weapon could have been reasonably interpreted by a juror to require presumption of intent in violation of *Sandstrom*; since trial court did not immediately qualify challenged instruction, there was no certainty its impact was reduced by a later instruction that state must prove all elements of crime).

Evans v. Lewis, 855 F.2d 631, 635-36 (9th Cir. 1988) (holding instruction that "you may determine that the defendant intended to do the act if he did it voluntarily" is permissive inference which does not violate *Sandstrom*).

Willard v. California, 812 F.2d 461 (9th Cir. 1987) (holding jury instruction which California Supreme Court held unconstitutional not *Sandstrom* error because charged crime does not require intent instruction).

Other Circuits:

Thompson v. Dixon, 987 F.2d 1038 (4th Cir. 1993) (holding presumption of sanity instruction not *Sandstrom* error).

Buford v. Dugger, 841 F.2d 1057 (11th Cir. 1988) (holding trial court's jury instruction on "associates" did not allow jury to conclusively presume defendant intended to cause death and therefore did not violate *Sandstrom*).

Drake v. Kemp, 762 F.2d 1449, 1452–53 (11th Cir. 1985) (en banc) (holding jury instruction that acts of a person of sound mind are rebuttably presumed to be products of person's will and instruction that person of sound mind rebuttably presumed to intend natural and probable consequences of acts is impermissible burden-shifting instruction under *Sandstrom*; *Sandstrom* error not harmless where evidence of intent to aid and abet the murder was not overwhelming and it was unclear from jury verdict under what theory defendant was convicted), *cert. denied*, 478 U.S. 1020 (1986).

See generally:

Laurie A. Briggs, Note, *Presumptive Mens Rea: An Analysis of the Federal Judiciary's Retreat from Sandstrom v. Montana*, 64 Notre Dame L. Rev. 367 (1989) (examining goals of *Sandstrom* and their frustration by application of *Sandstrom* by federal judiciary).

Charles Collier, Note, *The Improper Use of Presumptions in Recent Criminal Law Adjudication*, 38 Stan. L. Rev. 423 (1986) (arguing that, in developing contemporary mandatory/permissive standard, Court has misunderstood effects of presumptions on juries).

David D. Cook, Note, *Presumptive Intent Jury Instructions After Sandstrom*, 1980 Wis. L. Rev. 366 (1980) (reviewing *Sandstrom* and arguing that *Sandstrom* established strict test to erroneous presumption instructions, despite Court's declining to resolve harmless error issue).

Shari L. Jacobson, *Special Topics in the Law of Evidence: Mandatory and Permissive Presumptions in Criminal Cases: The Morass Created by Allen*, 42 U. Miami L. Rev. 1009 (1988) (discussing presumptions in criminal cases, analyzing mandatory-permissive standard, and arguing mandatory criminal presumptions have created unnecessary confusion and serve no useful purpose).

William J. Leahy and Brownlow M. Sheer, *An End to Burden–Shifting Presumptions: The Signal Criminal Law Achievement of the Post–Warren Court,* 35 B. B.J. 10 (1991) (outlining the developments of the doctrine of "presumptions" from *Winship* to *Yates*).

3.5.1.1 Retroactivity of *Sandstrom* and *Francis*

In *Yates v. Aiken*, 484 U.S. 211 (1988), the Supreme Court determined that *Francis* did not represent a new rule of law but was instead an amplification of principles announced in *Sandstrom*. Therefore, the Court reasoned that *Francis* should be applied retroactively.

Supreme Court:

Yates v. Aiken, 484 U.S. 211 (1988) (holding *Francis* applies retroactively).

3.5.1.2 Harmless Error

In *Rose v. Clark*, 478 U.S. 570 (1986), the Supreme Court held that *Sandstrom* violations are reviewed under harmless error analysis. The Court stated that jury instructions that erroneously create a mandatory presumption of intent do not require reversal of an otherwise valid conviction if they are harmless beyond a reasonable doubt. Since the *Sandstrom* rule is designed to promote accurate adjudication of guilt or innocence, the Court reasoned, there is no ground for reversal if the correctness of the verdict is clear. Although *Rose* was a habeas case, it was decided prior to *Brecht v. Abrahamson*, 507 U.S. 619 (1993), which established a new harmless error standard of review for habeas cases. *See supra* § 1.16.2.

Supreme Court:

Mitchell v. Esparza, 540 U.S. 12 (2003) (per curiam) (holding that precedent did not support Sixth Circuit Court of Appeal's conclusion that the failure of the state to charge in an indictment for aggravated murder in the course of committing aggravated robbery that defendant was a "principal" was the functional equivalent of "dispensing with the reasonable doubt requirement," as prohibited by *Sullivan v. Louisiana;* noting that in noncapital cases, trial court's failure to instruct a jury on all of the statutory elements of an offense is subject to harmless-error analysis and that "we cannot say that because the violation occurred in the context of a capital sentencing proceeding that our precedent requires the opposite result. Indeed, a number of our harmless-error cases have involved capital defendants.")*.*

Yates v. Evatt, 500 U.S. 391 (1991) (holding on certiorari to South Carolina Supreme Court that the court failed to apply proper harmless error standard when it determined beyond a reasonable doubt that jury would have found it unnecessary to rely on the unconstitutional presumptions; proper inquiry is whether jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independent of the presumption), *disapproved of on other grounds*, *Estelle v. McGuire*, 502 U.S. 62 (1991).

Burger v. Kemp, 483 U.S. 776 (1987) (holding *Sandstrom* violation harmless where evidence so dispositive of intent that it can be said beyond a reasonable doubt that jury would have found it unnecessary to rely on the presumption).

Pope v. Illinois, 481 U.S. 497 (1987) (holding test for harmless error of *Sandstrom* violation is whether "facts found by jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same").

Rose v. Clark, 478 U.S. 570 (1986) (holding harmless error analysis of *Chapman* applies to *Sandstrom* violations).

Francis v. Franklin, 471 U.S. 307 (1985) (holding unconstitutional burden-shifting instruction regarding intent not harmless where intent was issue at trial and state's evidence of intent was not overwhelming).

Rushen v. Spain, 464 U.S. 114 (1983) (holding factual findings underlying state court determination of harmless error entitled to presumption of correctness under 28 U.S.C. § 2254(d)).

Chapman v. California, 386 U.S. 18 (1967) (creating harmless beyond reasonable doubt standard for appellate review of Fifth and Fourteenth Amendment constitutional errors).

Ninth Circuit:

Watts v. Bonneville, 879 F.2d 685 (9th Cir. 1989) (following *Willard*, finding unconstitutional instruction regarding aiding and abetting harmless error).

Leavitt v. Vasquez, 875 F.2d 260 (9th Cir.) (following *Willard*, holding unconstitutional jury instruction regarding intent and aiding and abetting, even if was *Sandstrom* violation, merely harmless error), *cert. denied*, 493 U.S. 866 (1989).

Dickey v. Lewis, 859 F.2d 1365, 1371 (9th Cir. 1988) (holding state has burden of proving *Sandstrom* error harmless; "overpowering" evidence of intent to kill renders error harmless).

Ruff v. Kincheloe, 843 F.2d 1240 (9th Cir. 1988) (holding review of entire record for evidence rendering *Sandstrom* error harmless is not required where portions of record relevant to petitioner's claim are dispositive on issue of intent).

Prantil v. California, 843 F.2d 314 (9th Cir.) (holding erroneous jury instruction does not merit habeas relief if deficiencies pertain to matters not in dispute, and error did not so affect entire trial as to deprive defendant of due process), *cert. denied*, 488 U.S. 861 (1988).

McKenzie v. Risley, 842 F.2d 1525, 1530-35 (9th Cir.) (en banc) (holding since jury could not have found that defendant committed the acts without also finding intent, *Sandstrom* error is harmless), *cert. denied*, 488 U.S. 901 (1988).

Willard v. California, 812 F.2d 461 (9th Cir. 1987) (holding unconstitutional jury instruction regarding intent and aiding and abetting, even if was *Sandstrom* violation, merely harmless error).

Herd v. Kincheloe, 800 F.2d 1526, 1528 (9th Cir. 1986) (specifying *de novo* review for determining whether *Sandstrom* error is harmless as question of federal constitutional law).

3.5.2 Reasonable Doubt Instructions

In *Cage v. Louisiana*, 498 U.S. 39 (1990), the Supreme Court held that a reasonable

doubt jury instruction requiring "moral certainty" and describing "actual substantial doubt" and "grave uncertainty" violated due process. The Court held such deficient reasonable doubt instructions unconstitutional because they allow a lower degree of proof than that required by due process.

Supreme Court:

Cage v. Louisiana, 498 U.S. 39 (1990) (holding reasonable doubt instruction describing "grave uncertainty" and "actual substantial doubt" and requiring "moral certainty" unconstitutional because reasonable juror, taking instructions as a whole, could have interpreted instruction to allow degree of proof below that required by due process).

3.5.2.1 Not Subject to Harmless Error Analysis

The Supreme Court held that a deficient reasonable doubt instruction, unlike a *Sandstrom* error, is a structural defect requiring automatic reversal because a verdict based on an improper reasonable doubt instruction vitiates all of the jury's factual findings. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Therefore, a constitutionally deficient instruction regarding reasonable doubt is *not* subject to harmless error analysis.

Supreme Court:

Sullivan v. Louisiana, 508 U.S. 275 (1993) (holding constitutionally deficient reasonable doubt instruction–identical to one in *Cage v. Louisiana*, 498 U.S. 39 (1990)–requires reversal; not subject to harmless error analysis because, unlike an erroneous presumption instruction, a deficient reasonable doubt instruction vitiates all of jury's factual findings).

3.5.2.2 Retroactivity of *Cage*

In *Tyler v. Cain,* 533 U.S. 656, *reh'g denied*, 533 U.S. 970 (2001), the Supreme Court held under the AEDPA that *Cage* had not been "made retroactive to cases on collateral review by the Supreme Court," within the meaning of 28 U.S.C. § 2244(b)(2)(A). The court held that as used in § 2244(b)(2)(A), "made" means held. The court declined in

Tyler to make the rule of *Cage* retroactive because the Court stated such a holding would be dictum as it would not help the petitioner, and stressed that neither *Cage* itself nor *Sullivan v. Louisiana* had held *Cage* to be retroactive. Subsequently in *Leavitt v. Arave*, 383 F.3d 809 (9th Cir. 2004) (per curiam), the Ninth Circuit held that a *Cage* error was not a watershed rule of the sort from which the petitioner can retroactively benefit on federal habeas review under *Teague*.

Supreme Court:

Tyler v. Cain, 533 U.S. 970 (holding under AEDPA that *Cage* rule was not "made retroactive to cases on collateral review by Supreme Court" within meaning of § 2244(b)(2)(A) and thus was not available to habeas petitioner), *reh'g denied*, 533 U.S. 970 (2001).

Ninth Circuit

Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004) (per curiam) (holding that *Cage* error was not a watershed rule of the sort from which a capital habeas petitioner could retroactively benefit on habeas review, and that his claim was barred by *Teague*, making it unnecessary to determine whether the jury instruction actually ran afoul of *Cage*; noting that the six other circuits that had held *Cage* error to be a watershed rule and to be retroactive were decided after *Sullivan*, but before *Tyler v. Cain*), *cert. denied*, 125 S. Ct. 2540 (2005).

Other Circuits:

Gaines v. Kelly, 202 F.3d 598 (2nd Cir. 2000) (holding in pre-AEDPA case that *Cage* fits into the second *Teague* exception and therefore can be applied retroactively to cases on collateral review).

In re Smith, 142 F.3d 832 (5th Cir. 1998) (holding that under the AEDPA, *Cage* is not retroactive since Supreme Court has not made it so).

Rodriguez v. Bay State Correctional Center, 139 F.3d 270 (1st Cir. 1998) (holding that under the AEDPA, *Cage* is not retroactive as Supreme Court has not made it so).

Humphrey v. Cain, 138 F.3d 552 (5th Cir.) (en banc) (holding that *Cage* fits into the

second *Teague* exception and therefore can be applied retroactively to cases on collateral review), *cert. denied*, 525 U.S. 935, *and cert. denied*, 525 U.S. 943 (1998).

In re Vial, 115 F.3d 1192 (4th Cir. 1997) (en banc) (holding that under the AEDPA, *Cage* is not retroactive because Supreme Court has not made it so).

In re Hill, 113 F.3d 181 (11th Cir. 1997) (holding that under the AEDPA, Cage is not retroactive as Supreme Court has not made it so).

Adams v. Aiken, 41 F.3d 175 (4th Cir. 1994) (holding rule that constitutionally deficient reasonable doubt instruction violates due process applies retroactively under *Teague* second exception), *cert. denied,* 515 U.S. 1124 (1995).

Nutter v. White, 39 F.3d 1154 (11th Cir. 1994) (holding *Cage* announces a new rule of law falling within *Teague's* second exception).

3.5.3 Lesser-Included Offense Instructions

In *Beck v. Alabama*, 447 U.S. 625 (1980), the Supreme Court held that a capital defendant is constitutionally entitled to an instruction on lesser-included offenses if the evidence could support a finding of guilt on such offenses. The Court confirmed in *Hopper v. Evans*, 456 U.S. 605 (1982), that the guarantee of a lesser-included offense instruction is limited to cases where the evidence supports such an instruction. The *Hopper* Court stated "[t]he federal rule is that a lesser-included offense instruction should be given 'if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater.'" *Id*. at 612 (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973)).

The *Beck* guarantee is limited in another way, as well. In *Spaziano v. Florida*, 468 U.S. 447 (1984), the trial court offered to instruct the jury on lesser-included offenses if the defendant would waive the statute of limitations on those offenses. The defendant refused to waive his statute of limitations defenses, and the court consequently did not instruct on lesser-included offenses. In upholding the trial court's refusal to instruct on lesser-included offenses, the Supreme Court held that no such instructions are necessary where no such offense is actually at issue. In *Spaziano*, since the statute of limitations for the lesser-included offenses had expired and the defendant had not waived the statute of limitations, the offenses were not at issue, and

Beck did not require instruction on them.

In *Hopkins v. Reeves*, 524 U.S. 88 (1998), the Court resolved a split of authority between the Eighth and Ninth Circuits. The *Hopkins* Court reversed the Eighth Circuit and held that in a case of felony-murder, a defendant is not entitled to an instruction on second degree murder or manslaughter since neither is a lesser-included offense of felony-murder. The Court rejected the argument that *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987) effectively added an intent element to capital felony-murder charges. The Court distinguished *Beck* and held that the jury could convict on felony-murder or acquit.

Supreme Court:

Hopkins v. Reeves, 524 U.S. 88 (1998) (holding that second degree murder and manslaughter instructions were not required when state pursued first degree felony-murder conviction since they were not lesser-included offenses of felony-murder).

Schad v. Arizona, 501 U.S. 624 (1991) (holding *Beck* does not require an instruction on every possible lesser-included offense supported by the evidence; since trial court instructed on second degree murder, it need not also have instructed on robbery).

Spaziano v. Florida, 468 U.S. 447 (1984) (holding constitutional for trial court to refuse to instruct jury on lesser-included offense where defendant refused to waive the statute of limitations as to the lesser offenses in exchange for jury instructions on the lesser offenses).

Hopper v. Evans, 456 U.S. 605 (1982) (holding constitutional to preclude consideration by the jury of lesser-included offenses where evidence would not support the lesser offenses).

Beck v. Alabama, 447 U.S. 625 (1980) (holding unconstitutional to preclude consideration by the jury of lesser-included offenses where evidence would support the lesser offenses).

Ninth Circuit:

LaGrand (Karl) v. Stewart, 133 F.3d 1253 (9th Cir.) (holding trial court did not err in refusing to instruct on second degree murder as lesser-included offense of felony-murder; distinguishing *Beck* because court alternatively instructed *LaGrand* jury on

premeditated murder which included a stepdown second degree murder instruction), *cert. denied*, 525 U.S. 971 (1998).

Gerlaugh v. Stewart, 129 F.3d 1027 (9th Cir. 1997) (recognizing that no lesser-included homicide offense exists to felony-murder under Arizona law; holding even if facts purporting to negate specific intent warranted second degree murder instruction, claim still fails under *Brecht*), *cert. denied*, 525 U.S. 903 (1998).

Villafuerte v. Stewart, 111 F.3d 616 (9th Cir. 1997) (holding, in felony-murder trial, no constitutional error in failing to give lesser-included offense instruction of unlawful imprisonment on predicate felony of kidnapping when conviction of predicate felony does not require finding of guilt on murder charge), *cert. denied*, 522 U.S. 1079 (1998).

United States v. Roston, 986 F.2d 1287 (9th Cir.) (holding trial court did not err in refusing to instruct on lesser-included offense of voluntary manslaughter in murder case because, on facts, not clear that jury would have found manslaughter instead of murder), *cert. denied*, 510 U.S. 874 (1993).

Carriger v. Lewis, 971 F.2d 329 (9th Cir. 1992) (holding no error where judge instructed jury on second degree murder but failed to provide jury with verdict form for second degree murder where jury found petitioner guilty of underlying felony as well as first degree felony-murder), *cert. denied*, 507 U.S. 992 (1993).

Greenawalt v. Ricketts, 943 F.2d 1020 (9th Cir. 1991) (holding trial court did not commit error for failing to give second degree murder instruction where defendant was tried solely for felony-murder; Arizona law recognizes no lesser-included offense for felony-murder), *cert. denied*, 506 U.S. 888 (1992).

United States v. Walker, 915 F.2d 480, 486 (9th Cir. 1990) (stating defendant entitled to lesser-included offense instruction when elements of lesser offense are subset of charged offense and factual basis supports instruction).

Woratzeck v. Ricketts, 820 F.2d 1450, 1457 (9th Cir. 1987) (holding due process requires that lesser-included offense instruction to a capital offense be given whenever the evidence warrants such an instruction; however, failure to instruct on the lesser-included offenses underlying felony-murder charge may be harmless error), *vacated on other grounds*, 486 U.S. 1051 (1988).

Vickers v. Ricketts, 798 F.2d 369 (9th Cir. 1986) (holding second degree murder instruction required because premeditation–difference between first and second degree murder–was in dispute even though the evidence on lack of premeditation was not

compelling), *cert. denied*, 479 U.S. 1054 (1987).

United States v. Brown, 761 F.2d 1272, 1277 (9th Cir. 1985) (holding defendant entitled to lesser-included offense instruction if (1) lesser-included offense is within offense charged, and (2) based on evidence presented at trial, a rational jury could find defendant guilty of lesser-included offense but not greater offense).

District Courts in Ninth Circuit:

Gerlaugh v. Lewis, 898 F. Supp. 1388 (D. Ariz. 1995) (applying *Beck*, holding no entitlement to lesser-included offense instruction on voluntary intoxication), *aff'd*, 129 F.3d 1027 (9th Cir. 1997), *and cert. denied*, 525 U.S. 903 (1998).

See generally:

Michael H. Hoffheimer, Note, *Habeas Corpus Review of State Trial Court Failure to Give Lesser Included Offense Instructions*, 16 U. Mich. L. Rev. 617 (1983) (advocating federal review of state convictions where lesser-included offense instructions were available under state law but were not given).

3.5.4 Alternative Grounds for Conviction: Malice or Premeditation vs. Felony-Murder

Where a capital conviction is supported on alternative grounds of premeditation or felony-murder, the Supreme Court has held that the Constitution does not require the jury to reach separate verdicts on each alternate theory. *Schad v. Arizona*, 501 U.S. 624 (1991). However, where the court instructs the jury that it may rely on two or more independent grounds for conviction, and the evidence is insufficient on one of those grounds, the general verdict must be set aside since it may have rested exclusively on the insufficient ground. *Zant v. Stephens*, 462 U.S. 862, 881 (1983).

Supreme Court:

Schad v. Arizona, 501 U.S. 624 (1991) (plurality) (holding premeditation and felony-murder are not separate offenses requiring separate verdicts; rather, they are two means of satisfying the mens rea requirement for first degree murder; therefore, it was constitutionally permissible for the jury to reach one verdict based on any combination of the statutory alternatives of premeditation or felony-murder).

Zant v. Stephens, 462 U.S. 862, 881 (1983) (holding general verdict must be set aside

when jury is instructed that it may rely on two or more independent grounds for conviction and evidence is insufficient on one of those grounds because the verdict may have rested exclusively on the insufficient ground).

Ninth Circuit:

LaGrand (Karl) v. Stewart, 133 F.3d 1253 (9th Cir.) (holding that lesser-included offense instruction to felony-murder need not be given where jury is given the option of first degree murder and second degree murder), *cert. denied*, 525 U.S. 971 (1998).

See generally:

Elizabeth R. Carty, *Schad v. Arizona*: *Jury Unanimity on Trial*, 42 Cath. U. L. Rev. 355 (1993) (analyzing *Schad* and whether Arizona statute violates defendant's due process rights, and contrasting felony-murder doctrine with premeditated murder doctrine as alternative theories of first degree murder).

James J. McGuire, Note, *Schad v. Arizona*: *Diminishing the Need for Verdict Specificity*, 70 N.C. L. Rev. 936 (1992) (reviewing *Schad* and its precedent, concluding that Court's recharacterization of jury unanimity is misguided).

3.5.5 Standard for Measuring Constitutionality of Jury Instruction

In *Estelle v. McGuire*, 502 U.S. 62 (1991), the Supreme Court established that the proper inquiry for determining the constitutional validity of a jury instruction is not whether the instruction "could have" been applied in an unconstitutional manner, but rather, whether a "reasonable likelihood" exists that the jury applied the instruction unconstitutionally.

Supreme Court:

Victor v. Nebraska, 511 U.S. 1 (1994) (applying *Estelle* standard in reviewing constitutionality of reasonable doubt instruction).

Estelle v. McGuire, 502 U.S. 62 (1991) (setting forth standard for reviewing constitutionality of jury instruction as whether there is "reasonable likelihood" that jury unconstitutionally applied it).

3.6 Juror Misconduct

Ninth Circuit:

Fields v. Brown, 431 F.3d 1186 (9th Cir. 2005) (holding that claim of juror misconduct based on the jury's use of Biblical quotations and dictionary definitions during penalty phase of capital trial was not *Teague*-barred; also holding that the Biblical references were not necessarily extrinsic, factual material and to the extent that the material was extrinsic or improper it did not have an injurious effect on the verdict).

Sassounian v. Roe, 230 F.3d 1097 (9th Cir. 2000), *as amended on denial of rehearing,* (applying *Brecht* to claim in pre-AEDPA petition and finding prejudicial error where jurors considered evidence discussed at side bar but not admitted in evidence; *but see* dissenting opinion finding error harmless under *Brecht*).

CHAPTER 4

SENTENCING PHASE ISSUES

4. SENTENCING PHASE ISSUES

4.1 General Due Process Concerns

In *Gardner v. Florida*, 430 U.S. 349 (1977), the Supreme Court established that a capital sentencing proceeding must comply with due process, just as the trial itself, because it is a critical stage in the criminal proceeding. The Court has also made various specific findings of a defendant's rights at sentencing based on the due process clause.

Supreme Court:

Gardner v. Florida, 430 U.S. 349, 358 (1977) (stating capital sentencing proceedings must satisfy due process; no due process where petitioner sentenced to death on basis of information of which he had no opportunity to deny or explain).

Ninth Circuit:

Fetterly v. Paskett, 15 F.3d 1472, 1482 (9th Cir.) (citing *Gardner*, stating sentencing must satisfy due process; defendant has legitimate interest in character of procedure which leads to imposition of sentence, even if defendant may have no right to object to particular *result* of sentencing proceedings), *cert. denied*, 513 U.S. 914 (1994).

See Generally:

Beth S. Brinkman, Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 Yale L.J. 351 (1984) (reviewing Supreme Court's due process treatment of capital cases, focusing on sentencing, and arguing that due process analysis of capital sentencing system should include presumption of life, analogous to presumption of innocence).

4.1.1 Rights Regarding Evidence Presented at Sentencing

In *Gardner v. Florida*, the Supreme Court established that a defendant cannot be sentenced to death based on confidential evidence presented at sentencing that the

defendant had no opportunity to deny or explain. In *Skipper v. South Carolina*, 476 U.S. 1 (1986), the Court confirmed that this rule applies not only in situations where the evidence was not disclosed but also where the defendant was prevented from rebutting the information. In *Gray v. Netherland*, 518 U.S. 152 (1996), the Supreme Court held that while a capital defendant at sentencing has a due process right to notice of all of the charges against him or her, there is no constitutional right to notice of the evidence which the state plans to use to prove the charges.

Supreme Court:

Gray v. Netherland, 518 U.S. 152 (1996) (holding, while capital defendant at sentencing has right to notice of charges against him, there is no constitutional right to notice of evidence which state will use to prove charges; distinguishing *Gardner* as involving confidential information kept from defendant altogether).

Romano v. Oklahoma, 512 U.S. 1 (1994) (holding introduction at sentencing of defendant's prior conviction and death sentence not violation of due process because instructions did not offer jury any means to give effect to such evidence, and other evidence presented by state was sufficient to justify imposition of death sentence).

Skipper v. South Carolina, 476 U.S. 1 (1986) (stating sentencer cannot be precluded from considering any mitigating evidence defendant offers as basis for sentence less than death).

Gardner v. Florida, 430 U.S. 349 (1977) (holding judge's consideration of confidential sentence reports submitted but not available to defendant violated due process: defendant could not be sentenced based on evidence which he had no opportunity to deny or explain).

District Courts in Ninth Circuit:

Bonin v. Vasquez, 794 F. Supp. 957, 977 (C.D. Cal. 1992) (holding that barring petitioner's co-counsel from presenting argument at the penalty phase after lead counsel presented argument did not violate due process), *aff'd*, 59 F.3d 815 (9th Cir. 1995), *cert. denied*, 516 U.S. 1051 (1996).

Other Circuits:

Ables v. Scott, 73 F.3d 591 (5th Cir.) (stating criminal defendant entitled to notice and

due process at sentencing, to a "lesser degree than at trial"), *cert. denied*, 517 U.S. 1198 (1996).

Russell v. Lynaugh, 892 F.2d 1205 (5th Cir. 1989) (holding admission in guilt phase of evidence of robbery conviction which was later reversed on appeal did not undermine fundamental fairness of sentencing phase), *cert. denied,* 501 U.S. 1259 (1991).

See generally:

Steven P. Smith, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 Colum. L. REV. 1249 (1993) (arguing that introduction of extraneous, unadjudicated offenses at sentencing phase of capital trial violates due process and should be barred or severely restricted).

A.J. Stephani, *Dead Again: Prior Death Sentences in Capital Sentencing Procedures*, 64 U. Cin. L. Rev. 249 (1995) (analyzing *Romano* and agreeing with *Romano* dissent).

4.1.2 Right to Speak

The Ninth Circuit has held that a capital defendant has a due process right to speak at sentencing.

Ninth Circuit:

Boardman v. Estelle, 957 F.2d 1523 (9th Cir.) (holding where defendant, either unrepresented or represented by counsel, makes an affirmative request to speak at the sentencing phase, denial of that request is a denial of due process), *cert. denied*, 506 U.S. 904 (1992).

See generally:

Caren Myers, Note, *Encouraging Allocution at Capital Sentencing: A Proposal for Use Immunity*, 97 Colum. L. Rev. 787 (1997) (addressing question of detriment to defendant from speaking at sentencing phase, and advocating use immunity as solution).

4.1.3 Notice of Death Sentence Possibility

The Supreme Court has held that the imposition of the death penalty where the state has

given notice that it will not recommend death is a violation of due process.

Supreme Court:

Lankford v. Idaho, 500 U.S. 110 (1991) (holding petitioner's due process rights were violated where trial court imposed death penalty despite state's notice that it would not recommend the death penalty).

4.1.4 Right to Confront and Cross-Examine Witnesses

In *Williams v. New York*, 337 U.S. 241 (1949), the Supreme Court held that the sentencing judge's consideration of information contained in a presentence report did not violate due process because a defendant does not have the right to confront and cross-examine witnesses at sentencing. However, in light of *Gardner*, the Ninth Circuit has construed *Williams* to stand for the proposition that a sentencing judge can rely on information provided by non-testifying witnesses when the defendant is aware of and has the opportunity to rebut, deny, or explain, the submitted information. *Ortiz v. Stewart*, 149 F.3d 923, 937 (9th Cir. 1998), *cert. denied*, 526 U.S. 1123 (1999).

Supreme Court:

Gardner v. Florida, 430 U.S. 349 (1977) (distinguishing *Williams*, basing due process violation on confidential nature of information rather than on its hearsay character).

Specht v. Patterson, 386 U.S. 605 (1967) (reaffirming *Williams* but declining to extend it to non-capital case).

Williams v. New York, 337 U.S. 241 (1949) (holding defendant has no due process right to confront and cross-examine witnesses during sentencing proceeding).

Ninth Circuit:

Ortiz v. Stewart, 149 F.3d 923, 937 (9th Cir. 1998) (discussing *Williams* and *Gardner*, holding no due process violation where sentencing judge considered evidence offered by defendant's wife at her trial to rebut defendant's mitigation evidence, reasoning that the defendant had an opportunity to rebut wife's testimony), *cert. denied*, 526 U.S. 1123 (1999).

United States v. Petty, 992 F.2d 1015 (9th Cir. 1993) (following *Williams*, holding confrontation clause does not apply at capital sentencing to bar admission of hearsay evidence; dissent arguing capital sentencing does entitle defendant to right to confront and cross-examine).

Other Circuits:

Bassette v. Thompson, 915 F.2d 932, 939 (4th Cir. 1990) (suggesting defendants in capital cases do not have right to confront and cross-examine at sentencing all witnesses under due process), *cert. denied*, 499 U.S. 982 (1991).

United States v. Marshall, 910 F.2d 1241, 1244 (5th Cir. 1990) (holding use of hearsay at sentencing did not deny defendant right of confrontation).

Proffitt v. Wainwright, 685 F.2d 1227, 1255 (11th Cir. 1982) (distinguishing *Williams* and holding trial court erred by refusing to allow defense counsel to cross-examine prosecution expert witness at sentencing hearing; reasoning that due process requires cross-examination–at least where necessary to ensure the reliability of the witnesses' testimony).

See generally:

Christopher K. Tahbaz, Note, *Fairness to the End: The Right to Confront Adverse Witnesses in Capital Sentencing Proceedings*, 89 Colum. L. Rev. 1345 (1989) (analyzing Supreme Court and state court approaches, including Eighth Amendment and due process, to defendant's right to confront and cross-examine witnesses in capital sentencing phase).

4.1.5 Length of Sentencing Proceeding

Although the Supreme Court has not addressed the issue, the Eleventh Circuit has held that due process does not require a sentencing proceeding to be a specific length.

Other Circuits:

Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987) (holding due process does not require sentencing proceeding to be specific length, rather, the proceeding is consistent with due process if not fundamentally unfair).

4.1.6 Defendant's Appearance Before Jury: Jail Clothing and Restraints

The presumption of innocence prevents a court from compelling a defendant to wear identifiable prison clothing at trial. The presumption of innocence does not apply to a sentencing proceeding, however, and the Ninth Circuit and other circuits have held that requiring a defendant to wear prison clothing at sentencing does not offend due process.

The Supreme Court has held that courts may, at times, compel a defendant to wear restraints. In *Illinois v. Allen*, 397 U.S. 337 (1970), the Court held that although "inherently prejudicial" to a defendant, security interests may warrant shackling a defendant at trial. However, shackling must be done only as a "last resort." Furthermore, the Court held in *Deck v. Missouri*, 125 S. Ct. 2007 (2005), that the Constitution forbids the use of visible shackles during the penalty phase of a capital case, unless that use is "justified by an essential state interest"–such as courtroom security–specific to the defendant on trial. The Ninth Circuit has held that due process requires the trial judge to find compelling circumstances of courtroom security and to pursue less restrictive alternatives before imposing such physical restraints. *Jones v. Meyer*, 899 F.2d 883, 885 (9th Cir.), *cert. denied*, 498 U.S. 832 (1990). According to *Wilson v. McCarthy*, 770 F.2d 1482 (9th Cir. 1985), shackling in the Ninth Circuit is proper where there is a serious threat of escape or danger to those in and around the courtroom, or where courtroom disruption is likely if the defendant is not restrained. These limitations on shackling exist at sentencing proceedings as well.

Supreme Court:

Deck v. Missouri, 125 S. Ct. 2007 (2005) (holding that Constitution forbids use of visible shackles during penalty phase, just as it does during guilt phase, unless that use is "justified by an essential state interest" specific to the defendant on trial).

Estelle v. Williams, 425 U.S. 501 (1976) (holding presumption of innocence prohibits trial court from compelling defendant to wear identifiable prison clothes at trial, without violating due process).

Illinois v. Allen, 397 U.S. 337 (1970) (holding public's interest in security may warrant use of shackles, but only as "last resort").

Ninth Circuit:

Rhoden v. Rowland, 172 F.3d 633 (9th Cir. 1999) (holding petitioner, who was unjustifiably shackled during entire trial, entitled to habeas relief where five jurors saw shackles and case involved violent crimes and disputed evidence).

Rich v. Calderon, 170 F.3d 1236 (9th Cir.) (holding no constitutional error resulted from shackling capital defendant where record devoid of any indication that jury saw shackles), *amended and superseded on denial of reh'g*, 187 F.3d 1064 (9th Cir. 1999).

Villafuerte v. Stewart, 111 F.3d 616, 628 (9th Cir.) (holding no constitutional violation where defendant appeared in jail clothing on first day of trial, because civilian clothes were available but rejected and defendant volunteered to jury that he had been in jail for five months), *cert. denied*, 522 U.S. 1079 (1998).

Ainsworth v. Calderon, 152 F.3d 1223 (9th Cir. 1998) (finding no due process violation where up to six armed guards in courtroom during trial).

Duckett v. Godinez, 109 F.3d 533 (9th Cir.) (holding defendant's appearance before sentencing jury in shackles is error, but harmless error where shackles not visible to jury), *cert. denied*, 522 U.S. 848 (1997).

Logan v. Gomez, 81 F.3d 169 (9th Cir. 1996) (finding shackling of defendant at trial prejudicial, remanding for evidentiary hearing to determine if error was harmless).

Hartman v. McCarthy, 74 F.3d 1245 (9th Cir. 1996) (concluding no compelling need for shackles, but harmless error because state had strong case, defendant's dangerousness was not an issue, and jury knew defendant was an inmate).

Duckett v. Godinez, 67 F.3d 734 (9th Cir. 1995) (holding petitioner's due process rights were violated by being required to appear in shackles at sentencing because no evidence of disruptive behavior; noting that requiring defendant to wear prison clothes during sentencing does not violate due process, citing *Estelle v. Williams*), *cert. denied*, 517 U.S. 1158 (1996).

Morgan v. Bunnell, 24 F.3d 49 (9th Cir. 1994) (holding shackling justified on facts, for courtroom security).

Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir.) (holding shackling defendant during trial not due process violation because defendant's conduct justified restraint and less restrictive alternatives were attempted and failed), *cert. denied*, 512 U.S. 1229 (1994).

Castillo v. Stainer, 997 F.3d 669 (9th Cir.) (describing two-step process necessary before shackles may be used at trial), *cert. denied*, 510 U.S. 1014 (1993).

Jones v. Meyer, 899 F.2d 883, 885 (9th Cir.) (stating Ninth Circuit precedent that "court must be persuaded by compelling circumstances that some measure was needed to maintain security of courtroom," and that court must "pursue less restrictive alternatives before imposing physical restraints"), *cert. denied*, 498 U.S. 832 (1990).

Spain v. Rushen, 883 F.2d 712, 716, 720 (9th Cir. 1989) (holding defendant has constitutional right to appear before jury without shackles, absent compelling circumstances), *cert. denied*, 495 U.S. 910 (1990).

Wilson v. McCarthy, 770 F.2d 1482 (9th Cir. 1985) (addressing limits on right to appear before jury free of shackles).

District Courts in Ninth Circuit:

Williams v. Calderon, 41 F. Supp. 2d 1043 (C.D. Cal. 1998) (finding no evidence to justify leg chain and handcuffs, but finding error harmless under *Brecht*).

Other Circuits:

United States v. Stewart, 20 F.3d 911, 916 (8th Cir. 1994) (holding that when circumstances permit shackling defendant during trial, compelling defendant also to wear prison clothing is not inherently prejudicial because prisoner status is already apparent to jury).

Marquez v. Collins, 11 F.3d 1241 (5th Cir.) (holding capital defendant must not be shackled before jury unless restraint is necessary to protect safety of trial participants or sanctity of trial itself; holding shackling at trial not due process violation, on facts), *cert. denied*, 513 U.S. 881 (1994).

Elledge v. Dugger, 823 F.2d 1439 (11th Cir.) (holding new capital sentencing hearing required where defendant forced to appear before jury in shackles and state failed to establish shackling was necessary and trial court failed to consider less restrictive alternatives or give defendant an opportunity to rebut charges that he [or she] was a security threat), *withdrawn in part*, 833 F.2d 250 (11th Cir. 1987), *and cert. denied*, 485 U.S. 1014 (1988).

4.1.7 Sentencer Reliance on Undisclosed Information

In *Gardner v. Florida*, the Supreme Court held that a death sentence based in part on a confidential presentence report given to the trial judge but not to the defense was unconstitutional because it was based on information which the defendant had no opportunity to deny or explain. Thus, under *Gardner* and its progeny, a capital defendant must be permitted to see and respond to any evidence or argument on which the death sentence might be based.

Supreme Court:

Simmons v. South Carolina, 512 U.S. 154 (1994) (citing *Gardner*, holding that where a defendant's future dangerousness is at issue, and state law prohibits defendant's release on parole, due process requires that the sentencing jury be informed that defendant is parole ineligible; to extent that jury's potential belief that defendant was parole eligible may have affected its deliberations, defendant would be sentenced to death on basis of information which he or she had no opportunity to deny or explain).

Gardner v. Florida, 430 U.S. 349 (1977) (holding Eighth and Fourteenth Amendments bar reliance by sentencer on confidential presentence report; "full disclosure of the basis for the death sentence" is required).

Ninth Circuit:

McKenzie v. McCormick, 27 F.3d 1415 (9th Cir. 1994) (distinguishing *Gardner* in upholding death sentence issued after meeting between prosecutor and judge after verdict and before sentencing because no evidence that meeting, or substance of it, affected sentencing decision), *cert. denied*, 514 U.S. 1033 (1995).

Paradis v. Arave, 20 F.3d 950 (9th Cir. 1994) (holding private letter from co-defendant and in camera statements to judge not *Gardner* violation because no showing that judge considered them in sentencing), *cert. denied*, 513 U.S. 1117 (1995).

Clark v. Ricketts, 958 F.2d 851 (9th Cir.) (holding no constitutional violation where judge had presentence report before him at sentencing phase where evidence showed that judge's finding that defendant lacked remorse was based on evidence at trial and not information contained in presentence report), *cert. denied*, 506 U.S. 838 (1992).

Other Circuits:

Lusk v. Singletary, 965 F.2d 946 (11th Cir. 1992) (holding court's failure to ensure defendant personally reviewed presentence report not a due process *Gardner* violation), *cert. denied*, 508 U.S. 920 (1993).

Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) (holding judge's *ex parte* visit to prison death row constitutes *Gardner* violation, but harmless error), *cert. denied*, 496 U.S. 929 (1990).

See generally:

Lawrence E. Jacobs, Note, *Ex Parte Information and the Appellate Review of Capital Sentences*, 60 N.Y.U. L. Rev. 104 (1985) (reviewing *Gardner*, concluding use of *ex parte* information in appellate review of death sentence is unconstitutional).

4.1.8 Right to Be Present at Verdict

A defendant has a due process right to be present in court when the presence bears a reasonably substantial relation to the opportunity to defend but not where the presence would be useless. *Snyder v. Massachusetts*, 291 U.S. 97 (1934). The Supreme Court, however, has not specifically addressed the constitutionality of a capital defendant's absence when a jury announces sentence. In *Rice v. Wood*, 77 F.3d 1138 (9th Cir.), *cert. denied*, 519 U.S. 873 (1996), a case in which the state conceded that petitioner's absence from the reading of her capital sentencing verdict amounted to constitutional error, the Ninth Circuit held that the error was not structural error and upheld the verdict under a harmless error analysis.

Ninth Circuit:

Rice v. Wood, 77 F.3d 1138 (9th Cir.) (holding trial court's acceptance of jury's death verdict in defendant's absence was harmless error), *cert. denied*, 519 U.S. 873 (1996).

Campbell v. Wood, 18 F.3d 662 (9th Cir.) (stating felony defendant has fundamental right to be present at every stage of trial; right may be waived if voluntary, knowing, and intelligent), *cert. denied*, 511 U.S. 1119 (1994).

4.1.9 Competency at Penalty Phase

Davis v. Woodford, 384 F.3d 628 (9th Cir. 2004) (affirming denial of a habeas petition in a capital case, the court held that, although petitioner's Sixth Amendment right to a fair trial would have been implicated if he had actually been incompetent at penalty phase of trial, the trial court did not err in not sua sponte holding a competency hearing at the penalty phase where there was no substantial evidence of incompetency, and the petitioner was not actually incompetent; thus holding district court did not err in denying an evidentiary hearing on these issues, and counsel was not ineffective in failing to request a competency hearing), *cert. dismissed*, 126 S. Ct. 410 (2005).

4.2 Fifth and Sixth Amendment Restrictions on Use of Psychiatric Examinations at Sentencing

In *Estelle v. Smith*, 451 U.S. 454 (1981), the Supreme Court held that the state may not compel a defendant to submit to a psychiatric examination for sentencing purposes. The Court held that *Miranda v. Arizona*, 384 U.S. 436 (1966) applies to any examination of a defendant performed for the purpose of obtaining evidence to be used at sentencing. A psychiatric interview conducted without proper *Miranda* warnings or without notice to counsel violates the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel, respectively, and is inadmissible at sentencing.

The *Smith* Court, acknowledging the state's interest in ensuring a defendant's mental competency, held that a defendant does not have a right to refuse to submit to a psychiatric examination to determine his or her competency to stand trial. However, the state must limit its use of the elicited testimony to that issue only.

In *Smith,* the Supreme Court established that the Fifth Amendment privilege against self-incrimination applies to capital proceedings. The Court's holding regarding the use of psychiatric testimony is limited to those defendants "who neither initiate . . . a psychiatric evaluation nor attempt . . . to introduce any psychiatric evidence." In a noncapital case, *Buchanan v. Kentucky*, 483 U.S. 402 (1987), the Court reasoned that where a defendant requests a psychiatric examination or presents his or her own psychiatric evidence, then the prosecution should at least be allowed to rebut this evidence with evidence from the psychiatric examinations requested by the

defendant. Thus, the *Buchanan* Court held that a defendant waives his or her Fifth Amendment privilege against self-incrimination by raising a mental status defense. Following this logic, some circuits have held that raising an insanity defense constitutes a waiver of a defendant's Fifth Amendment right with regard to psychiatric testimony. In the capital case of *Powell v. Texas*, 492 U.S. 680 (1989), the Court ruled that a Fifth Amendment waiver due to the insanity defense does not also constitute a waiver of the Sixth Amendment right to counsel.

In *Penry v. Johnson*, 532 U.S. 782 (2001), the Court limited *Estelle* to its narrow facts and denied relief under 28 U.S.C. § 2254(d). The Court noted the distinguishing facts: (1) Penry made his mental status an issue in both his prior case and the death case; (2) Penry's counsel requested the competency evaluation in the earlier case; (3) the testimony elicited at Penry's sentencing trial was presented in cross-examination through Penry's own witness; and (4) Penry had not committed the capital murder when he underwent the competency-determination interview so future dangerousness was not an issue.

A defendant is protected by the Sixth Amendment right to counsel when the psychiatric exam takes place after formal adversary proceedings have begun. Thus, under *Smith,* a defendant must also validly waive his or her right to counsel before a psychiatric examination or testimony regarding that examination is admissible at sentencing.

Supreme Court:

Penry v. Johnson, 532 U.S. 782 (2001) (holding Texas court did not err in distinguishing *Estelle*–where, on state's cross-examination and over defense objection, psychiatrist recited from report of another psychiatrist who evaluated defendant for competency to stand trial on an earlier unrelated charge; finding Texas court's decision not "contrary to" or an "unreasonable application of" Supreme Court law within meaning of 28 U.S.C. § 2254(d), because the Court never extended *Estelle's* Fifth Amendment holding beyond its particular facts; also stating that even if the testimony was admitted contrary to *Estelle*, error probably harmless under *Brecht*).

Powell v. Texas, 492 U.S. 680 (1989) (applying *Satterwhite* to reverse death sentence on Sixth Amendment grounds where psychiatric testimony re: future dangerousness admitted at sentencing in violation of *Estelle v. Smith;* waiver of Fifth Amendment

rights by raising insanity defense does not constitute waiver of Sixth).

Satterwhite v. Texas, 486 U.S. 249 (1988) (holding *Smith* violation because admission of psychiatric testimony based on examination undertaken without notice to defense counsel or waiver of right to counsel violated Sixth Amendment).

Buchanan v. Kentucky, 483 U.S. 402, 422–23 (1987) (applying *Smith* to use of psychiatric evidence as rebuttal during guilt stage of noncapital case; "if a defendant requests [a psychiatric] evaluation or presents psychiatric evidence, . . . at the very least, the prosecution may rebut this presentation with evidence from reports of the examination that the defendant requested").

Estelle v. Smith, 451 U.S. 454 (1981) (holding Fifth, Sixth, and Fourteenth Amendments bar admission of psychiatric testimony resulting from court-ordered examination where defendant was not advised of *Miranda* rights).

Ninth Circuit:

Hoffman v. Arave, 236 F.3d 523 (9th Cir.) (finding court's refusal to allow counsel to attend petitioner's presentence interview violated petitioner's Sixth Amendment right to counsel at a critical stage; remanding for evidentiary hearing to determine whether error was harmless), *cert. denied*, 534 U.S. 944 (2001).

Harris v. Pulley, 692 F.2d 1189, 1202–03 (9th Cir. 1982) (holding, where defendant had not requested or retained counsel and was not yet arraigned or indicted, no Sixth Amendment concerns raised by psychiatric interview conducted; at this stage, statements to psychiatrist should be analyzed for voluntariness under Fifth Amendment), *rev'd on other grounds*, 465 U.S. 37 (1984).

District Courts in Ninth Circuit:

United States v. Vest, 905 F. Supp. 651 (D. Mont. 1995) (ruling defendants would be compelled to undergo pretrial examination by government mental health experts if defendants planned to introduce mental health testimony at penalty phase).

Troiani v. Poole, 858 F. Supp. 1051 (S.D. Cal. 1994) (finding no Fifth or Sixth Amendment violations under *Smith).*

Arnett v. Ricketts, 665 F. Supp. 1437, 1442-43 (D. Ariz. 1987) (holding testimony of psychiatrist and probation officer at sentencing violated petitioner's *Miranda* rights, under *Smith).*

See generally:

Welsh S. White, *Government Psychiatric Examinations and the Death Penalty,* 37 Ariz. L. Rev. 869 (1995) (addressing constitutional issues raised when defendant is subjected to government psychiatric examination).

Welsh S. White, *The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases,* 74 J. Crim. L. & Criminology 943 (1983) (analyzing Fifth Amendment issues raised when a defendant presents expert psychiatric testimony in support of mitigating circumstances at sentencing).

4.2.1 Harmless Error

In *Satterwhite v. Texas*, 486 U.S. 249 (1988), the Supreme Court held that the harmless error standard applies to the review of *Estelle v. Smith* violations.

Supreme Court:

Satterwhite v. Texas, 486 U.S. 249 (1988) (holding harmless error standard applies in capital cases to admission of testimony in violation of Sixth Amendment right set out in *Estelle v. Smith;* in this case, error not harmless because impossible to say beyond reasonable doubt that expert testimony re: future dangerousness did not influence sentencing jury).

4.2.2 Retroactivity of *Estelle v. Smith*

The Fifth and Eleventh Circuits apply *Estelle v. Smith* retroactively.

Other Circuits:

Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.) (holding, following *Battie,* that *Smith* applies retroactively), *cert. denied*, 469 U.S. 956 (1984).

White v. Estelle, 720 F.2d 415, 417 (5th Cir. 1983) (following *Battie* in applying *Estelle v. Smith* retroactively).

Battie v. Estelle, 655 F.2d 692, 696-99 (5th Cir. 1981) (holding *Smith* applies retroactively).

4.2.3 Psychiatric Testimony on Future Dangerousness

In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Supreme Court rejected the argument that psychiatric testimony regarding future dangerousness is too unreliable. The Court held instead that the state may introduce psychiatric evidence of a defendant's future dangerousness in capital sentencing proceedings. The psychiatric evidence does not have to be based on personal examinations of defendant, but, if it is, the state must give *Miranda* warnings to the defendant or notice to defendant's counsel pursuant to *Estelle v. Smith*. The evidence may also be responses to hypothetical questions given without the benefit of an examination. The answers to hypothetical questions may not, however, "be influenced by" or "derive from" a psychological examination conducted without the proper warnings and waivers.

When the state intends to introduce psychiatric evidence on future dangerousness, the defendant has a due process right under *Ake v. Oklahoma*, 470 U.S. 68 (1985), to access to psychiatric assistance in the preparation of his or her defense. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

Supreme Court:

Ake v. Oklahoma, 470 U.S. 68 (1985) (holding where defendant's mental state at issue, defendant entitled to access to psychiatrist and psychiatric assistance in preparing defense).

Barefoot v. Estelle, 463 U.S. 880 (1983) (upholding admission in sentencing proceeding of psychiatric testimony regarding future dangerousness).

State Courts:

People v. Murtishaw, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981) (finding no showing of reliability and holding inadmissible as aggravating factor during penalty phase expert testimony forecasting future dangerousness), *cert. denied*, 455 U.S. 922 (1982).

See generally:

Deborah W. Denno, Comment, *Review Essay: "Death is Different" and Other Twists*

of Fate: The Death Penalty in the Nineties: An Examination of the Modern System of Capital Punishment. By Welsh W. White, 83 J. Crim. L. & Criminology 437 (1992) (discussing *Barefoot* as an example of Supreme Court's twisting of original "death is different" doctrine).

George E. Dix, *Expert Prediction Testimony in Capital Sentencing: Evidentiary and Constitutional Considerations,* 19 Am. Crim. L. Rev. 1 (1981) (discussing, after *Smith* but prior to *Barefoot,* due process problems with admission of "unreliable" evidence in capital sentencing proceedings).

William S. Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from its Death Penalty Standards,* 12 Fla. St. U.L. Rev. 737 (1985) (reviewing *Barefoot* and other Supreme Court decisions, arguing that Court has abandoned commitment to due process in capital cases; *Barefoot* is one example).

Christopher Slobogin, *Dangerousness and Expertise,* 133 U. Pa. L. Rev. 97 (1984) (arguing that "clinical" testimony re: future behavior should be admissible only if defendant first seeks to use clinical testimony to show not dangerous; otherwise, state must rely on hard "actuarial" data to prove future dangerousness).

4.3 Victim Impact Testimony

From 1987 until 1991, the Supreme Court maintained the position that the introduction of victim impact evidence in the sentencing phase of a capital trial violated the Eighth Amendment. *Booth v. Maryland*, 482 U.S. 496 (1987); *South Carolina v. Gathers*, 490 U.S. 805 (1989). However, in 1991, the Court overruled *Booth* and *Gathers. Payne v. Tennessee*, 501 U.S. 808 (1991). *Payne* held that the Eighth Amendment erects no per se bar against the admission of victim impact evidence relating to a victim's personal characteristics and the emotional impact on the victim's family. Thus, such evidence is admissible at capital sentencing if the state legislature chooses to permit it. However, under *Payne,* a due process violation arises if victim impact evidence is "so unduly prejudicial that it renders the trial fundamentally unfair."

Supreme Court:

Payne v. Tennessee, 501 U.S. 808 (1991) (holding Eighth Amendment erects no per se bar against admission of victim impact evidence and prosecutorial argument on the subject at capital sentencing).

South Carolina v. Gathers, 490 U.S. 805 (1989) (extending *Booth,* holding prosecutor's description of victim's personal qualities based on items found in victim's possession was not related directly to circumstances of the crime and therefore inadmissible at capital sentencing, under *Booth*), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991).

Booth v. Maryland, 482 U.S. 496 (1987) (holding Eighth Amendment bars introduction of statement at capital sentencing hearing because irrelevant to sentencing decision and creates risk of arbitrary and capricious imposition of death penalty), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991).

Ninth Circuit:

Sager v. Maass, 84 F.3d 1212 (9th Cir. 1996) (finding ineffective assistance of counsel where petitioner's attorney introduced victim impact testimony for purpose of showing victim's signature, which could easily have been obtained by other means).

McKenzie v. Risley, 842 F.2d 1525, 1537–38 n.25 (9th Cir.) (finding, during *Booth* era, that strictures in *Booth* apply only to sentencing, not to decision to take case to trial; thus any consideration prosecution gives to family's wishes in decision not to plea bargain is not *Booth* violation), *cert. denied*, 488 U.S. 901 (1988).

District Courts in Ninth Circuit:

Bonin v. Vasquez, 807 F. Supp. 586 (C.D. Cal. 1992) (holding prosecutor's statements regarding impact of murders on victims' families constitutional and not unduly prejudicial under *Payne*).

Other Circuits:

Free v. Peters, 12 F.3d 700 (7th Cir. 1993) (holding petitioner not entitled to retroactive application of *Booth* because *Booth* is new rule under *Teague;* noting petitioner also cannot object to state's retroactive use of *Payne* under *Teague* because *Teague* protects state's interest in finality of criminal convictions, and thus only state may object to retroactive application of new rule to old case).

See generally:

Kathryn E. Bartolo, Payne v. *Tennessee: The Future Role of Victim Statements of Opinion in Capital Sentencing Proceedings,* 77 Iowa L. Rev. 1217 (1992) (examining *Payne* and identifying difficulties in future use of victim impact evidence, concluding

victim statements of opinion should not be allowed, and urging admission of victim impact evidence should not extend beyond limits in *Payne).*

Matthew V. Brammer, Note, *Eighth Amendment No Longer Bars Victim Impact Statements Admission in Capital Sentencing Proceedings,* 61 U. Cin. L. Rev. 261 (1992) (reviewing victim impact precedent and *Payne,* offering model for admission of such evidence).

Randall Coyne, *Inflicting Payne on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Trials,* 45 Okla L. Rev. 589 (1992) (analyzing and summarizing legal and practical issues and impact of *Payne).*

Craig E. Gilmore, Note, Payne v. *Tennessee: Rejection of Precedent, Recognition of Victim Impact Worth,* 41 Cath. U. L. Rev. 469 (1992) (tracing development of use of victim impact information at sentencing).

Jonathan H. Levy, *Limiting Victim Impact Evidence and Argument After* Payne v. *Tennessee,* 45 Stan. L. Rev. 1027 (1993) (arguing *Payne* failed to give adequate guidelines for using victim impact evidence at capital sentencing proceedings and attempting to fill gap by exploring post-*Payne* constitutional limitations on use of victim impact evidence and argument).

Elizabeth A. Meek, Note, *Victim Impact Evidence and Capital Sentencing–A Casenote on Payne v. Tennessee,* 52 La. L. Rev. 1299 (1992) (reviewing *Payne,* recommending states keep victim impact evidence out, especially in capital cases, because causes troubling results).

Michael Ira Oberlander, *The Payne of Allowing Victim Impact Statements at Capital Sentencing Hearings,* 45 Van. L. Rev. 1621 (1992) (arguing victim impact evidence should not be admissible at capital sentencing; reviewing victims' rights movement, arguing system catering to victims' "rights" when in conflict with defendants' rights, is unconstitutional, and reviewing *Payne* and progeny).

David M. Paul, Note, Payne v. *Tennessee: A Case of Precedents Forgotten,* 54 U. Pitt. L. Rev. 893 (1993) (arguing *Payne* cannot be reconciled with Court's death penalty jurisprudence).

4.4 Prosecutorial Misconduct

The constitutional restraints on a prosecutor's comments during the guilt phase, *see* § 3.3, also apply to the capital sentencing phase. Improper closing argument by a state

prosecutor in a capital sentencing hearing justifies federal habeas corpus relief only if the argument rendered the capital sentencing hearing fundamentally unfair.

Supreme Court:

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) (ruling on alleged guilt phase prosecutorial misconduct as establishing "fundamental fairness" standard for reviewing prosecutorial misconduct).

4.4.1 Prosecutorial Expertise

Assertions of expertise ("vouching") on the part of the prosecutor during sentencing is improper when it undermines the jury's perception that it has discretion to determine the appropriate sentence. Such improper assertions in sentencing argument, however, do not always render the sentencing proceeding "fundamentally unfair."

Ninth Circuit:

United States v. Necoechea, 986 F.2d 1273, 1278 (9th Cir. 1993) (describing factors to consider in determining improper prosecutorial vouching).

Other Circuits:

Nelson v. Nagle, 995 F.2d 1549 (11th Cir. 1993) (granting relief because prosecution's reading during closing sentencing argument of portion of state case discouraging mercy rendered penalty phase of trial fundamentally unfair).

Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1985) (holding prosecutor's closing comments at sentencing regarding limited number of times his office seeks death penalty and personal opinion that death penalty is warranted in this case constituted prosecutorial misconduct because undermined jury's perception that it had unfettered discretion to decline to impose the death penalty, but in context of entire sentencing proceeding, did not render trial fundamentally unfair), *cert. denied*, 484 U.S. 872 (1987).

Tucker v. Kemp, 762 F.2d 1496, 1505 (11th Cir. 1985) (en banc) (holding sentencing opening argument invoking prosecutorial expertise was improper but did not render trial fundamentally unfair).

Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) (en banc) (finding harmful prosecutorial misconduct where prosecutor invoked hundred-year- old cases suggesting with apparent weight of state supreme court that mercy is inappropriate consideration for jury to use in sentencing), *cert. denied*, 478 U.S. 1020 (1986).

Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (en banc) (holding prosecutor's discussion of his seeking death in only a few cases improperly implied that prosecutor's office had already made careful determination that case warranted death penalty but did not render trial fundamentally unfair), *vacated on other grounds*, 478 U.S. 1016 (1986).

4.4.2 Possibility of Escape

The Ninth and Eleventh Circuits have held that references in sentencing argument to the potential harm to witnesses if defendant were to escape are proper because they relate to future dangerousness.

Ninth Circuit:

Campbell v. Kincheloe, 829 F.2d 1453 (9th Cir. 1987) (holding statement in sentencing rebuttal argument regarding potential harm to trial witnesses "if jury did not protect them," although suggesting possibility of escape, was not improper because jury may speculate about what defendant might do if released), *cert. denied*, 488 U.S. 948 (1988).

Other Circuits:

Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (holding arguments regarding possibility of escape were proper because they were arguments about future dangerousness which were appropriate inferences from record before jury), *vacated on other grounds*, 478 U.S. 1016 (1986).

4.4.3 Role of Aggravating and Mitigating Circumstances

The Fifth Circuit has held that in closing arguments during the sentencing phase of a trial, a prosecutor cannot distract the jury from its duty to focus on the aggravating and mitigating circumstances of the crime. If a prosecutor's arguments make rational assessment by the jury unlikely, then the sentencing hearing is fundamentally unfair.

Other Circuits:

Kirkpatrick v. Blackburn, 777 F.2d 272, 283–84 (5th Cir. 1985) (holding prosecutor's references to law on defense of others improperly distracted jury from focus on aggravating and mitigating circumstances but not so prejudicial as to render trial fundamentally unfair), *cert. denied*, 476 U.S. 1178 (1986).

4.4.4 Deterrence

The Eleventh Circuit has held that a capital sentencing jury may properly consider deterrence.

Other Circuits:

Davis v. Kemp, 829 F.2d 1522, 1528 (11th Cir. 1987) (holding prosecutor may argue that death penalty serves as deterrent, citing statement in *Brooks* that deterrence is appropriate subject of jury consideration), *cert. denied*, 485 U.S. 929 (1988).

Drake v. Kemp, 762 F.2d 1449, 1459-60 (11th Cir. 1985) (holding prosecutor may argue deterrence of death penalty during argument at sentencing because under *Gregg v. Georgia* deterrence is valid rationale for imposing death penalty), *cert. denied*, 478 U.S. 1020 (1986).

Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (en banc) (stating deterrence is proper consideration of a sentencing jury in a capital case), *vacated on other grounds*, 478 U.S. 1016 (1986).

4.4.5 Inflammatory Comments

Inflammatory comments by a prosecutor during sentencing warrants relief for prosecutorial misconduct only if they meet the "fundamental unfairness" standard.

Ninth Circuit:

Nefstad v. Baldwin, 66 F.3d 335 (9th Cir. 1995) (unpublished) (holding no violation of due process where prosecutor during closing argument shows photographs of victim before and after murder because relevant to intent), *cert. denied*, 516 U.S. 1081 (1996).

District Courts in Ninth Circuit:

Williams v. Calderon, 48 F. Supp. 2d 979 (C.D. Cal. 1998) (granting summary judgment for state on petitioner's habeas claim where prosecutor used analogy of caged versus wild tiger, comparing petitioner to the wild tiger in penalty phase closing argument).

Other Circuits:

Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991) (holding prosecutor's argument that allegedly invited jury to put themselves in position of victim upheld as permissible comment on defendant's future dangerousness), *cert. denied*, 502 U.S. 1066 (1992).

Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991) (holding prosecutor's "outrageous" statements that he was personally offended by defendant's exercise of his right to trial and that defendant had abused the legal system by exercising that right inflamed and misinformed the jury and were therefore improper; court did not reach prejudice issue because sentence reversed on other grounds).

Smith v. Black, 904 F.2d 950 (5th Cir. 1990) (holding prosecutor's presentation of evidence of rape at sentencing phase proper because tended to support aggravating factor of "especially heinous, atrocious or cruel"), *vacated on other grounds*, 503 U.S. 930 (1992).

Burden v. Zant, 903 F.2d 1352 (11th Cir. 1990) (holding references during sentencing closing to publicity and public anger not prosecutorial misconduct), *rev'd on other grounds*, 498 U.S. 433 (1991).

Gates v. Zant, 863 F.2d 1492 (11th Cir.) (holding prosecutor's "war on crime" argument improper but harmless error), *cert. denied*, 493 U.S. 945 (1989).

Williams v. Kemp, 846 F.2d 1276 (11th Cir. 1988) (prosecutor's sentencing phase closing argument that defendant was trained to kill in the Marine Corps, although offensive and undesirable, did not render the sentencing proceeding fundamentally unfair because argument was "obvious overstatement and its factual incorrectness [wa]s readily apparent"), *cert. denied*, 494 U.S. 1090 (1990).

Davis v. Kemp, 829 F.2d 1522 (11th Cir. 1987) (holding prosecutorial arguments that jurors were like soldiers fighting for their country, death penalty a deterrent to crime, retribution and future dangerousness were factors justifying imposition of death penalty, and that jury had duty to impose death, did not render sentencing proceeding

fundamentally unfair), *cert. denied*, 485 U.S. 929 (1988).

Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985) (holding sentencing proceeding rendered fundamentally unfair by prosecutor's argument emphasizing jury's duty to show mercy to society rather than defendant and express society's moral outrage), *cert. denied*, 476 U.S. 1153 (1986).

See generally:

Mark S. Davies, Comment, *Enlisting the Jury in the "War on Drugs:" A Proposed Ban on Prosecutor's Use of "War on Drugs" Rhetoric During Opening and Closing Argument of a Narcotics Trial*, 1994 U. Chi. Legal F. 395 (1994) (addressing use of "war on drugs" rhetoric in prosecutor's argument).

4.4.6 Diminished Jury Responsibility

The Supreme Court has held that there is a specific prohibition in capital cases against arguments that have the effect of misleading the jury about its role in sentencing. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The *Caldwell* Court stated that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id*. at 328–329 Thus, such statements are unconstitutional because they indicate that the jury's decision would automatically be reviewed by a higher court and, therefore, the jury's decision would not be the final decision in the case. The Court in *Caldwell* held that the danger from these statements–that the jury would minimize the importance of its role–violates the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case.

In *Dugger v. Adams*, 489 U.S. 401, 407 (1989), the Court stated that to establish a *Caldwell* violation, a defendant must show that the remarks to the jury "improperly described the role assigned to the jury by local law," minimizing their sense of true responsibility.

The Ninth Circuit has reversed a death sentence because the prosecutor's closing argument invoked biblical passages that undercut the jury's sense of responsibility to impose the appropriate sentence. *Sandoval v. Calderon*, 241 F.3d 765 (9th Cir. 2000), *cert. denied*, 534 U.S. 847 (2001).

Supreme Court:

Dugger v. Adams, 489 U.S. 401 (1989) (holding no basis for *Caldwell* claim because to establish *Caldwell* violation, defendant necessarily must show that remarks to jury improperly described the role assigned to the jury by local law, and defendant here made no objection to challenged jury instructions under local law).

Darden v. Wainwright, 477 U.S. 168 (1986) (holding *Caldwell* not violated by prosecutor's statements at guilt stage which could not have misled the jury into thinking it had a reduced role in the sentencing process).

Caldwell v. Mississippi, 472 U.S. 320 (1985) (holding closing argument that responsibility for determining appropriateness of death sentence rested with state supreme court and not jury was improper because it diminished jury's sense of responsibility for determining death sentence, in violation of Eighth Amendment).

Ninth Circuit:

Sandoval v. Calderon, 241 F.3d 765 (9th Cir. 2000) (reversing death sentence where prosecutor invoked biblical passages in closing argument commonly understood as sanctioning the death penalty), *cert. denied*, 534 U.S. 847 (2001).

Anderson v. Calderon, 232 F. 3d 1053 (9th Cir. 2000) (finding that judge's comments to jury at resentencing–that petitioner had been sentenced to death by a prior jury and the sentence was reversed on automatic appeal because of "technical questions" with the sentence–did not rise to *Caldwell* violation), *cert. denied*, 534 U.S. 1036 (2001), *reh'g and reh'g en banc denied,* 276 F.3d 483 (9th Cir. 2001).

Jeffries v. Blodgett, 5 F.3d 1180, 1192 (9th Cir. 1993) (holding prosecution's passing reference to defendant's right to appeal did not indicate jury's diminished responsibility and thus proper under *Caldwell;* jury instructions also made jury responsibility clear), *cert. denied*, 510 U.S. 1191 (1994).

Campbell v. Kincheloe, 829 F.2d 1453, 1460–61 (9th Cir. 1987) (holding statement in sentencing closing argument that jury should not debate the death penalty but only determine if there are mitigating factors sufficient to merit leniency was proper because was only general comment on validity of death penalty, and no prejudice because trial court clearly instructed jury on its proper role), *cert. denied*, 488 U.S. 948 (1988).

Other Circuits:

Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995) (holding prosecutor's statements during penalty phase closing argument indicating death sentence would be quick, instantaneous process diminished jurors' sense of responsibility for imposing death penalty and thus violated due process), *cert. denied*, 516 U.S. 1067 (1996).

Gaskins v. McKellar, 916 F.2d 941 (4th Cir. 1990) (holding evidence that defendant's prior death sentence was vacated does not diminish jury's sense of responsibility by leading it to believe its sentence was advisory only, and is proper under *Caldwell)*, *cert. denied*, 500 U.S. 961 (1991).

See generally:

Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study,* 44 Buff. L. Rev. 339 (1996) (addressing issues surrounding jury responsibility in capital sentencing, and suggesting reforms).

4.4.6.1 Retroactivity of *Caldwell v. Mississippi*

In *Sawyer v. Smith*, 497 U.S. 227 (1990), the Supreme Court affirmed the Fifth Circuit's conclusion that *Caldwell* states a "new rule" under *Teague v. Lane* and is thus not retroactive. Therefore, a habeas petitioner whose conviction was final at the time *Caldwell* was decided (June 11, 1985) is barred from pursuing a *Caldwell* claim and is entitled to relief for prosecutorial misconduct only under the pre-*Caldwell* standard of *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) ("improper prosecutorial arguments. . . vitiate a sentencing proceeding only if they render the proceedings fundamentally unfair").

Supreme Court:

Sawyer v. Smith, 497 U.S. 227 (1990) (holding *Caldwell* announces a "new rule" and is not retroactively applicable under *Teague).*

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) (stating "improper prosecutorial arguments . . . vitiate a sentencing proceeding only if they render the proceedings fundamentally unfair").

4.5 Jury Instructions

4.5.1 Ambiguous or Vague Instructions

In *Boyde v. California*, 494 U.S. 370 (1990), the Supreme Court held that the standard of reviewing a claim that a sentencing instruction is ambiguous is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." A federal court reviewing the issue on habeas still must apply the *Brecht* analysis after determining the constitutionality of the instruction. *Calderon v. Coleman*, 525 U.S. 141 (1998).

In *Tuilaepa v. California*, 512 U.S. 967 (1994), the Supreme Court stated that its review of sentencing eligibility factors in the context of jury instructions is deferential. An instruction will not be ruled unconstitutional for vagueness if it has some "common-sense core of meaning . . . that criminal juries should be capable of understanding." *Id*. at 973–974. In addition, the Court stated that jury instructions at capital sentencing need not be only in the form of specific propositional questions. An instruction may direct the jury to consider a crime's "facts and circumstances." *Id*. at 978.

Supreme Court:

Calderon v. Coleman, 525 U.S. 141 (1998) (per curiam) (holding Ninth Circuit erred by failing to apply *Brecht* standard of review on habeas writ regarding sentencing instruction; applying *Boyde* standard of review was not adequate).

Tuilaepa v. California, 512 U.S. 967 (1994) (upholding as not unconstitutionally vague, California sentencing factors of Penal Code § 190 requiring sentencer to consider (1) the "circumstances of the crime of which defendant was convicted . . . and the existence of any special circumstances found to be true," (2) the "presence or absence of criminal activity [involving] the use or attempted use of force or violence or the express or implied threat to use force or violence," and (3) defendant's age at the time of the crime).

Boyde v. California, 494 U.S. 370 (1990) (holding standard of review of a claim that an instruction is ambiguous is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence").

Ninth Circuit:

McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997) (en banc) (holding that where jury returns note showing confusion as to proper mitigating evidence, it is reversible error to simply refer to and repeat the same instruction already given which the jury previously misunderstood), *cert. denied*, 523 U.S. 1103 (1998), *implicitly rejected* in *Calderon v. Coleman*, 525 U.S. 141 (1998).

See generally:

Susie Cho, Comment, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. Crim. L. 532 (1994) (discussing jury's comprehension and application of law in capital cases).

Shari S. Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, Judicature, Vol. 79, No.5, at 224 (March-April 1996) (suggesting improvements to reduce jury miscomprehension of capital jury instructions).

Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993) (reviewing inaccuracy and misunderstanding in jury instructions at capital sentencing).

Christopher Slobogin, Symposium, *The Capital Jury Project: Should Juries and the Death Penalty Mix?*, 70 Ind. L.J. 1249 (1995) (addressing research of Capital Jury Project, and whether evidence of unpredictable jury decision-making in capital cases has constitutional significance).

Peter M. Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 Utah L. Rev. 1 (1995) (addressing nature of mitigating and aggravating circumstances and evidence of jurors' non-comprehension of instructions on mitigation in death penalty cases).

4.5.2 Role of Aggravating and Mitigating Circumstances

In *Tuilaepa v. California*, 512 U.S. 967 (1994), the Supreme Court held that the jury need not be instructed on how to weigh any particular factor in the sentencing decision. The Ninth Circuit has held that a trial court need not instruct that the jury find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating

circumstances. *Harris v. Pulley*, 692 F.2d 1189, 1195 (9th Cir. 1982). In reversing this Ninth Circuit decision on other grounds, the Supreme Court noted, without disapproving, this Ninth Circuit holding. *Pulley v. Harris*, 465 U.S. 37 (1984).

Supreme Court:

Tuilaepa v. California, 512 U.S. 967 (1994) (holding that instructions need not tell jury how to weigh any particular factor).

Pulley v. Harris, 465 U.S. 37 (1984) (noting, without disapproving, Ninth Circuit's lower holding that no beyond a reasonable doubt finding required for determining death sentence).

Ninth Circuit:

Murtishaw v. Woodford, 255 F.3d 926 (9th Cir. 2001) (holding that there was ex post facto violation requiring reversal of death sentence where jury was instructed on more onerous 1978 California death penalty statute, rather than the 1977 statute, in effect at time of crime; 1977 statute permitted jury discretion to reject death penalty even if it found that aggravating factors outweighed mitigating factors, but under 1978 statute, jury did not have this discretion), *cert. denied,* 535 U. S. 935 (2002).

Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992) (holding ambiguous jury instruction at sentencing phase which suggested that jury must unanimously find that mitigating factors outweigh aggravating factors was error), *cert. denied*, 507 U.S. 951 (1993).

Harris v. Pulley, 692 F.2d 1189, 1195 (9th Cir. 1982) (holding beyond-a-reasonable-doubt standard not required to determine whether death penalty should be imposed), *rev'd on other grounds*, 465 U.S. 37 (1984).

District Courts in Ninth Circuit:

Wade v. Vasquez, 752 F. Supp. 931 (C.D. Cal. 1990) (applying *Harris* in rejecting petitioner's argument that trial court should have instructed jury that it must find beyond reasonable doubt that aggravating circumstances outweigh mitigating and that death is appropriate punishment).

See generally:

James Luginbuhl & Julie Howe, Symposium, *The Capital Jury Project: Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 Ind. L.J. 1161 (1995) (addressing jury comprehension of capital sentencing instructions and jury application of guided discretion principle of *Furman).*

4.5.3 Sympathy and Passion

In *California v. Brown*, 479 U.S. 538 (1987), the Supreme Court held that a jury instruction that the jurors must consider and weigh aggravating and mitigating circumstances but "must not be swayed by mere sympathy" or public sentiment is permissible and does not violate the Eighth Amendment. The Court reasoned that a reasonable juror would interpret the instruction to mean he or she should ignore only the sort of sympathy not rooted in the aggravating and mitigating evidence introduced at sentencing.

Supreme Court:

California v. Brown, 479 U.S. 538 (1987) (holding jury instruction that jurors "must not be swayed by mere sympathy" or by public sentiment does not violate Eighth and Fourteenth Amendment prohibition of unbridled discretion and requirement that defendants be allowed to introduce any mitigating evidence).

Other Circuits:

Lusk v. Singletary, 965 F.2d 946 (11th Cir. 1992) (citing *Brown*, holding sentencing judge's statement that mercy should not be extended to defendant did not indicate that judge refused to consider mercy where judge found that no mitigating factors existed), *cert. denied*, 508 U.S. 920 (1993).

Julius v. Jones, 875 F.2d 1520 (11th Cir.) (holding guilt phase instruction that jury was not to be swayed by sympathy did not preclude consideration of mitigating evidence at penalty phase), *cert. denied*, 493 U.S. 900 (1989).

See generally:

Paul W. Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment,* 99 Yale L.J. 589 (1989) (discussing role of mercy, including *Brown,* in capital sentencing,

and proposing revival of mercy through courts, legislatures, and governors).

4.5.3.1 Retroactivity of *California v. Brown*

In *Saffle v. Parks*, 494 U.S. 484 (1990), the Supreme Court stated that the decision in *California v. Brown* created a new rule because its reasoning was not dictated by *Lockett v. Ohio* or *Eddings v. Oklahoma*. Therefore, under *Teague v. Lane*, it is not retroactively applied to cases which became final before it was decided.

Supreme Court:

Saffle v. Parks, 494 U.S. 484 (1990) (stating *Brown* not retroactively applied under *Teague*).

4.5.4 Possibility of Commutation or Parole

In *California v. Ramos*, 463 U.S. 992 (1983), the Supreme Court held that the Eighth and Fourteenth Amendments allow but do not require a state capital sentencing jury to be instructed that a sentence of life imprisonment without the possibility of parole may be commuted by the governor to a lesser sentence that includes the possibility of parole. On the other hand, the Supreme Court held in *Simmons v. South Carolina*, 512 U.S. 154 (1994), that where a defendant's future dangerousness is at issue and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible.

Supreme Court:

Kelly v. South Carolina, 534 U.S. 246 (2002) (holding that capital defendant's future dangerousness was at issue and it was error for the trial court to refuse to instruct that he would be ineligible for parole under life sentence where prosecution presented evidence that while in prison, defendant had made a knife and had taken part in escape attempt; also holding that it was not dispositive that jury did not ask judge for further instruction on parole eligibility, whereas juries in *Shafer v. South Carolina* and *Simmons v. South Carolina* did).

Shafer v. South Carolina, 532 U.S. 36 (2001) (holding that whenever future dangerousness is at issue in a capital sentencing proceeding, due process requires that

jury be informed that life sentence carries no possibility of parole under South Carolina statute providing that if jury finds statutory aggravator, it must recommend a sentence and its choices are limited to death and life without parole).

Ramdass v. Angelone, 530 U.S. 156 (2000) (denying habeas relief in death case where petitioner refused a jury instruction explaining parole ineligibility because, although petitioner was found guilty of a felony making him ineligible for parole under state law, the judgment of conviction was not entered before petitioner's sentencing hearing in the capital case and under state law, entry of a judgment is more than a ministerial act).

Calderon v. Coleman, 525 U.S. 141 (1998) (reversing grant of habeas relief based on state court's inaccurate instruction on the governor's power to commute a sentence; must first apply the *Brecht* harmless error standard).

Brown v. Texas, 522 U.S. 940 (1997) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., respecting denial of petition for certiorari) (pointing out tension between Texas law, which prohibits a capital defendant from presenting evidence regarding parole eligibility for a life imprisonment sentence, and *Simmons* rule).

Simmons v. South Carolina, 512 U.S. 154 (1994) (holding where the state makes an issue of defendant's future dangerousness during sentencing phase of a capital trial, and state law prohibits defendant's release on parole, due process requires that the court inform the sentencing jury that the defendant is ineligible for parole).

California v. Ramos, 463 U.S. 992 (1983) (upholding against federal constitutional challenge state law requiring instruction on governor's power to commute life sentence without possibility of parole). *But see People v. Ramos*, 689 P.2d 430 (Cal. 1984) (voiding same law on state constitutional grounds), *cert. denied*, 471 U.S. 1119 (1985).

Ninth Circuit:

Morris v. Woodford, 273 F.3d 826 (9th Cir. 2001) (granting writ of habeas corpus and reversing in part and remanding with instructions to vacate sentence of death and ordering new penalty-phase trial because of typographical error in written jury instructions in penalty phase whereby jury was instructed " if you have a reasonable doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty of life in prison *with* the possibility of parole; holding error was not harmless where jury was confused by instruction and inquired about it and court inadvertently exacerbated problem), *cert. denied,* 537 U.S. 741 (2002).

Coleman v. Calderon, 210 F.3d 1047 (9th Cir. 2000) (finding reversible error under *Brecht* and reversing death sentence based on jury instruction which mislead jury regarding possibility of gubernatorial commutation of a "life without parole" sentence; dissent finding error harmless).

McClain v. Calderon,134 F.3d 1383 (9th Cir.) (following *Hamilton*, holding trial court erred instructing jury on governor's commutation power, where–under former state law–power was limited by supreme court approval), *cert. denied*, 525 U.S. 942 (1998), *implicitly rejected by Calderon v. Coleman*, 525 U.S. 141 (1998).

Gallego v. McDaniel, 124 F.3d 1065 (9th Cir. 1997) (holding that penalty phase instruction, discussing executive clemency procedure applicable to a sentence of life imprisonment without possibility of parole, was reversible error since instruction failed to state that defendant–convicted of capital murder out of state–faced additional clemency hurdles), *cert. denied*, 524 U.S. 917 (1998), *and cert. denied*, 524 U.S. 922 (1998).

Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir.) (holding improper jury instruction re: possibility of governor commuting life sentence prevented jury from making reasoned and informed choice between a sentence of life without possibility of parole and death), *cert. denied*, 512 U.S. 1229 (1994), *implicitly rejected by Calderon v. Coleman*, 525 U.S. 141 (1998).

District Courts in Ninth Circuit:

Bonin v. Vasquez, 807 F. Supp. 586 (C.D. Cal. 1992) (holding court need not define meaning of "life without parole" to jury).

Other Circuits:

Mollett v. Mullen, 348 F.3d 902 (10th Cir. 2003) (holding that where (1) in a capital case the prosecution placed future dangerousness at issue through the charging of a continuing threat aggravator; (2) the jury requested an explanation of the definition of life imprisonment; (3) the judge's response created a false choice in that the judge replied that matters of parole are beyond the purview of the jury or the court to consider; and (4) there was no opportunity to cure the confusion because counsel were not informed of the jury's question, petitioner was entitled to habeas relief).

See generally:

Janie Clark, Note, *Putting an End to the Imposition of Death by Misperception and Misunderstanding: Simmons v. South Carolina*, 43 Kan. L. Rev. 1147 (1995) (addressing *Simmons* and arguing Court should have gone further to hold that Eighth and Fourteenth Amendments require capital sentencing jury to be informed, on request of either prosecution or defense, of defendant's parole status).

John Christopher Johnson, Note, *When Life Means Life: Juries, Parole, and Capital Sentencing*, 73 N.C. L. Rev. 1211 (1995) (analyzing *Simmons* and its impact in context of capital sentencing procedures).

Anthony Paduano & Clive A. S. Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211 (1987) (discussing popular misperceptions regarding life imprisonment and parole, analyzing practical and legal effects on capital sentencing).

4.5.4.1 Retroactivity of *Simmons*

In a five to four split, the Supreme Court ruled that *Simmons* presents a "new rule" under *Teague* and, therefore, may not be used to disturb a death sentence which was final at the time *Simmons* was decided. *O'Dell v. Netherland*, 521 U.S. 151 (1997). Justice Stevens, writing for the dissent, argued that the *Simmons* rule is a bedrock procedural element of a full and fair hearing and should be excepted from *Teague*.

Supreme Court:

O'Dell v. Netherland, 521 U.S. 151 (1997) (holding *Simmons* is "new rule" under *Teague*).

4.5.5 *Allen*-type Charges

In *Lowenfield v. Phelps*, 484 U.S. 231 (1988), the Supreme Court held that at least some forms of supplemental jury charges by the trial court to secure jury unanimity–traditional "*Allen* charges"–are not coercive of jury decision-making at capital sentencing proceedings.

Supreme Court:

Lowenfield v. Phelps, 484 U.S. 231 (1988) (holding penalty phase jurors not coerced by trial court's supplemental instruction that fellow jurors' views should be considered, but that no juror should surrender honest belief as to the weight of the evidence; even more of attempt to secure jury unanimity than traditional "*Allen"* charge because not directed specifically to minority jurors).

Jenkins v. United States, 380 U.S. 445 (1965) (requiring supplemental charges be considered in context and "under all the circumstances").

Allen v. United States, 164 U.S. 492 (1896) (upholding as not coercive, supplemental charge by trial court urging minority jurors to consider views of majority, and whether own views were reasonable under circumstances; charge is attempt to secure jury unanimity, to avoid societal costs of retrial).

Ninth Circuit:

Rich v. Calderon, 187 F.3d 1064 (9th Cir. 1999) (holding no trial error where judge refused to inform jury at impasse that a deadlock results in a sentence of life without parole), *cert. denied sub nom.*, *Rich v. Woodford*, 528 U.S. 1092 (2000).

4.5.6 Diminishing Jury Sense of Responsibility

The prohibition against prosecutorial argument that diminishes the jury's sense of its sentencing responsibility applies with equal force to jury instructions.

Other Circuits:

Stewart v. Dugger, 877 F.2d 851 (11th Cir. 1989) (holding no *Caldwell* violation where prosecutor and trial judge called attention to jury's advisory role during *voir dire* but entire record established jury's role was properly explained), *cert. denied*, 495 U.S. 962 (1990).

Mulligan v. Kemp, 818 F.2d 746 (11th Cir.) (holding instruction that jury could "recommend" death sentence, followed by instruction that such a verdict would require a death sentence, adequately explained jury's responsibility for sentence), *cert. denied*, 481 U.S. 1043 (1987).

See generally:

Joseph L. Hoffman, Symposium, *The Capital Jury Project: Where's the Buck? Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137 (1995) (addressing hypothesis that capital jurors faced with death sentencing decision seek to avoid perception that they bear personal moral responsibility for making decision).

Steven J. Sherman, Symposium, *The Capital Jury Project: The Role of Responsibility and How Psychology Can Inform the Law*, 70 Ind. L.J. 1241 (1995) (discussing psychological issues re: jury's sense of responsibility in capital sentencing hearings).

4.6 Role of the Jury and Judge

4.6.1 Right of Capital Defendant to Jury Determination of Any Fact Leading to Increase in Maximum Punishment

In *Spaziano v. Florida*, 468 U.S. 447 (1984), the Supreme Court ruled that the Sixth Amendment does not guarantee that the death sentence be determined by a jury. The Court stated that nothing in the constitutional safeguards against arbitrary and discriminatory application of the death penalty requires that the sentence be imposed by a jury and the purposes of the death penalty are not frustrated by or inconsistent with a sentencing scheme where the imposition of the death sentence is determined by a judge. In *Walton v. Arizona*, 497 U.S. 639 (1990), the Court specifically held that a sentencing scheme in which a judge alone determines the death sentence, based on aggravating and mitigating circumstances, is constitutional. In addition to Arizona, in the Ninth Circuit Idaho and Montana have judge-based capital sentencing. In Nevada if the defendant pleads guilty or waives a jury trial or if the penalty phase jury is unable to reach a unanimous verdict, the supreme court appoints a three-judge panel to conduct the required penalty hearing and determine a sentence.

The Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), however, raised issues as to the continuing validity of the *Walton* decision. The *Apprendi* Court struck down a New Jersey hate crime statute that increased the exposure for a second degree felony from a 10 year maximum sentence to a 20 year maximum sentence. The statute provided for the extended term if the prosecutor

proved to a judge (as opposed to a jury) the elements of the hate crime statute by a preponderance of the evidence. The Court held that the Fourteenth Amendment right to due process and the Sixth Amendment right to a jury trial, taken together, require that any factual determination required to increase a sentence that otherwise could not be imposed without the factual determination must be proven beyond a reasonable doubt to a jury.

In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court held that *Walton* and *Apprendi* are irreconcilable and overruled *Walton* to the extent that it allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. The Supreme Court reasoned that because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense" (*Apprendi*, 530 U.S. at 494 n. 19), the Sixth Amendment requires that they be found by a jury. The Court held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. The Court pointed out that 29 of 38 states in which there is a death penalty generally commit sentencing decisions to juries, and that other than Arizona, only four States commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges: Colorado (Colo. Rev. Stat § 16-11-103 (2001) (three-judge panel); Idaho (Idaho Code § 19-2515 (Supp. 2001)); Montana (Mont. Code § 46-18-301 (1997)); and Nebraska (Neb. Rev. Stat. § 29-2520 (1995)). The Court observed that the right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put a defendant to death.

Supreme Court:

Ring v. Arizona, 536 U.S. 584 (2002) (holding that capital defendants are entitled to jury determination of any fact on which legislature conditions increase in their maximum punishment; also holding that *Walton* and *Apprendi* are irreconcilable and overruling *Walton* to extent that it allowed sentencing judge, sitting without jury, to find aggravating circumstance necessary for imposition of death penalty).

Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding, in the context of noncapital

sentencing, that the Due Process Clause requires that any factual determination that is required to increase a sentence that otherwise could not be imposed without the factual determination must be proven beyond a reasonable doubt to a jury).

Walton v. Arizona, 497 U.S. 639 (1990) (holding Sixth Amendment not violated by sentencing scheme in which judge alone determines aggravating and mitigating circumstances and imposes sentence), *overruled by Ring v. Arizona, supra.*

Baldwin v. Alabama, 472 U.S. 372 (1985) (upholding as constitutional later repealed Alabama death penalty statute requiring that jury must fix sentence at death if aggravating circumstances are found but then leaving the trial judge, after considering aggravating and mitigating circumstances, total sentencing discretion).

Spaziano v. Florida, 468 U.S. 447 (1984) (holding state may allocate sentencing power as it wishes between the judge and jury since Constitution does not require a death sentence to be imposed by a jury).

Ninth Circuit:

Carriger v. Lewis, 971 F.2d 329 (9th Cir. 1992) (applying *Richmond*, 948 F.2d 1473 (9th Cir. 1992), in rejecting challenge to Arizona's judge-only sentencing scheme), *cert. denied*, 507 U.S. 992 (1993).

Clark v. Ricketts, 958 F.2d 851 (9th Cir.) (applying *Richmond,* 948 F.2d 1473 (9th Cir. 1992), in rejecting equal protection challenge to Arizona's sentencing scheme), *cert. denied*, 506 U.S. 838 (1992).

Richmond v. Lewis, 948 F.2d 1473 (9th Cir. 1990) (rejecting equal protection challenge to Arizona's judge-only sentencing scheme), *rev'd on other grounds*, 506 U.S. 40 (1992).

See generally:

Michael Mello, *Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes that Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C. L. Rev. 283 (1989) (examining constitutionality of capital sentencing schemes that divide sentencing responsibility between judges and juries, focusing on *Caldwell,* arguing–based on *Caldwell's* ruling regarding diminished jury responsibility, *see supra* §§ 4.4.6, 4.5.6–that when responsibility for death sentence is divided, no one bears ultimate responsibility, and thus such schemes are unconstitutional).

Welsh S. White, *Fact-finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 Notre Dame L. Rev. 1 (1989) (analyzing capital defendant's right to jury at both guilt and sentencing phases).

4.6.1.1 Retroactivity of *Ring v. Arizona*

The majority opinion in *Ring v. Arizona*, 536 U.S. 584 (2002) (see § 4.6.1), did not discuss the retroactivity of the decision. In *Schriro v. Summerlin,* 542 U.S. 348 (2004), the Supreme Court held that *Ring* does not apply retroactively to cases already final on direct review. The Supreme Court held that the *Ring* decision is properly classified as procedural, rather than substantive, because it did not alter the range of conduct or the class of persons subject to the death penalty in Arizona, but only the method of determining whether the defendant engaged in that conduct. The Court also held that the rule in *Ring* does not fall within *Teague's* exception for a watershed rule of criminal procedure, since the Court could not confidently say that judicial factfinding seriously diminishes accuracy.

Supreme Court:

Schriro v. Summerlin, 542 U.S. 348 (2004) (holding that *Ring v. Arizona* did not apply retroactively to cases already final on direct review; also holding that (1) that the *Ring* decision is properly classified as procedural, rather than substantive; and (2) the *Ring* rule does not fall under the second exception under *Teague* for watershed rules of criminal procedure).

State Cases:

State v. Ring, 204 Ariz. 534, 65 P.3d 915 (2003) (en banc) (holding in consolidated cases involving all defendants sentenced to death who had matters pending on direct appeal at the time of *Ring*, that changes in state's capital sentencing statutes were procedural in nature and that resentencing these defendants under new statutes would not violate the ex post facto clauses of state or federal constitutions, nor did double jeopardy principles preclude resentencing them; also holding that Sixth Amendment principles of *Apprendi/Ring* do not require that *Enmund-Tison* findings be made by jury; ruling that failure to submit capital aggravating factors to jury was not structural error mandating reversal).

State v. Towery, 204 Ariz. 386, 64 P.3d 828 (en banc) (holding that *Ring v. Arizona* does not apply retroactively to those defendants whose cases have become final; holding that new rule announced in *Ring* did not meet either of two exceptions to *Teague*'s general rule that new rules do not apply to cases that have become final; also holding under an *Allen v. Hardy* analysis the rule did not apply retroactively where (1) the rule was not designed to improve the accuracy of criminal trials; (2) the Arizona justice system acted in good faith in applying the rule in *Walton*; and (3) applying the rule would greatly disrupt the administration of justice and noting that Arizona has approximately 90 prisoners on death row whose cases are final), *cert. dismissed,* 539 U.S. 986 (2003).

State v. Whitfield, 107 S.W.3d 253 (Mo. 2003) (holding that Missouri statutory scheme that permitted trial judge to make independent determination to impose sentence of death if jury deadlocked violated defendant's right to have jury make findings of fact that are predicate to death eligibility and that requirements of *Ring* were retroactive; applying approach of *Linkletter v. Walker* and *Stovall v. Denno* and not a *Teague* analysis, court considered following factors: (1) purpose to be served by new rule; (2) extent of reliance by law enforcement on old rule; and (3) effect on administration of justice of retroactive application of new rule, in holding *Ring* to be retroactive; setting aside sentence of death and resentencing defendant to life imprisonment without eligibility for probation, parole or release except by act of governor).

Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002) (en banc) (holding that *Ring* does not apply retroactively on state collateral review of a finalized death penalty imposed by three-judge panel; alternatively, concluding that *Ring* was inapplicable here because petitioner had pleaded guilty and waived his right to a jury trial).

4.6.1.2 Advisory Jury

Prior to the *Ring* decision, Alabama, Delaware, Florida and Indiana had chosen to retain a sentencing jury but only to render an advisory "recommendation" of the proper sentence, which the court then reviewed and upon occasion may override. In *Spaziano v. Florida*, the Supreme Court, finding this scheme constitutional, held that the constitution does not require a jury recommendation to be final because the constitution does not provide the right to a jury determination of death in the first place. However, in *Ring v. Arizona*, the Supreme Court held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. See § 4.6.1 above for further discussion of *Ring*. In response

to *Ring*, the legislatures of Delaware and Indiana amended the statutes in question: (1) the Delaware statute was amended to provide that the jury's role at the narrowing phase was transformed from one that was advisory into one that is now determinative as to the existence of any statutory aggravating circumstances; and (2) the Indiana statute was amended to provide that if the jury reaches a sentencing decision, the court "shall sentence the defendant accordingly."

Supreme Court:

Harris v. Alabama, 513 U.S. 504 (1995) (holding Alabama statute requiring judge to "consider" jury verdict rather than to give it "great weight" nevertheless adequately channels sentencer discretion so as to prevent arbitrary results; Eighth Amendment does not require state to define weight which sentencing judge must give advisory jury verdict).

Sochor v. Florida, 504 U.S. 527 (1992) (holding Supreme Court will not presume jury error where general verdict at sentencing phase came after consideration of aggravating factor that was unsupported by the evidence because the judge reviewed the jury's sentencing determination).

Hildwin v. Florida, 490 U.S. 638 (1989) (reaffirming *Spaziano,* finding no constitutional requirement that advisory jury make specific factual finding that sufficient aggravating circumstances exist to warrant death penalty).

Spaziano v. Florida, 468 U.S. 447 (1984) (holding state law that allows judge to override jury's recommendation of life sentence is constitutional, no requirement that jury recommendation be final; law does not constitute double jeopardy and does not violate requirement of reliability in capital sentencing).

State Courts:

Ortiz v. State, 869 A.2d 285 (Del.) (holding that Delaware's hybrid form of sentencing, which allows the jury to find the defendant death eligible and then allows a judge to impose the death penalty once the defendant is found to be death eligible, satisfies the Sixth Amendment of the United States Constitution as construed in *Ring v. Arizona*), *cert. denied*, 126 S. Ct. 55 (2005).

Johnson v. State, 904 So.2d 400 (Fla. 2005) (holding that *Ring* did not apply retroactively in Florida).

Bottoson v. Moore, 833 So.2d 693 (Fla.) (per curiam opinion with one justice concurring, two justices concurring specially, and four justices concurring in result only) (holding that petitioner was not entitled to relief in light of *Ring* decision, where U.S. Supreme Court had stayed petitioner's execution and placed petitioner's case in abeyance while Court decided *Ring*, and then summarily denied petitioner's certiorari petition and lifted stay without directing Florida Supreme Court to reconsider petitioner's case in light of *Ring,* and where court in *Ring* did not address alleged areas of irreconcilable conflict in precedent concerning Florida's capital sentencing statute), *cert. denied*, 537 U.S. 1070 (2002); to same effect, see *King v. Moore,* 831 So.2d 143 (Fla) (per curiam opinion with two justices concurring, and four justices concurring in result only), *cert. denied*, 537 U.S. 1067 (2002).

See generally:

Michael Mello & Ruthann Robson, *Judge over Jury: Florida's Practice of Imposing Death over Life in Capital Cases*, 13 Fla. St. U. L. Rev. 31 (1985) (critiquing Florida's death penalty statute allowing judicial override of jury recommendation of life sentence).

Abe Muallem, Note, *Harris v. Alabama: Is the Death Penalty in America Entering the Fourth Phase?*, 22 J. Legis. 85 (1996) (discussing constitutionality of Alabama death penalty statute and analyzing *Harris* majority and dissenting opinions).

Jeffrey A. Wellek, Note, *Eighth Amendment–Trial Court May Impose Death Sentence Despite Jury's Recommendation of Life Imprisonment: Spaziano v. Florida*, 75 J. Crim. L. & Criminology 813 (1984) (reviewing *Spaziano* and arguing Eighth Amendment does require jury-determined sentence of life or death).

4.6.2 Resentencing by Judge or Jury

The Eleventh Circuit has held that there is no constitutional right to a jury resentencing on rehearing. *Proffitt v. Wainwright*, 756 F.2d 1500 (11th Cir. 1985). However, this holding is affected by the decision in *Ring v. Arizona*, in which the Supreme Court held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. See § 4.6.1 for further discussion of *Ring v. Arizona*.

Other Circuits:

Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987) (holding where resentencing was

without a new advisory jury and trial court in imposing death specifically relied on jury's recommendation, errors in original penalty phase of trial impermissibly tainted subsequent sentence).

Funchess v. Wainwright, 772 F.2d 683, 692 (11th Cir. 1985) (holding resentencing by jury not required where initial sentencing proceeding was "free of serious error"), *cert. denied*, 475 U.S. 1031 (1986).

Proffitt v. Wainwright, 756 F.2d 1500 (11th Cir. 1985) (holding because there is no constitutional entitlement to have a jury consider the sentence in the first instance, there is no constitutional requirement to have advisory jury as well as judge consider the penalty on rehearing).

4.7 Aggravating Circumstances

In *Zant v. Stephens*, 462 U.S. 862, 878 (1983), the Supreme Court stated that a capital sentencing statute must "circumscribe the class of persons eligible for the death penalty" by permitting execution only where specified aggravating circumstances are present. The capital sentencer must find at least one aggravating circumstance in order for the defendant to be eligible for the death penalty. This can be done either at the guilt phase of a capital trial, as in California, or as part of the penalty phase.

The ultimate purpose of statutory aggravating circumstances is to direct and limit sentencing discretion and minimize the risk of arbitrary and capricious infliction of the death penalty. Statutory aggravating circumstances "narrow the class of persons eligible for the death penalty" by providing a meaningful basis for distinguishing the few cases in which capital punishment is imposed from the many in which it is not appropriate. *Id*. at 877. According to *Zant*, a constitutional death penalty statute must provide an "objective, evenhanded, and substantively rational way" for drawing this distinction. *Id*. at 879. A statute that "provides for categorical narrowing at the definition stage and for individualized determination and appellate review at the selection stage" ordinarily will meet this requirement. *Id*.

In *Ring v. Arizona,* 536 U.S. 584 (2002), the Supreme Court overruled *Walton v. Arizona*, 497 U.S. 639 (1990), to the extent that *Walton* allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for the imposition of the death penalty. The Supreme Court held that because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a

greater offense," the Sixth Amendment requires that they be found by a jury. *Ring*, 536 U.S. at 609. See § 4.6.1 for further discussion of *Ring*.

Supreme Court:

Ring v. Arizona, 536 U.S. 584 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990) to extent that *Walton* allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for the imposition of the death penalty)

Tuilaepa v. California, 512 U.S. 967 (1994) (stating sentencer must find at least one aggravating circumstance to render death sentence, citing *Lowenfield* and *Zant).*

Lowenfield v. Phelps, 484 U.S. 231 (1988) (stating sentencer must find at least one aggravating factor at guilt or penalty phase in order to sentence death).

Zant v. Stephens, 462 U.S. 862 (1983) (holding aggravating circumstances must genuinely narrow class of persons eligible for the death penalty and justify imposition of death penalty in given case as compared to others).

Godfrey v. Georgia, 446 U.S. 420 (1980) (ruling death sentence invalid because state court did not give limiting construction to aggravating circumstance to "distinguish this case, in which the death penalty was imposed, from the many cases in which it was not").

Presnell v. Georgia, 439 U.S. 14 (1979) (holding death sentence unconstitutional where no jury finding of an aggravating circumstance is necessary to impose death).

Ninth Circuit:

Poland v. Stewart, 117 F.3d 1094, 1098 (9th Cir. 1997) (stating function of aggravating factors is not to give notice to potential defendants that their contemplated conduct would put them at risk but rather to guide sentencer), *cert. denied*, 523 U.S. 1082 (1998).

McKenzie v. Risley, 842 F.2d 1525, 1538–39 (9th Cir.) (en banc) (stating state capital sentencing procedures must conform to two requirements: (a) must minimize the risk of arbitrary sentencing by delimiting the classes of crimes for which death penalty is permissible punishment and by requiring consideration of mitigating evidence; and (b) must provide review of the death sentence by a state appellate court to ensure sentence is not arbitrary and disproportionate to underlying crime), *cert. denied*, 488 U.S. 901 (1988).

4.7.1 Statutory and Nonstatutory Aggravating Circumstances

Subject to the constitutional requirement that a death penalty statute must non-arbitrarily define the class of death-eligible murderers, states are free to determine what aggravating factors best serve this purpose. Unlike mitigating factors, the constitution does not require a state to treat any particular factor as an aggravator. Moreover, in *Zant v. Stephens*, the Court stated that a statute identifying aggravating circumstances need not also provide standards to govern the jury in weighing the significance of those circumstances. *Id*. at 880. Finally, in *Blystone v. Pennsylvania*, 494 U.S. 299, 306–07 (1990), the Court stated that the Eighth Amendment does not require that the jury evaluate the weight of a given aggravating circumstance to determine if the severity of the aggravating circumstance in each particular case justifies the death sentence.

According to *Zant* and *Barclay v. Florida*, 463 U.S. 939 (1983), a state may choose to make its statutory aggravating circumstances exclusive or it may permit the consideration of nonstatutory aggravating factors. Any nonstatutory aggravating circumstance considered must be relevant to either the defendant's character or the circumstances of the crime. *Barclay*, 463 U.S. at 966–67.

Supreme Court:

Blystone v. Pennsylvania, 494 U.S. 299, 306–07 (1990) (holding presence of aggravating circumstances serves purpose of limiting class of death-eligible defendants; Eighth Amendment does not require any further weighing of severity of aggravating circumstances by jury).

Wainwright v. Goode, 464 U.S. 78 (1983) (holding despite improper reliance on nonstatutory circumstance under state law, procedures used did not produce arbitrary sentence in violation of Eighth Amendment).

Barclay v. Florida, 463 U.S. 939 (1983) (finding no constitutional violation in sentencer's improper consideration of nonstatutory aggravating circumstances against state statutory prohibition of consideration of nonstatutory aggravating circumstances, because did not infect balancing process created by state statute).

Zant v. Stephens, 462 U.S. 862 (1983) (stating statutory and nonstatutory factors may be considered; under *Jurek v. Texas*, specific standards for balancing aggravating against mitigating circumstance are not required).

State Statutes:

Ariz. Rev. Stat. Ann. § 13-703 (Supp. 2005) (listing statutory aggravating circumstances).

Cal. Penal Code § 190.3 (West 1999) (listing factors sentencer should consider).

Idaho Code § 19-2515 (2004) (listing statutory aggravating circumstances).

Mont. Code Ann. §§ 46-18-302, 303 (2005) (listing non-exclusive aggravating circumstances).

NRS § 200.033 (2005) (listing exclusive aggravating circumstances).

Or. Rev. Stat. § 163.095 (2005) (listing circumstances of "aggravated murder").

Wash. Rev. Code § 10.95.020 (Supp. 2006) (listing circumstances of aggravated first degree murder).

4.7.2 Constitutionality of Aggravating Circumstances: Application to Subclass Only; Not Vague

In *Tuilaepa v. California*, the Supreme Court enumerated two requirements for the constitutionality of an aggravating circumstance: first, it must apply only to a subclass of death-eligible defendants, and second, it must not be vague.

In *Arave v. Creech*, 507 U.S. 463 (1993) the Court held that an aggravating circumstance must not be applicable to every defendant convicted of murder but rather only to a subclass of such defendants. If an aggravating circumstance could apply to every defendant eligible for the death penalty, then it would not serve to "genuinely narrow" the class of defendants eligible for the death penalty as required in *Zant v. Stephens*.

To overcome a vagueness challenge, the Court has held that the aggravating factor must channel the sentencing decision against an arbitrary and capricious result. *Godfrey v. Georgia*, 446 U.S. 420 (1980). A statutory aggravating factor that appears facially invalid may nevertheless be validated by more exacting jury instructions. Thus, federal rulings on a vagueness attack of an identical or similar aggravating

circumstance vary among cases, particularly because federal courts afford deference to state interpretation of state law. Moreover, in *Tuilaepa v. California*, the Supreme Court announced that it has struck down few sentencing factors for vagueness, acknowledging that a factor is constitutional if it has some "commonsense core of meaning . . . that criminal juries should be capable of understanding." *Id*. at 973 *(quoting Jurek v. Texas*, 428 U.S. 262, 279 (1976)).

Supreme Court:

Tuilaepa v. California, 512 U.S. 967 (1994) (adopting language in *Jurek v. Texas*, 428 U.S. 262, 279, that factor not unconstitutionally vague if has some "commonsense core of meaning . . . that criminal juries should be capable of understanding").

Arave v. Creech, 507 U.S. 463, 474 (1993) (stating "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm").

Shell v. Mississippi, 498 U.S. 1 (1990) (holding when limiting instructions are used to cure defect in facially vague statute, the instructions must meet specificity requirements of *Godfrey).*

Walton v. Arizona, 497 U.S. 639 (1990) (holding that Arizona State Supreme Court's narrowing definition of facially vague statutory aggravating circumstance furnishes sufficient guidance to sentencer to satisfy Eighth Amendment and is therefore not unconstitutionally vague), overruled in *Ring v. Arizona,* 536 U.S. 584 (2002), to the extent that *Walton* allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for the imposition of the death penalty).

Maynard v. Cartwright, 486 U.S. 356 (1988) (stating review process for use of facially vague statutory aggravating circumstances).

Zant v. Stephens, 462 U.S. 862, 877 (1983) (stating aggravating circumstances must genuinely narrow the class of defendants eligible for the death penalty).

Godfrey v. Georgia, 446 U.S. 420 (1980) (stating under post-*Furman* cases, death penalty statute must not have standards so vague that they create arbitrary and capricious sentencing).

Ninth Circuit:

Valerio v. Crawford, 306 F.3d 742 (9th Cir. 2002) (en banc) (holding that "depravity of mind" aggravating-circumstances jury instruction was unconstitutionally vague under *Godfrey v. Georgia* and that state appellate court cannot cure such error under *Walton v. Arizona*, by applying a narrowing construction to the instruction to a *de novo* finding of the facts when the penalty phase factfinder has been a jury; also holding that, even if the *Walton* procedure were available, the Nevada Supreme Court failed to provide "close appellate scrutiny" and therefore failed to cure the error caused by the unconstitutionally vague jury instruction and the error was not harmless), *cert. denied*, 538 U.S. 994 (2003).

Knapp v. Cardwell, 667 F.2d 1253, 1260 (9th Cir.) (stating federal courts will not review state court's interpretation of statute unless clearly untenable and amounts to subterfuge to avoid federal review of the unconstitutional deprivation of rights), *cert. denied*, 459 U.S. 1055 (1982).

See generally:

Diale Taliaferro, Note, *Constitutional Law—A Ruling on the Constitutionality of a State's Capital Punishment Statute Under the Eighth and Fourteenth Amendments Requires the Court to Base its Holding on the Relevant State's Highest Court's Construction of Such Statute, Rather than its Own*, 72 U. Det. Mercy L. Rev. 229 (1994) (analyzing limiting construction used in *Arave v. Creech*).

4.7.3 Specific Aggravating Circumstances

4.7.3.1 Element of Underlying Crime as Aggravating Factor

In *Lowenfield v. Phelps*, 484 U.S. 231 (1988), the Supreme Court held that an element of the underlying crime may constitutionally be used as an aggravating circumstance, provided that the constitutionally required narrowing function was performed at the guilt phase of the trial. In such cases, the fact that the aggravating circumstance duplicated one of the elements of the crime did not invalidate the sentence. *Id*. at 245.

Supreme Court:

Lowenfield v. Phelps, 484 U.S. 231 (1988) (upholding Louisiana capital punishment scheme in which the intent to kill more than one person is both an element of first

degree murder and an aggravating circumstance).

Ninth Circuit:

Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995) (holding jury properly instructed to consider: (a) the circumstances of the crime; and (b) the presence or absence of criminal activity including force or threats of force; instructions did not improperly lead jury to count circumstances of crime twice).

McKenzie v. Risley, 842 F.2d 1525, 1539 (9th Cir.) (en banc) (holding "by means of torture" may be both element of crime and aggravating factor), *cert. denied*, 488 U.S. 901 (1988).

District Courts in Ninth Circuit:

Odle v. Vasquez, 754 F. Supp. 749 (N.D. Cal. 1990) (holding fact that special circumstance found by California jury is also a statutory aggravating factor does not create presumption in favor of death penalty; invalid special circumstance was harmless error with respect to penalty phase because there was clear record of what was being charged and jury instructed not to count up aggravating and mitigating factors in a mechanical fashion).

Other Circuits:

United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996) (finding double counting in federal death penalty case where statutory and nonstatutory aggravating factors substantially overlapped).

4.7.3.2 Unadjudicated Criminal Conduct

In a capital case, evidence of unadjudicated criminal conduct may constitute an aggravating circumstance and be admissible at sentencing.

Ninth Circuit:

Campbell v. Kincheloe, 829 F.2d 1453, 1461 (9th Cir. 1987) (holding unadjudicated criminal conduct may be introduced to support the aggravating factor of probable future violence), *cert. denied*, 488 U.S. 948 (1988).

District Courts in Ninth Circuit:

Williams v. Vasquez, 817 F. Supp. 1443 (E.D. Cal. 1993) (holding admission of prior criminal conduct does not violate due process), *aff'd*, 52 F.3d 1465 (9th Cir. 1995), *and cert. denied*, 516 U.S. 1124 (1996).

4.7.3.3 "Outrageously or Wantonly Vile"

Supreme Court:

Maynard v. Cartwright, 486 U.S. 356, 362–64 (1988) (stating "outrageously or wantonly vile, horrible, and inhuman" aggravating circumstance too vague under Eighth Amendment).

Godfrey v. Georgia, 446 U.S. 420 (1980) (holding Georgia Supreme Court construction of "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance too broad and vague, not sufficiently limiting to satisfy Eighth Amendment).

See generally:

Paul J. Heald, *Medea and the Un-Man: Literary Guidance in the Determination of Heinousness Under Maynard v. Cartwright,* 73 Tex. L. Rev. 571 (1995) (illustrating methodology that literary texts may be applied to interpreting concrete legal problems, bringing Dante, C.S. Lewis, and Euripides to bear on development of ethical framework for determining what constitutes "heinous, atrocious, or cruel," as addressed by Supreme Court in Maynard v. Cartwright).

4.7.3.4 "Wicked or Morally Corrupt"

Supreme Court:

Barber v. Tennessee, 513 U.S. 1184 (1995) (mem.) (denying certiorari on other grounds, but noting "wicked or morally corrupt" is "plainly impermissible" because such a state of mind is characteristic of every murder, citing *Godfrey* and *Maynard).*

4.7.3.5 "Heinous, Cruel or Depraved"

Supreme Court:

Richmond v. Lewis, 506 U.S. 40 (1992) (holding Arizona's "especially heinous, cruel,

or depraved" aggravating factor unconstitutionally vague at time of petitioner's resentencing).

Espinosa v. Florida, 505 U.S. 1079 (1992) (holding Florida's "especially heinous, wicked, evil, atrocious or cruel" aggravating circumstance is unconstitutional where no limiting instruction or definition applied to it).

Stringer v. Black, 503 U.S. 222 (1992) (holding Mississippi's "especially heinous, atrocious, or cruel" aggravating circumstance unconstitutionally vague without further limiting instruction).

Shell v. Mississippi, 498 U.S. 1 (1990) (per curiam) (holding trial court's instruction limiting "especially heinous, atrocious or cruel" aggravating factor insufficient to cure vagueness; instruction nothing more than dictionary definitions, did not limit population of those to be punished under capital statute).

Lewis v. Jeffers, 497 U.S. 764 (1990) (holding Arizona state court construction of "especially heinous . . . or depraved" not unconstitutionally vague, following *Walton*).

Walton v. Arizona, 497 U.S. 639 (1990) (holding Arizona's "especially heinous, cruel or depraved" aggravating circumstance constitutional because trial judge, not jury, makes sentencing determination and Arizona courts have sufficiently narrowed the definition of this factor to circumstances where victim suffers mental anguish or physical abuse), overruled in *Ring v. Arizona,* 536 U.S. 584 (2002), to the extent that *Walton* allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for the imposition of the death penalty).

Maynard v. Cartwright, 486 U.S. 356 (1988) (holding that in the absence of limiting construction by state courts, Oklahoma statutory aggravating circumstance of "especially heinous, atrocious or cruel" did not adequately channel jury discretion and was unconstitutionally vague and overbroad).

Proffitt v. Florida, 428 U.S. 242, 255–56 (1976) (plurality opinion) (stating "heinous, atrocious or cruel" aggravating circumstance provides adequate guidance to sentencing bodies where it is interpreted as applying only to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim").

Ninth Circuit:

Valerio v. Crawford, 306 F.3d 742 (9th Cir. 2002) (en banc) (holding that "depravity of mind" aggravating-circumstances jury instruction was unconstitutionally vague

under *Godfrey v. Georgia* and that state appellate court cannot cure such error under *Walton v. Arizona*, by applying a narrowing construction to the instruction to a *de novo* finding of the facts when the penalty phase factfinder has been a jury; also holding that, even if the *Walton* procedure were available, the Nevada Supreme Court failed to provide "close appellate scrutiny" and therefore failed to cure the error caused by the unconstitutionally vague jury instruction and the error was not harmless), *cert. denied*, 538 U.S. 994 (2003).

Gerlaugh v. Stewart, 129 F.3d 1027, 1043 (9th Cir. 1997) (rejecting vagueness challenge to Arizona's "heinous, cruel or depraved" aggravating circumstance because petitioner's final sentencing occurred after the Arizona Supreme Court sufficiently construed aggravator), *cert. denied*, 525 U.S. 903 (1998).

Ceja v. Stewart, 97 F.3d 1246 (9th Cir. 1996) (upholding Arizona Supreme Court's narrowing construction re: "additional violence" of facially vague "heinous, cruel or depraved" aggravating circumstance).

McKenna v. McDaniel, 65 F.3d 1483 (9th Cir. 1995) (holding jury instruction re: Nevada "depravity of mind" aggravating factor was unconstitutionally vague), *cert. denied,* 517 U.S. 1150 (1996).

Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994) (outlining procedure for federal court in deciding whether aggravating factor violates Eighth Amendment: (1) determine whether statutory language defining the factor is itself too vague to guide sentencer, (2) if so, determine whether state courts have construed vague terms to provide guidance), *cert. denied*, 513 U.S. 1120 (1995).

Clark v. Lewis, 1 F.3d 814 (9th Cir. 1993) (holding Arizona's "depraved" aggravating factor not unconstitutionally applied because court narrowed it by stating "depraved" referred to "mental state and attitude of perpetrator as reflected in words and actions").

Chaney v. Lewis, 801 F.2d 1191, 1195 (9th Cir. 1986) (following *Walton*), *cert. denied*, 481 U.S. 1023 (1987).

District Courts in Ninth Circuit:

Fetterly v. Paskett, 744 F. Supp. 966 (D. Idaho 1990) (holding narrowing instruction on Idaho's "heinous, atrocious and cruel" aggravating factor cures vagueness).

Beam v. Paskett, 744 F. Supp. 958 (D. Idaho 1990) (holding Idaho's "especially heinous, atrocious or cruel, manifesting exceptional depravity" aggravating

circumstance not impermissibly vague on its face and sufficiently narrowed by state supreme court decisions), *rev'd on other grounds*, 966 F.2d 1563 (9th Cir. 1992).

See generally:

Richard N. Garnett, Note, *Depravity Thrice Removed: Using the "Heinous, Cruel, or Depraved" Factor to Aggravate Convictions of Nontriggermen Accomplices in Capital Cases*, 103 Yale L.J. 2471 (1994) (exploring peculiar confluence of constitutional standards governing execution of nontriggermen with those controlling operation and construction of statutory aggravating factors).

Jonathan Kennedy, *Florida's "Cold, Calculated & Premeditated Aggravating Circumstance in Death Penalty Cases,"* 17 Stetson L. Rev. 47 (1987) (reviewing "cold, calculated and premeditated" aggravating circumstance and arguing it is unconstitutional as applied).

Terrill Pollman, Note, *Maynard v. Cartwright: Channeling Arizona's Use of the Heinous, Cruel, or Depraved Aggravating Circumstance to Impose the Death Penalty*, 32 Ariz. L. Rev. 193 (1990) (examining history underlying guidelines Supreme Court has established for constitutionally permissible application of "heinous, cruel or depraved" aggravating circumstance provisions).

Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases–The Standardless Standard*, 64 N.C. L. Rev. 941 (1986) (examining "especially heinous" aggravating circumstance in light of Eighth Amendment guided discretion and Fourteenth Amendment due process, concluding that overbroad and inconsistent application undermines limits on discretion).

4.7.3.6 "Torture, Depravity of Mind or Mutilation"

Supreme Court:

Proffitt v. Florida, 428 U.S. 242, 255–58 (1976) (holding question whether crime was "conscienceless or pitiless crime which was unnecessarily torturous to victim" was not unconstitutionally vague).

Gregg v. Georgia, 428 U.S. 153 (1976) (finding "torture, depravity of mind" aggravating circumstance not unconstitutional on face).

Ninth Circuit:

Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994) (finding torture aggravating circumstance unconstitutionally vague without limiting construction re: intent; instructions at guilt phase do not spill over to cure vagueness at sentencing), *cert. denied*, 513 U.S. 1120 (1995).

Deutscher v. Whitley, 884 F.2d 1152, 1162–63 (9th Cir. 1989) (holding while "depravity of mind" factor of Nevada's "torture, depravity of mind or mutilation of the victim" aggravating circumstance is unconstitutionally vague, "torture" and "mutilation" are sufficiently clear), *vacated on other grounds*, 500 U.S. 901 (1992).

Other Circuits:

Battle v. Delo, 19 F.3d 1547 (8th Cir. 1994) (finding "depravity of mind" aggravating circumstance without further definition unconstitutionally vague, but "some kind of torture or serious physical abuse" is sufficient limiting instruction).

See generally:

Ellen F. Beckman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 Colum. L. Rev. 291 (1989) (arguing that sentencer in capital punishment proceeding cannot constitutionally consider aggravating circumstances stemming from defendant's mental illness).

4.7.3.7 "Utter Disregard for Human Life"

Supreme Court:

Arave v. Creech, 507 U.S. 463 (1993) (reversing Ninth Circuit and holding Idaho supreme court's consistent limiting construction of "utter disregard for human life" meets constitutional standards, not vague as applied).

Ninth Circuit:

Paradis v. Arave, 20 F.3d 950 (9th Cir. 1994) (following *Creech,* reversing earlier position that Idaho's "utter disregard" aggravating circumstance was unconstitutionally vague as applied), *cert. denied*, 513 U.S. 1117 (1995).

Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993) (following *Creech,* reversing earlier

position that Idaho's "utter disregard" aggravating circumstance was unconstitutionally vague as applied), *cert. denied*, 511 U.S. 1060 (1994).

See generally:

Cheri L. Bugajski, *Criminal Law–Capital Punishment–Aggravating Circumstances–Clear and Objective Standard*, 32 Duq. L. Rev. 347 (1994) (analyzing *Arave v. Creech).*

Jonah J. Goldstein, Note, *Arave* v. *Creech: Utter Disregard for the "Clear and Objective" Standard for Death Sentencing,* 71 Denv. U. L. Rev. 509 (1994) (critiquing *Arave v. Creech*, arguing it misapplies *Walton* and undermines precedent that aggravating circumstance must make reference to facts capable of objective determination).

4.7.3.8 Unadjudicated Criminal Conduct

Supreme Court:

Delo v. Lashley, 507 U.S. 272 (1993) (ruling petitioner not entitled to instruction at sentencing phase that he or she was presumed innocent of other unadjudicated crimes that were being considered as aggravating factors by the jury).

District Courts in Ninth Circuit:

Williams v. Vasquez, 817 F. Supp. 1443 (E.D. Cal. 1993) (holding lack of jury instruction enumerating elements of offenses or standard of proof which must be met before jury can consider those offenses does not render California's aggravating factor allowing jury to weigh unadjudicated criminal conduct unconstitutionally vague).

4.7.3.9 Protected Conduct

Supreme Court:

Dawson v. Delaware, 503 U.S. 159 (1992) (holding evidence of defendant's membership in white racist group irrelevant to capital sentencing; no *per se* constitutional barrier to admissibility of evidence re: beliefs and associations, but if irrelevant to sentencing, then not admissible).

Zant v. Stephens, 462 U.S. 862 (1983) (noting "factors that are constitutionally

impermissible or totally irrelevant to sentencing process, such as race, religion, or political affiliation of defendant"; aggravating circumstance is invalid if "it authorizes a jury to draw adverse inference from conduct that is constitutionally protected").

Ninth Circuit:

Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993) (holding evidence of defendant's prior nonviolent consensual and involuntary sexual history in support of "continuing threat" aggravating circumstance violates Eighth Amendment because serves no retributive purpose), *cert. denied,* 511 U.S. 1060 (1994).

4.7.3.10 Prior Felony Convictions

Supreme Court:

Johnson v. Mississippi, 486 U.S. 578 (1988) (holding Eighth Amendment requires reexamination of death sentence based in part on aggravating circumstance of prior conviction which was later declared invalid; error extended beyond mere invalidation of aggravating circumstances since jury was allowed to consider evidence which was materially inaccurate).

Ninth Circuit:

Gretzler v. Stewart, 112 F.3d 992, 1004–5 (9th Cir. 1997) (approving use of prior out-of-state conviction as aggravator, even though the California judge did not accurately inform petitioner, who was facing capital murder charges in Arizona when he pled to nine counts of murder in California, of the consequences in Arizona of his plea in California), *cert. denied*, 522 U.S. 1081 (1998).

Campbell v. Kincheloe, 829 F.2d 1453, 1461 (9th Cir. 1987) (holding use of prior conviction improper if (1) prior conviction unconstitutional and (2) sentence enhanced in reliance on this conviction), *cert. denied*, 488 U.S. 948 (1988).

District Courts in Ninth Circuit:

Arnett v. Ricketts, 665 F. Supp. 1437, 1444 (D. Ariz. 1987) (holding allowance of hearsay evidence of prior convictions to prove aggravating circumstance of prior conviction constitutes fundamental error violating defendant's due process rights).

4.7.3.11 Pecuniary Gain

Ninth Circuit:

LaGrand (Karl) v. Stewart, 133 F.3d 1253 (9th Cir.) (finding Arizona pecuniary gain aggravating factor not arbitrary or capricious), *cert. denied*, 525 U.S. 971 (1998).

Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997) (holding Arizona Supreme Court ruling that pecuniary gain aggravating circumstance applies to one who kills in expectation of financial gain as well as to parties involved in a murder for hire is not an unforeseeable judicial enlargement of sentence), *cert. denied*, 118 U.S. 1533 (1998).

Woratzeck v. Stewart, 97 F.3d 329 (9th Cir. 1996) (holding pecuniary gain aggravating factor does not apply to all persons convicted of robbery felony-murder; sentencer's discretion is adequately channeled), *cert. denied*, 520 U.S. 1173 (1997).

4.7.3.12 Miscellaneous

Supreme Court:

Tuilaepa v. California, 512 U.S. 967 (1994) (holding following sections of California Penal Code § 190.3 not unconstitutionally vague: (1) "circumstances of crime," (2) "presence or absence of criminal activity involving use or attempted use of force or violence," (3) defendant's age at time of crime).

Ninth Circuit:

Jeffries v. Blodgett, 5 F.3d 1180, 1194 (9th Cir. 1993) (holding Washington's aggravating circumstance addressing whether murder was committed to conceal the commission of a crime and whether the murder involved more than one victim and was the common scheme of the defendant are not unconstitutionally vague), *cert. denied*, 510 U.S. 1191 (1994).

4.8 Mitigating Circumstances

4.8.1 Consideration of all Relevant Mitigating Circumstances

In the post-*Furman* era, the Supreme Court established that the Eighth Amendment prohibition against cruel and unusual punishment requires the individualized

consideration of mitigating circumstances in determining a sentence of death. In *Lockett v. Ohio*, 438 U.S. 586 (1978), and later in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court ruled that the sentencer must consider all relevant mitigating evidence in a capital case. In *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), the Court, *quoting Eddings*, stated that the sentencer may "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." Thus, the capital sentencer must consider both statutory and nonstatutory mitigating evidence. In *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), the Court held that the trial judge must instruct the jury that it may consider evidence presented by the defendant of nonstatutory mitigating factors. In *Delo v. Lashley*, 507 U.S. 272 (1993), the Court clarified its precedent on mitigating jury instructions holding that such instructions are constitutionally required only when supported by evidence.

In *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), the Court held that Mr. Penry's second sentencing trial was constitutionally flawed because the jury instructions were internally inconsistent. Although the additional supplemental instruction mentioned mitigating evidence, in order to consider the evidence in mitigation, the jury would have to disregard the instructions on answering the special issues.

Supreme Court:

Oregon v. Guzek, 126 S. Ct. 1226 (2006) (holding that Constitution does not prohibit State from limiting the innocence-related evidence a capital defendant may introduce at trial; explaining that Supreme Court had not interpreted Eighth Amendment as providing such defendant a right to introduce at sentencing alibi evidence designed to cast residual doubt on his guilt of basic crime of conviction).

Smith v. Texas, 125 S. Ct. 400 (2004) (per curiam) (holding that an instruction that directed the jury to give effect to mitigation evidence, but allowed the jury to do so only by negating what would otherwise be affirmative responses to two special issues relating to deliberateness and future dangerousness was constitutionally inadequate under *Penry II*).

Tennard v. Dretke, 542 U.S. 274 (2004) (holding that the Fifth Circuit assessed a capital habeas petitioner's *Penry v. Lynaugh* claim under an improper standard: that is,

by applying a threshold test to the petitioner's mitigating evidence presented at the penalty phase of the trial that he had an IQ of 67 as to whether it was evidence of a "uniquely severe permanent handicap" that bore a "nexus" to the crime; noting that the "Eighth Amendment requires that the jury must be able to consider and give effect to" a capital defendant's mitigating evidence).

Penry v. Johnson, 532 U.S. 782 (2001) (*Penry II*) (reversing death sentence because jury had no way to meaningfully consider supplemental mitigation instruction).

Buchanan v. Angelone, 522 U.S. 269 (1998) (holding that jury need not be instructed specifically on particular statutory mitigating factors as long as jury is instructed that all mitigating evidence should be considered).

Delo v. Lashley, 507 U.S. 272 (1993) (upholding trial court's refusal to give instruction in sentencing phase that jury could consider petitioner's lack of significant prior criminal activity because petitioner presented no evidence of prior criminal history and Constitution does not obligate court to give mitigating circumstance instruction when no evidence offered to support it).

Boyde v. California, 494 U.S. 370 (1990) (holding states are free to structure and shape consideration of mitigating evidence in effort to achieve more rational and equitable administration of death penalty).

Blystone v. Pennsylvania, 494 U.S. 299 (1990) (stating requirement of individualized sentencing in capital cases is satisfied by allowing jury to consider all mitigating evidence).

Penry v. Lynaugh, 492 U.S. 302 (1989) (*Penry I*) (holding Texas death penalty statute–as applied–unconstitutional as impermissibly restricted the jury's consideration of Penry's mental retardation as mitigating evidence).

Franklin v. Lynaugh, 487 U.S. 164 (1988) (affirming death sentence on facts of this case; however five Justices stating that Texas death penalty scheme may or does violate *Lockett* because jury cannot consider all mitigating evidence).

Hitchcock v. Dugger, 481 U.S. 393 (1987) (holding death sentence unconstitutional where advisory jury was precluded from considering nonstatutory mitigating circumstances and trial judge also refused to do so).

Skipper v. South Carolina, 476 U.S. 1 (1986) (stating sentencer cannot be precluded from considering as mitigating factor any evidence that defendant offers as basis for

sentence less than death).

Eddings v. Oklahoma, 455 U.S. 104 (1982) (holding sentencing court's refusal to consider defendant's difficult family history as mitigating factor violates *Lockett*).

Bell v. Ohio, 438 U.S. 637 (1978) (holding capital statute unconstitutional because it precluded consideration of circumstances offered in mitigation).

Lockett v. Ohio, 438 U.S. 586 (1978) (holding capital sentencing procedure, to be constitutional, must permit consideration, as a mitigating circumstance, of "any aspect of the 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").

Ninth Circuit:

Babbitt v. Calderon, 151 F.3d 1170, 1178 (9th Cir. 1998) (finding California jury instruction constitutional, allowing jury to consider "[a]ny other circumstance which extenuates the gravity of the crime," even though the court did not define "extenuates" and the jury was not told which factors it could consider as extenuating), *cert. denied*, 525 U.S. 1159 (1999).

Langford v. Day, 110 F.3d 1380 (9th Cir. 1996) (holding, where defendant and counsel do not ask to find mitigation, Eighth Amendment does not require sentencing court to search record to address specifically less-than-substantial unenumerated mitigating factors neither offered nor pointed out as mitigation at time of sentencing), *cert. denied*, 522 U.S. 881 (1997).

Rupe v. Wood, 93 F.3d 1434 (9th Cir. 1996) (holding that failure to allow jury to hear key state witness' polygraph results violates defendant's Eighth Amendment right to have all relevant mitigating evidence admitted at sentencing), *cert. denied*, 519 U.S. 1142 (1997).

Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993) (holding instructions stating whether there were sufficient mitigating circumstances to merit leniency and for the jury to consider "any relevant factors" did not preclude jury from giving full effect to mitigating evidence), *cert. denied*, 510 U.S. 1191 (1994).

Creech v. Arave, 928 F.2d 1481, 1489 (9th Cir. 1991) (holding defendant must be permitted to present new mitigating evidence on resentencing), *rev'd on other grounds*, 507 U.S. 463 (1993).

Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990) (holding court may not refuse to consider evidence which is not "sufficiently substantial to call for leniency").

McKenzie v. Risley, 842 F.2d 1525 (9th Cir.) (en banc) (holding Montana statute does not list mitigating circumstances and does not set out procedure for considering them; no constitutional violation because trial judge gave defendant full opportunity to present mitigating evidence), *cert. denied*, 488 U.S. 901 (1988).

State Statutes:

Ariz. Rev. Stat. § 13-703 (Supp. 2005) (listing mitigating factors).

Cal. Penal Code § 190.3 (West 1999) (listing factors sentencer should consider).

Idaho Code §§ 18-4505, 19-2515 (2004) (addressing mitigating circumstances).

Mont. Code Ann. § 46-18-304 (2005) (listing mitigating circumstances).

NRS § 200.035 (2005) (listing mitigating circumstances).

Or. Rev. Stat. § 163.150 (2005) (providing nonexclusive list of mitigating factors).

Wash. Rev. Code § 10.95.070 (2002) (listing factors to consider for leniency in capital sentencing).

See generally:

Craig Haney, Symposium, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 Santa Clara L. Rev. 547 (1995) (addressing societal image and stereotypes of capital criminals and commenting on role of mitigation at sentencing).

Mary Kay Sicola & Richard R. Shreves, *Jury Consideration of Mitigating Evidence: A Reviewed Challenge to the Texas Death Penalty Statute*, 15 Am. J. Crim. L. 55 (1988) (addressing infirmities in Texas death penalty procedure resulting from failure to effectively guide jury in considering and acting upon mitigating evidence during sentencing).

Joshua N. Sondheimer, Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 Hastings L.J. 409 (1990) (discussing "double-edged sword" nature of mitigating factors that can also

weigh against defendant, such as those indicating future dangerousness, arguing that modern death penalty statutes are thus just as arbitrary and irrational as pre-*Furman* era).

Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA. L. Rev. 1147 (1991) (examining changes in Court's Eighth Amendment jurisprudence since *Lockett* and addressing conflict between guided discretion of post-*Furman* cases and full mitigation under *Lockett).*

Jonathan P. Tomes, *Damned if You Do, Damned if You Don't: The Use of Mitigation Experts in Death Penalty Legislation*, 24 Am. J. Crim. L. 359 (1997) (reviewing practical use and impact of using mitigation experts from practitioner's perspective).

4.8.2 Scope of Mitigating Factors

Since the capital sentencer must consider "any" relevant mitigating factors, no finite list of mitigating factors exists. However, there are several common categories of mitigating circumstances which the Supreme Court and the circuits have specifically discussed.

4.8.2.1 Minimal Participation in Crime

Supreme Court:

Lockett v. Ohio, 438 U.S. 586 (1978) (involving minimal participation in crime as mitigating factor).

Ninth Circuit:

Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992) (holding refusal of trial court to admit at penalty phase circumstantial evidence that petitioner's co-defendant and a third party, rather than petitioner, might have planned the murder in question was constitutional error), *cert. denied*, 507 U.S. 951 (1993).

4.8.2.2 Youth/Family History

Supreme Court:

Johnson v. Texas, 509 U.S. 350 (1993) (holding Texas special issues allowed adequate consideration of defendant's youth because ample room in future dangerousness assessment for juror to take into account youth as mitigating factor).

Eddings v. Oklahoma, 455 U.S. 104 (1982) (holding sentencing court's refusal to consider defendant's difficult family history as mitigating factor violates *Lockett).*

4.8.2.3 Good Prison Behavior/ Potential for Rehabilitation

Supreme Court:

Truesdale v. Aiken, 480 U.S. 527 (1987) (holding *Skipper* fully retroactive).

Skipper v. South Carolina, 476 U.S. 1 (1986) (holding evidence that defendant has adjusted well to incarceration is relevant mitigation evidence, and exclusion violates *Lockett).*

District Courts in Ninth Circuit:

McClain v. Calderon, No. CV 89-3061 JGD, 1995 WL 769176 (C.D. Cal. Aug. 22, 1995) (holding trial judge should have allowed defense attorneys to introduce psychological evidence to support claim that defendant would not be threat to prison employees if sentenced to life), *aff'd*, 134 F.3d 1383 (9th Cir.), *and cert. denied*, 545 U.S. 942 (1998).

4.8.2.4 Mental Retardation

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Supreme Court held that mental retardation may be considered as a mitigating factor, but that executing mentally retarded persons was not categorically prohibited by the Eighth Amendment. However, more recently the Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that executing the mentally retarded violates the Eighth Amendment's prohibition against cruel and unusual punishment. The Court recognized that not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded

offenders about whom there is a national consensus against execution. The Court left to the states "the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Id.* at 317. For further discussion of *Atkins*, see § 1.6.

Supreme Court:

Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executing the mentally retarded violates the Eighth Amendment's prohibition against cruel and unusual punishment).

Penry v. Lynaugh, 492 U.S. 302 (1989) (holding mental retardation may be considered mitigating factor).

Ninth Circuit:

Harris v. Pulley, 885 F.2d 1354, 1383 (9th Cir. 1988) (holding, while *Zant* suggests mental illness may be mitigating, evidence regarding petitioner's personality disorder need not be identified as mitigating), *cert. denied*, 493 U.S. 1051 (1990).

4.8.2.5 Lack of Significant Prior Criminal Activity/Violence

Supreme Court:

Delo v. Lashley, 507 U.S. 272 (1993) (involving mitigating factor of lack of prior criminal activity).

Hitchcock v. Dugger, 481 U.S. 393 (1987) (involving lack of prior criminal activity as mitigating factor).

4.8.2.6 Coercion

Other Circuits:

Glass v. Butler, 820 F.2d 112 (5th Cir. 1987) (holding, on facts of case, "coercion" could be considered mitigating factor).

4.8.2.7 Good Character

Other Circuits:

Jernigan v. Collins, 980 F.2d 292 (5th Cir. 1992) (holding Texas sentencing statute did not prevent jury from giving mitigating effect to petitioner's evidence of good character), *cert. denied*, 508 U.S. 978 (1993).

4.8.2.8 "Catch All"

Supreme Court:

Brown v. Payton, 125 S. Ct. 1432 (2005) (ruling that the Ninth Circuit exceeded the limits on federal habeas review imposed by § 2254(d) in concluding that the California Supreme Court had unreasonably applied *Boyde v. California*, 494 U.S. 370 (1990), in holding that the California "factor (k)" catchall mitigating factor was not unconstitutionally ambiguous as applied in petitioner's case; holding that it could not be said that the California Supreme Court acted unreasonably in reading *Boyde* as establishing that factor (k)'s text was broad enough to accommodate petitioner's post-crime mitigating evidence of religious conversion and good behavior in prison where the factor directed consideration of any circumstance that might excuse the crime; also holding that even assuming that the state supreme court was incorrect in concluding that the prosecutor's argument did not mislead the jury into believing it could not consider the petitioner's post-crime mitigation evidence, that court's conclusion was not unreasonable and was just the type of decision that AEDPA shields on habeas review).

Ninth Circuit:

Sims v. Brown, 425 F.3d 560 (9th Cir.) (holding as to a pre-AEDPA capital habeas petition, that petitioner's Eighth and Fourteenth Amendment rights were not violated by the prosecutor's closing argument in the penalty phase about "factor (k)," the last factor in mitigation under California law that covers "any other circumstance which extenuates the gravity of the crime," because there was no reasonable possibility that the jury was misled to believe it could not consider petitioner's background, including childhood abuse, in mitigation), *as amended on denial of reh'g*, 430 F.3d 1220 (9th Cir. 2005).

Belmontes v. Brown, 414 F.3d 1094 (9th Cir. 2005) (on remand from the United States Supreme Court for further consideration in light of *Brown v. Payton*, 125 S. Ct. 1432 (2005), the panel reaffirmed its previous opinion in a pre-AEDPA capital habeas case,

affirming the district court's denial of habeas relief as to the guilt phase of trial and reversing the denial of relief as to the penalty phase; distinguishing *Payton* on the ground that *Payton* held that under the standards of AEDPA, the state court was not objectively unreasonable in concluding that the use of California's "factor (k)," instructing the jury in the penalty phase to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," did not unconstitutionally prevent the jury from considering relevant post-crime mitigating evidence; also holding that here the factor (k) instruction resulted in a reasonable probability that the jury did not consider petitioner's principal mitigating evidence), *petition for cert. filed* (Oct. 12, 2005) (No. 05-493).

Campbell v. Kincheloe, 829 F.2d 1453, 1464 (9th Cir. 1987) (holding Washington statute's sentencing factor permitting consideration of "any relevant factors" was properly limited by state courts to mitigating factors), *cert. denied*, 488 U.S. 948 (1988).

4.8.2.9 Reliable Hearsay Evidence

Supreme Court:

Green v. Georgia, 442 U.S. 95 (1979) (holding exclusion of evidence at sentencing phase based on state hearsay rule is unconstitutional).

4.8.2.10 Polygraph Evidence

Ninth Circuit:

Grisby v. Blodgett, 130 F.3d 365 (9th Cir. 1997) (holding that Court need not determine whether exclusion of polygraph evidence was error, since there was no showing of substantial or injurious effect).

4.8.3 Improper Mitigating Evidence

4.8.3.1 Irrelevant Evidence

Any mitigating evidence that is not relevant to guilt or sentencing does not satisfy the *Lockett* rule and need not be admitted or considered in determining a sentence of death.

Supreme Court:

Skipper v. South Carolina, 476 U.S. 1 (1986) (rejecting state's argument that evidence of future adaptability to prison life is irrelevant).

Other Circuits:

Glass v. Butler, 820 F.2d 112 (5th Cir. 1987) (holding trial court need not allow a defendant to introduce evidence not relevant to his or her character, prior record or the circumstances of offense; evidence of church's opposition to death penalty not relevant).

Johnson v. Thigpen, 806 F.2d 1243, 1250–51 (5th Cir. 1986) (holding purported irrationality of Mississippi's definition of capital murder, a description of the execution, and the issue of whether imposing a sentence of death is morally equivalent to killing not relevant to defendant's character or offense), *cert. denied*, 480 U.S. 951 (1987).

Brogdon v. Blackburn, 790 F.2d 1164, 1169 (5th Cir. 1986) (holding co-defendant's life sentence not relevant to defendant's character or offense), *cert. denied*, 481 U.S. 1042 (1987).

Martin v. Wainwright, 770 F.2d 918, 936 (11th Cir.) (holding failure to admit evidence on deterrent effect of death penalty does not violate *Lockett* because it does not help sentencer focus on unique characteristics of the defendant), *modified*, 781 F.2d 185 (11th Cir. 1985), *and cert. denied*, 479 U.S. 909 (1986).

State Courts:

People v. Ochoa, 19 Cal. 4th 353, 966 P.2d 442, 79 Cal. Rptr. 2d 408 (holding jury may not consider impact of death sentence on defendant's family, but family members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character), *cert. denied*, 528 U.S. 862 (1999).

4.8.3.2 Residual Doubt of Defendant's Guilt

In order to qualify for *Lockett-Eddings* status of admission and consideration at sentencing, mitigating evidence must be not only relevant but also related to defendant's character, record, or circumstances of the offense. The Supreme Court, in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), held that the jury's residual doubt about a

defendant's guilt was not a proper *Lockett-Eddings* mitigating factor because such doubt is not of the defendant's "character," "record," or "circumstances of the offense."

Supreme Court:

Franklin v. Lynaugh, 487 U.S. 164 (1988) (holding no constitutional right to have residual doubt re: guilt of defendant considered as a mitigating factor at sentencing because not related to defendant's character, record, or circumstances of offense).

Ninth Circuit:

Woratzeck v. Ricketts, 820 F.2d 1450, 1457 (9th Cir. 1987) (holding once guilt has been established beyond a reasonable doubt, a doubt about defendant's guilt is not relevant and may be excluded from an evaluation of mitigating factors), *vacated on other grounds*, 486 U.S. 1051 (1988) (vacated for reconsideration in light of *Maynard v. Cartwright).*

4.8.3.3 Sympathy and Passion

In *California v. Brown*, 479 U.S. 538 (1987), the Supreme Court upheld an instruction that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." The Court reasoned that the instruction did not violate *Lockett* because it only barred feelings of sympathy arising from outside the evidence presented. Thus, to the extent that mitigating sympathy is unrelated to the evidence presented, it is constitutionally prohibited.

Supreme Court:

California v. Brown, 479 U.S. 538 (1987) (holding jury instruction that jurors "must not be swayed by mere sympathy" or by public sentiment does not violate Eighth Amendment requirement under *Lockett* that sentencer be allowed to consider any relevant mitigating evidence about the crime or the defendant).

4.8.3.3.1 Retroactivity of *California v. Brown*

In *Saffle v. Parks*, 494 U.S. 484 (1990), the Supreme Court stated that the decision in *California v. Brown* created a new rule because its reasoning was not dictated by *Lockett* or *Eddings*. Therefore, under *Teague*, *California v. Brown* is not retroactively

applied to cases which became final before it was decided.

Supreme Court:

Saffle v. Parks, 494 U.S. 484 (1990) (stating *Brown* not retroactively applicable under *Teague*).

4.8.4 Burden of Persuasion

In *Walton v. Arizona*, 497 U.S. 639 (1990), the Supreme Court held that a state may require the defendant to bear the risk of nonpersuasion in the sentencing phase. So long as the method of allocating burdens of proof does not lessen the state's burden to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him or her the burden of proving, by a preponderance of the evidence, mitigating circumstances "sufficiently substantial to call for leniency." In *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990), the Ninth Circuit ruled that while the "sufficiently substantial to call for leniency" standard may be used in the weighing process under *Walton,* it may not be used to restrict the consideration of relevant mitigating evidence. Moreover, in *Mills v. Maryland*, 486 U.S. 367 (1988), the Court held that a state may not instruct the jury that it may consider only those mitigating circumstances which all jurors found unanimously. Such an instruction violates the requirement of *Lockett* that the sentencer may not be precluded from considering any relevant mitigating evidence.

Supreme Court:

Walton v. Arizona, 497 U.S. 639 (1990) (holding defendant may be given burden of proving mitigating circumstances "sufficiently substantial to call for leniency").

McKoy v. North Carolina, 494 U.S. 433 (1990) (holding *Mills* violated where capital sentencing procedure precludes jurors from considering mitigating evidence unless all jurors agree that the evidence is a mitigating factor).

Mills v. Maryland, 486 U.S. 367 (1988) (vacating death sentence for *Lockett* violation where jurors may have believed they were precluded from considering any mitigating evidence unless they agreed unanimously on the existence of a particular

circumstance).

Ninth Circuit:

Carriger v. Lewis, 971 F.2d 329 (9th Cir. 1992) (following *Walton* in rejecting claim that Arizona death penalty statute should require state to show absence of mitigating circumstances beyond reasonable doubt), *cert. denied,* 507 U.S. 992 (1993).

Richmond v. Lewis, 948 F.2d 1473 (9th Cir.1992) (following *Walton* in rejecting claim that death penalty statute illegitimately shifts burden of proof by requiring defendant to establish mitigating circumstances), *rev'd on other grounds*, 506 U.S. 40 (1992).

Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990) (holding Montana Supreme Court improperly used "sufficiently substantial to call for leniency" standard as a qualifier to exclude consideration of evidence which did not excuse defendant's conduct; however, that standard may be used in the weighing process under *Walton).*

See generally:

Miranda B. Strassmann, Note, *Mills v. Maryland: The Supreme Court Guarantees the Consideration of Mitigating Circumstances Pursuant to Lockett v. Ohio*, 38 Cath. U. L. Rev. 907 (1989) (reviewing *Mills* in light of precedent).

Victor L. Streib, *Symposium: Death Penalty for Battered Women*, 20 Fla. St. U. L. Rev. 163 (1992) (proposing battery be considered mitigating factor and in severe cases to exclude battered women from death penalty altogether).

4.8.4.1 Retroactivity of *Mills v. Maryland*

In *Beard v. Banks*, 542 U.S. 406 (2004), the Supreme Court stated that the decision in *Mills v. Maryland* (see § 4.8.4) created a new rule because its reasoning was not dictated by *Lockett.* The Court held that the *Mills v. Maryland* rule did not fall under either *Teague* exception and would not be retroactively applied to cases that became final before it was decided.

Supreme Court:

Beard v. Banks, 542 U.S. 406 (2004) (holding that *Mills* was not retroactively

applicable under either *Teague* exception).

4.9 Balancing Aggravating and Mitigating Circumstances

4.9.1 Weighing or Nonweighing by Sentencing Body

While all death penalty statutes require a finding of at least one aggravating circumstance for a defendant to be eligible for the death penalty, the treatment of aggravating circumstances by the sentencer depends on whether state law requires the sentencer to weigh the aggravating and mitigating circumstances. In nonweighing states, if the jury finds the existence of at least one aggravating circumstance, then it has the option to impose the death penalty. In deciding whether to impose this penalty, the jury is not instructed to consider the aggravating circumstances in any particular fashion. The Supreme Court in *Zant v. Stephens*, 462 U.S. 862 (1983), approved this nonweighing approach holding that a statute identifying aggravating circumstances need not provide standards to govern the jury in weighing the significance of those circumstances. In lieu of such standards, however, the Court stated that a statute must provide for appellate review of "the death sentence to determine whether it was arbitrary, excessive, or disproportionate." *Id*. at 879.

In weighing states, on the other hand, the statute specifically instructs the sentencing jury to weigh certain enumerated aggravating factors against any mitigating factors. If the mitigating factors outweigh the aggravating factors, then the jury is not entitled to impose the death penalty. If the aggravating factors outweigh the mitigating factors, the jury then has the option–but is not required–to impose a death sentence. In *Brown v. Sanders*, 126 S. Ct. 884 (2006), the Supreme Court held that it would simplify the sentence-invalidating factors it had previously applied to nonweighing states and would be guided by the following rule: "An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." *Id.* at 892. The Court also said that the "circumstances of the crime factor" has the effect of rendering all the specified sentencing factors

nonexclusive thus "causing California to be (in our prior terminology) a non-weighing State." *Id.* at 893.

Supreme Court:

Brown v. Sanders, 126 S. Ct. 884 (2006) (holding an invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances"; also holding that, despite the fact that the California Supreme Court invalidated two special circumstances on direct appeal, there was no constitutional error in the jury's consideration of the invalid eligibility factors in the weighing process because all the facts necessary to establish the "heinous, atrocious, or cruel" and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor).

Zant v. Stephens, 462 U.S. 862 (1983) (holding, based on *Jurek v. Texas*, that standards for balancing aggravating against mitigating circumstances not required, but appellate review by state needed in the alternative).

Ninth Circuit:

Jeffries v. Blodgett, 974 F.2d 1179 (9th Cir. 1992) (holding jury not required during penalty phase to specify mitigating factors it considered and how those factors weighed against aggravating factors).

Clark v. Ricketts, 958 F.2d 851, 858 (9th Cir.) (holding petitioner's due process rights were not denied when state court sentencing judge did not identify and explain each mitigating factor where it was clear from record that sentencing court considered all statutory and nonstatutory mitigating evidence before imposing death sentence), *cert. denied*, 506 U.S. 838 (1992).

Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990) (holding trial court must consider the mitigating factors as a whole to determine if they are "sufficiently substantial to call for leniency").

See generally:

Marcia A. Widder, Comment, *Hanging Life in the Balance: The Supreme Court and the Metaphor of Weighing in the Penalty Phase of the Capital Trial*, 68 Tul. L. Rev. 1341

(1994) (exploring Supreme Court reliance on weighing as doctrine governing appellate review of capital sentencing, arguing doctrine is misplaced and distorting).

4.9.1.1 One Invalid/Weak Aggravating Circumstance

In a nonweighing state, a death sentence based upon an aggravating circumstance found to be invalid or insufficient alone to support a death sentence need not be set aside as long as at least one other aggravating circumstance supporting the sentence is valid. In *Zant v. Stephens*, 462 U.S. 862 (1983), the Supreme Court adopted the Georgia Supreme Court's determination that the invalid aggravating circumstance had only an "inconsequential" impact on the sentencing. The Court's holding, however, was also based on the state supreme court's mandatory appellate review of the sentence "to avoid arbitrariness and to assure proportionality." *Zant* at 890. This review allows the state appellate court to determine whether the elimination of an improperly considered aggravating circumstance possibly could have affected the sentence imposed.

In *Tuggle v. Netherland*, 516 U.S. 10 (1995), the Court clarified that *Zant* does *not* stand for the proposition that the existence of one valid aggravator *always* excuses a constitutional error, regardless of the reasons invalidating the other aggravating factor(s). The *Tuggle* Court reversed a capital sentence based on an *Ake* error, even though the error did not affect the validity of the "vileness" aggravating circumstance.

In a weighing state, some sort of reweighing process must occur before a reviewing court may affirm a death sentence based in part on an invalid aggravating circumstance–even where the sentence is also based on additional aggravating circumstances which are valid. *Clemons v. Mississippi*, 494 U.S. 738 (1990). The Supreme Court reiterated this rule in *Stringer v. Black*, 503 U.S. 222 (1992), stating that in a weighing state, where the jury must weigh all aggravating factors against mitigating factors, the state appellate court must determine what the sentencer would have done absent the invalid aggravating factor. The court may not simply uphold the sentence because the jury found other valid aggravating factors. Thus, in a weighing state, when an aggravating factor is invalidated, the appellate court may, short of remanding for resentencing, either reweigh the remaining factors or determine whether the sentencer's consideration of the invalid factor was harmless error.

In *Poland v. Arizona*, 476 U.S. 147 (1986), the Supreme Court held that a trial judge's rejection of an aggravating circumstance does not constitute an "acquittal" of that circumstance for double jeopardy purposes. A reviewing or resentencing court may still consider such circumstance.

In *Singletary v. Duest*, 507 U.S. 1048 (1993), the Court held that the *Brecht* standard applies to federal habeas review of a capital sentence involving an invalid aggravating factor. Therefore, on remand, the Eleventh Circuit was required to determine whether the error had a "substantial or injurious effect" on the jury's verdict.

Supreme Court:

Lambrix v. Singletary, 520 U.S. 518 (1997) (holding that rule announced in *Espinosa v. Florida*, 505 U.S. 1079 (1992)–if a weighing state requires the sentencing trial judge to give deference to a jury's advisory recommendation, neither the judge nor the jury is constitutionally permitted to weigh invalid aggravating circumstances–established a new rule of procedure which would not be applied retroactively to cases on collateral review).

Tuggle v. Netherland, 516 U.S. 10 (1995) (holding Fourth Circuit erred in interpreting *Zant* to mean that in nonweighing states a death sentence may be upheld on basis of one valid aggravating circumstance regardless of the reasons other aggravating factors are found invalid; one valid aggravator does not always excuse constitutional error in admission or exclusion of evidence).

Romano v. Oklahoma, 512 U.S. 1 (1994) (upholding appellate court's reweighing of three untainted aggravating circumstances against mitigating circumstances).

Singletary v. Duest, 507 U.S. 1048 (1993) (remanding Eleventh Circuit vacating of death sentence for invalid aggravating circumstance to review in light of *Brecht*).

Brecht v. Abrahamson, 507 U.S. 619 (1993) (holding, where state court determined prosecutor's comments regarding defendant's silence after being given *Miranda* warnings was harmless beyond reasonable doubt, federal district court need only determine whether error had "substantial or injurious effect" on jury's verdict").

Richmond v. Lewis, 506 U.S. 40 (1992) (holding reweighing after jury's consideration of invalid aggravating factor had not occurred where it was clear from state supreme court opinion that majority of court had not reweighed evidence in light of the invalid factor).

Espinosa v. Florida, 505 U.S. 1079 (1992) (holding in a state such as Florida, where both jury and judge weigh aggravating and mitigating circumstances, neither constitutionally permitted to weigh invalid aggravating circumstances).

Sochor v. Florida, 504 U.S. 527 (1992) (holding weighing of invalid aggravating factor was not cured by Florida Supreme Court where Court did not discuss whether error was harmless beyond a reasonable doubt; stating it is Eighth Amendment violation to weigh unconstitutional aggravating factor despite weighing other constitutional aggravating factors).

Stringer v. Black, 503 U.S. 222 (1992) (holding death sentence invalid where jury weighs unconstitutional aggravating circumstance against mitigating circumstance even though jury found two other valid aggravating circumstances; in order for a state appellate court to affirm a death sentence after sentencer was instructed to consider an invalid aggravating factor, court, to comply with Eighth Amendment, must determine what the sentencer would have done absent the factor).

Parker v. Dugger, 498 U.S. 308 (1991) (reversing death sentence where state supreme court had incorrectly determined that trial court found no mitigating circumstances after invalidating two of the trial court's aggravating factors in sentencing defendant to death and had consequently failed to follow required procedure of either reweighing aggravating and mitigating factors or applying harmless error analysis).

Clemons v. Mississippi, 494 U.S. 738 (1990) (holding, if it finds an aggravating factor unconstitutional, appellate court may re-weigh aggravating and mitigating factors to determine if death sentence still warranted; no constitutional prohibition against reweighing by court because no constitutional requirement that sentence of death be determined by a jury).

Poland v. Arizona, 476 U.S. 147 (1986) (holding double jeopardy does not bar consideration of an aggravating factor on review or retrial that was rejected by the original sentencing court).

Zant v. Stephens, 462 U.S. 862 (1983) (holding death sentence not unconstitutional where one of several statutory aggravating circumstances found by jury is held to be invalid where invalidity did not involve any constitutionally protected behavior and evidence submitted in support of invalid circumstance was otherwise properly before jury and not misleading or inaccurate).

Ninth Circuit:

Poland v. Stewart, 169 F.3d 573 (9th Cir.) (holding Arizona Supreme Court properly reweighed aggravating and mitigating circumstances after striking an aggravating factor), *cert. denied*, 528 U.S. 845 (1999).

Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997) (holding Arizona Supreme Court properly reweighed aggravating and mitigating circumstances after striking an aggravating factor), *cert. denied*, 522 U.S. 1082 (1998).

Jeffers v. Lewis, 38 F.3d 411 (9th Cir. 1994) (holding Arizona Supreme Court's independent review of record and explanation of its reweighing process satisfied requirements of *Clemons* and *Stringer*, and because it performed such reweighing, it thus was not required to remand the case under federal law; finding no clear requirement under federal or Arizona law that sentencer must itemize and discuss every piece of mitigating evidence in opinion), *cert. denied*, 514 U.S. 1071 (1995).

Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994) (vacating death sentence because error of invalid aggravating circumstance was not harmless, and no reweighing possible because other special circumstance invalidated by California Supreme Court), *cert. denied*, 513 U.S. 1120 (1995).

Jeffers v. Lewis, 5 F.3d 1199 (9th Cir. 1993) (remanding case where, after striking aggravating factors, state supreme court failed to properly reweigh remaining aggravating and mitigating circumstances).

Clark v. Lewis, 1 F.3d 814 (9th Cir. 1993) (holding Arizona supreme court on direct appeal properly narrowed "depraved" aggravating factor and reweighed mitigating and remaining two aggravating factors).

Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989) (holding unconstitutionality of one aggravating circumstance harmless since jury found two other aggravating circumstances), *vacated on other grounds*, 500 U.S. 901 (1992).

Beam v. Paskett, 966 F.2d 1563 (9th Cir. 1992) (holding death sentence invalid where one statutory aggravating circumstance was invalid and non-statutory aggravating circumstance invalid despite other valid statutory aggravating circumstances), *vacated,* 507 U.S. 1027 (1993) (and remanded in light of Supreme Court's finding statutory aggravating circumstance *not* invalid), *cert. denied*, 511 U.S. 1060 (1994).

Campbell v. Kincheloe, 829 F.2d 1453, 1461 (9th Cir. 1987) (holding because

petitioner did not show a reasonable probability that his sentence was enhanced by the allegedly unconstitutional aggravating factor and jury found other aggravating factors, death sentence appropriate), *cert. denied*, 488 U.S. 948 (1988).

Neuschafer v. Whitley, 816 F.2d 1390, 1393 (9th Cir. 1987) (holding death sentence valid where one aggravating circumstance held unconstitutional but jury found other aggravating circumstances and no mitigating circumstances; further, if at least one valid aggravating circumstance present, court need not consider whether other aggravating circumstances are valid).

See generally:

Stephen Hornbuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 Tex. L. Rev. 441 (1994) (examining Supreme Court's differing treatment of weighing and nonweighing states, arguing distinction should not determine method of reassessing death sentence; focusing on treatment of review of sentences based on invalid aggravating circumstance(s)).

4.9.2 Mandatory Presumption

An instruction that the jury "shall" impose the death sentence if it finds that the aggravating circumstances outweigh the mitigating circumstances does not create an improper "mandatory death sentence." According to *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), the requirement of individualized sentencing is satisfied as long as the jury is permitted to consider all relevant mitigating evidence.

Supreme Court:

Walton v. Arizona, 497 U.S. 639 (1990) (holding instruction that court shall impose death sentence if it finds one or more aggravating circumstances and no mitigating circumstances sufficient to call for leniency is proper under *Blystone* and *Boyde).*

Boyde v. California, 494 U.S. 370 (1990) (instruction that, if aggravating circumstances outweigh mitigating circumstances jury "shall impose" the death sentence, is proper under *Blystone).*

Blystone v. Pennsylvania, 494 U.S. 299 (1990) (holding instruction that verdict must be death if jury finds one aggravating circumstance and no mitigating circumstances or if aggravating circumstances outweigh mitigating circumstances is constitutional since

jury is permitted to consider all mitigating evidence).

Ninth Circuit:

Campbell v. Blodgett, 978 F.2d 1502 (9th Cir.) (following *Blystone,* upholding Washington death penalty statute as not creating a mandatory death penalty formula), *reh'g granted*, 978 F.2d 519 (1992).

Richmond v. Lewis, 948 F.2d 1473 (9th Cir. 1990) (following *Walton,* upholding "shall impose" language in Arizona death penalty statute), *rev'd on other grounds*, 506 U.S. 40 (1992).

4.9.3 Federal Review of State Law Errors

Federal courts do not grant relief for state law errors. Thus, federal habeas review of a state's application of its own aggravating circumstances is limited to a due process analysis–whether the error rendered the proceedings fundamentally unfair. The standard for federal habeas review, therefore, is not *de novo* but rather that of the "rational factfinder." Additionally, in *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990), the Court stated that the federal habeas court must view the evidence in the light most favorable to the prosecution to determine whether "any rational trier of fact" could have found the aggravating circumstance "beyond a reasonable doubt."

In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Court determined that the standard for a federal habeas court to apply is whether a constitutional trial error was harmless. A federal district court need only determine whether the error had a "substantial or injurious effect" on the jury's verdict. This standard is much less onerous than the traditional "harmless beyond a reasonable doubt" standard. However, in *O'Neal v. McAninch*, 513 U.S. 432 (1995), the Court elaborated that the petitioner does not carry any burden of proof in this inquiry. When a federal judge is in "grave doubt" about the likely effect of an error on the jury's verdict, the judge should treat it as having a substantial and injurious effect on the jury's verdict.

Supreme Court:

O'Neal v. McAninch, 513 U.S. 432 (1995) (holding where federal habeas court finds a

constitutional trial error and is in "grave doubt" about whether the error had "a substantial or injurious effect" on jury's verdict, the error is not harmless, and petitioner must win).

Singletary v. Duest, 507 U.S. 1048 (1993) (vacating death sentence which relied on invalid aggravating circumstance, and remanding in light of *Brecht*).

Brecht v. Abrahamson, 507 U.S. 619 (1993) (holding, where state court determined prosecutor's comments re: defendant's silence after being given *Miranda* warnings was harmless beyond reasonable doubt, federal district court need only determine whether error had "substantial or injurious effect" on jury's verdict).

Lewis v. Jeffers, 497 U.S. 764 (1990) (holding the standard of review of a state's application of a constitutionally narrowed aggravating factor is the "rational factfinder" standard of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), not *de novo* review).

Ninth Circuit:

Poland v. Stewart, 169 F.3d 573 (9th Cir.) (applying *Jeffers*, denying habeas relief), *cert. denied*, 528 U.S. 845 (1999).

Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997) (applying *Jeffers*, denying habeas relief), *cert. denied*, 523 U.S. 1082 (1998).

Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996) (regarding petitioner's attack on the presumption of correctness of state court factual findings, denying relief stating petitioner cannot transform a state law issue into a federal claim merely by alleging a due process violation), *cert. denied*, 522 U.S. 881 (1997).

Campbell v. Blodgett, 978 F.2d 1502 (9th Cir.) (following *Jeffers* in limiting standard of review of state sentencing), *reh'g granted*, 978 F.2d 519 (1992).

CHAPTER 5

FEDERAL DEATH PENALTY

5. FEDERAL DEATH PENALTY

5.1 Federal Death Penalty Crimes

Before 1988, there was a limited number of federal death penalty crimes and relatively little procedural guidance for processing these cases or for carrying out a federal death sentence. Then, beginning in 1988 with the Anti-Drug Abuse Act and then in 1994 with the Violent Crime Control and Law Enforcement Act, there was a significantly increased possibility of charging federal defendants with the death penalty. The Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e), created capital punishment for drug-related killings. The 1994 Act created several new federal capital offenses and added procedural clarifications to executing these sentences. Prior to the 1994 Act, some federal courts had found some federal death penalty statutes unconstitutionally arbitrary under *Furman v. Georgia*, 408 U.S. 238 (1972). The 1994 Act attempted to remedy this by including several sections on procedure, statutory aggravating and mitigating circumstances, and appointment of counsel.

Supreme Court:

Loving v. United States, 517 U.S. 748 (1996) (upholding constitutionality of military death penalty; President's prescription of aggravating factors does not violate separation of powers).

Ninth Circuit:

United States v. Cheely, 36 F.3d 1439 (9th Cir. 1994) (holding that 18 U.S.C. §§ 844(d) and 1716(a), providing federal death penalty for mail bombing, unconstitutionally allow disparate and arbitrary sentencing, do not "genuinely narrow class of persons eligible for death penalty," and thus violate *Furman v. Georgia*).

Other Circuits:

United States v. Quinones, 313 F.3d 49 (2nd Cir. 2002) (holding that the Federal Death Penalty Act does not violate the Due Process Clause; also holding, relying on *Herrera v. Collins* (*see* § 6.3.2.5), that the district court erred in recognizing a fundamental right of an innocent person not to be deprived, by execution, of the opportunity to

demonstrate that person's actual innocence), *cert. denied*, 540 U.S. 1051 (2003).

United States v. Battle, 173 F.3d 1343, 1350 (11th Cir. 1999) (holding that 18 U.S.C. § 3596 is a constitutional delegation of federal power), *cert. denied*, 529 U.S. 1022 (2000).

United States v. Webster, 162 F.3d 308 (5th Cir) (upholding constitutionality of the Federal Death Penalty Act of 1994), *cert. denied*, 528 U.S. 829 (1999).

United States v. Moore, 149 F.3d 773, 778 n.2 (8th Cir.) (finding nothing unconstitutionally vague in § 848(e)), *cert. denied*, 525 U.S. 1030 (1998).

United States v. Walker, 142 F.3d 103 (2d Cir.) (finding § 848(e) a valid exercise of Congress under the Commerce Clause), *cert. denied*, 525 U.S. 896 (1998).

United States v. Tipton, 90 F.3d 861 (4th Cir. 1996) (upholding constitutionality of § 848; Congress' power to legislate means of executing death sentence not exclusive power of executive branch), *cert. denied*, 520 U.S. 1253 (1997).

United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996) (holding statutory and nonstatutory aggravating factors in § 848(e) prosecution constitutionally valid), *cert. denied*, 520 U.S. 1213 (1997).

United States v. Chandler, 996 F.2d 1073 (11th Cir. 1993) (affirming conviction and death sentence; holding that the sentencing procedures under 21 U.S.C. § 848 do not violate the Eighth Amendment), *cert. denied*, 512 U.S. 1227 (1994).

United States v. Woolard, 981 F.2d 756 (5th Cir. 1993) (finding federal statute providing for death penalty for first degree murder of various federal employees unconstitutional because does not require weighing of mitigating evidence).

United States v. Villareal, 963 F.2d 725 (5th Cir.) (holding § 848(e) constitutional; states a crime, not merely a sentencing provision), *cert. denied*, 506 U.S. 927 (1992).

District Courts in Other Circuits:

United States v. Holloway, 29 F. Supp. 2d 435 (M.D. Tenn. 1998) (denying defendant's motion to dismiss request for death penalty and request for discovery from Department of Justice because defendant failed to present "clear evidence" of discriminatory effect and intent).

United States v. Beckford, 966 F. Supp. 1415 (E.D. Va. 1997) (holding that 21 U.S.C. 848(e)(1)(A) is neither unconstitutional on its face nor as applied since jury could convict on drug conspiracy charge without convicting on murder charge).

United States v. Boyd, 931 F. Supp. 968 (D.R.I. 1996) (holding Department of Justice death penalty authorization procedure not critical stage of prosecution and thus denial of defendant's requested discovery did not violate Sixth Amendment).

Nichols v. Reno, 931 F. Supp. 748 (D. Colo. 1996) (holding Attorney General's public statements in aftermath of Oklahoma City bombing that prosecutors would seek death penalty was insufficient charge of bias to support constitutional challenge to notice; death penalty protocol in U.S. Attorney's Manual does not provide defendant with judicially enforceable substantive or procedural rights), *aff'd*, 124 F.3d 1376 (10th Cir. 1997).

United States v. Nguyen, 928 F. Supp. 1525 (D. Kan. 1996) (upholding constitutionality of 18 U.S.C. § 924; holding statutory definition of capital offense under § 924 constitutional; statutory aggravating factors constitutional; federal death penalty statute provided meaningful review, proportionality review not required), *aff'd*, 155 F.3d 1219 (10th Cir. 1998), *and cert. denied*, 525 U.S. 1167 (1999).

Walker v. Reno, 925 F. Supp. 124 (N.D.N.Y. 1995) (finding Attorney General's determination to seek death penalty is action committed to agency discretion as mater of law; Attorney General Protocol is improper and insufficient source from which district court can draw law and apply it to review Attorney General's determination).

United States v. DesAnges, 921 F. Supp. 349 (W.D. Va. 1996) (holding § 848 does not unconstitutionally delegate legislative power to executive branch by allowing prosecutors to identify nonstatutory aggravating factors; § 848 adequately narrows death eligible class; no showing of racial bias in government's seeking of death penalty), *aff'd*, 134 F.3d 364 (4th Cir. 1997), *cert. denied*, 524 U.S. 911 (1998).

United States v. Nelson, 920 F. Supp. 825 (M.D. Tenn. 1996) (upholding constitutionality of 18 U.S.C. § 2113(c); concluding that "if death results" clause merely enhances penalty and does not create new offense).

United States v. Tidwell, No. 94-CR-353, 1995 WL 764077 (E.D. Pa. Dec. 22, 1995) (upholding constitutionality of 21 U.S.C. § 848(e); § 848(e) is a substantive offense, not just sentencing provision; language of § 848(e) not ambiguous–sufficient nexus between murder and continuing criminal enterprise).

United States v. Walker, 910 F. Supp. 837 (N.D.N.Y. 1995) (holding § 848(e) does not unconstitutionally limit scope of appellate review).

United States v. Davis, 904 F. Supp. 554 (E.D. La. 1995) (upholding constitutionality of 18 U.S.C. § 3591, § 241 and § 1512, following *Flores*; finding aggravating circumstances sufficiently narrowed class of eligible defendants, even though required in all capital cases; § 3592 not vague or overly broad; § 3592's discretion to prosecutor to argue nonstatutory aggravating factors is proper delegation of legislative authority to executive because statutory factors designate minimum requirements).

United States v. Bradley, 880 F. Supp. 271 (M.D. Pa. 1994) (rejecting statistical evidence as basis for claim that federal death penalty applied in racially discriminatory manner; upholding constitutionality of § 848; government's reliance on nonstatutory aggravating circumstances did not violate nondelegation doctrine).

United States v. Menzer, 817 F. Supp. 64 (E.D. Wis. 1993) (holding 18 U.S.C. § 34, which provides for death penalty for death caused by aircraft or motor vehicle felony, unconstitutional).

United States v. Pitera, 795 F. Supp. 546 (E.D.N.Y.) (upholding constitutionality of § 848(e)), *aff'd*, 986 F.2d 499 (2d Cir. 1992).

United States v. Pretlow, 779 F. Supp. 758 (D.N.J. 1991) (upholding constitutionality of § 848(e)).

United States v. Cooper, 754 F. Supp. 617 (N.D. Ill. 1990) (denying defendant's motion to prevent government from seeking death penalty under 21 U.S.C. § 848(e)), *aff'd*, 19 F.3d 1154 (7th Cir. 1994).

Federal Statutes:

8 U.S.C. § 1324(a)(1)(B) (2000) (providing death penalty for illegal transportation of alien resulting in death).

18 U.S.C. § 32 (2000) (defining crime of destruction of aircraft or aircraft facilities).

18 U.S.C. § 33 (2000) (defining crime of destruction of motor vehicles or motor vehicle facilities).

18 U.S.C. § 34 (2000) (providing death penalty for violation of § 32 and § 33 resulting in death).

18 U.S.C. § 36(b)(2) (2000) (providing death penalty for drive-by shooting resulting in death).

18 U.S.C. § 37(a) (2000) (providing death penalty for fatal violence in international airports).

18 U.S.C. § 241 (2000) (providing death penalty for conspiracy to violate civil rights resulting in death).

18 U.S.C. § 242 (2000) (providing death penalty for willful deprivation of federal rights resulting in death).

18 U.S.C. § 245(b) (2000) (providing death penalty for interference with federally protected activities resulting in death).

18 U.S.C. § 247(a), (d)(1) (2000) (providing death penalty for obstruction of free exercise of religious rights resulting in death).

18 U.S.C. § 351 (2000) (providing death penalty for murder of members of Congress, cabinet officers, Supreme Court justices, federal judges, families of federal officials with intent to impede or retaliate).

18 U.S.C. § 794 (2000) (providing death penalty for espionage offenses involving identification of U.S. agent to a foreign power).

18 U.S.C. § 844(d) (2000) (providing death penalty for interstate explosives offense resulting in death).

18 U.S.C. § 844(f)(3) (2000) (providing death penalty for damage of federal property by fire or explosives resulting in death).

18 U.S.C. § 844(i) (2000) (providing death penalty for damage of federal property affecting commerce by fire or explosives resulting in death)

18 U.S.C. § 924(j)(1) (2000) (providing death penalty for murder with firearm in course of federal violent crime or drug crime).

18 U.S.C. § 930(c) (2000), *as amended by* Act of Oct. 26, 2001, Pub. L. No. 107-56, 115 Stat. 381 (providing death penalty for murder during firearms attack in or on federal facility).

18 U.S.C. § 1091(b)(1) (2000) (providing death penalty for genocide).

18 U.S.C. § 1111(b) (2000) (providing death penalty for murder in special maritime and territorial jurisdiction).

18 U.S.C. § 1114 (2000) (providing death penalty for murder of federal employees and law enforcement officers).

18 U.S.C. § 1116(a) (2000) (providing death penalty for murder of diplomats or certain foreign officials).

18 U.S.C. § 1118 (2000) (providing death penalty for murder by lifetime federal prisoner).

18 U.S.C. § 1119 (2000) (providing death penalty for murder of U.S. national in foreign country).

18 U.S.C. § 1120 (2000) (providing death penalty for murder by escaped federal prisoner).

18 U.S.C. § 1121 (2000) (providing death penalty for murder of state employees, officials, or law enforcement officers assisting in federal investigation).

18 U.S.C. § 1201(a) (2000) (providing death penalty for kidnaping resulting in death).

18 U.S.C. § 1203(a) (2000) (providing death penalty for hostage-taking resulting in death).

18 U.S.C. § 1503(b)(1) (2000) (providing death penalty for murder of court officer, juror).

18 U.S.C. § 1512(a)(3)(A) (2000) (providing death penalty for killing with intent to tamper with witness, victim, or informant).

18 U.S.C. § 1513 (2000) (providing death penalty for retaliatory murders of witnesses).

18 U.S.C. § 1716(j)(3) (2000) (providing death penalty for mailing dangerous articles where death results).

18 U.S.C. § 1751 (2000) (providing death penalty for murder of president, vice president, high-level members of president's or vice president's staffs).

18 U.S.C. § 1958 (2000), *as amended by* Pub. L. No. 108-458, Title VI, § 6704, 118 Stat. 3766 (providing death penalty for use of interstate or foreign commerce facilities in commission of murder for hire).

18 U.S.C. § 1959(a)(1) (2000) (providing death penalty for murder in aid of racketeering).

18 U.S.C. § 1992 (2000) (providing death penalty for wrecking trains where death results).

18 U.S.C. § 2113(e) (2000) (providing death penalty for murder in course of bank robbery).

18 U.S.C. § 2119(3) (2000) (providing death penalty for carjacking resulting in death).

18 U.S.C. § 2245 (2000) (providing death penalty for sexual abuse offenses resulting in death).

18 U.S.C. § 2251(e) (2000), *as amended by* Pub. L. No. 108-21, Title V, § 506, 117 Stat. 652 (providing death penalty for child sexual exploitation resulting in death).

18 U.S.C. § 2280 (2000) (providing death penalty for acts of violence against maritime navigation resulting in death).

18 U.S.C. § 2281 (2000) (providing death penalty for violence against maritime fixed platforms).

18 U.S.C. § 2332(a)(1) (2000) (providing death penalty for terrorism outside the U.S. resulting in death).

18 U.S.C. § 2332a (2000), *as amended by* Pub. L. No. 108-48, Title VI, § 6802, 118 Stat. 3766 (providing death penalty for use of weapons of mass destruction resulting in death).

18 U.S.C. § 2332b (2000), *as amended by* Pub. L. No. 108-48, Title VI, §§ 6603, 6803, 6908, 118 Stat. 3762, 3769, 3774 (providing death penalty for terrorist act, which transcended national boundaries, resulting in death).

18 U.S.C. § 2340A (2000) (providing death penalty for torture resulting in death).

18 U.S.C. § 2381 (2000) (providing death penalty for treason).

18 U.S.C. § 2441 (2000) (providing death penalty for breaches of Geneva Convention resulting in death).

21 U.S.C. § 848(e) (2000) (providing death penalty for drug kingpins and leaders of major drug trafficking enterprises who murder or direct another to murder in order to obstruct justice or further the enterprise).

49 U.S.C. § 46502 (1994 & Supp. V 1999) (providing death penalty for aircraft piracy where death results).

See generally:

U.S. Department of Justice, *Survey of the Federal Death Penalty System (1988-2000)*, www.usdoj.gov/dag/pubdoc/dpsurvey.html (2000) (providing statistical compilation of death penalty cases in the United States, broken down by region, race/ethnicity of defendant and race/ethnicity of victim).

John P. Cunningham, *Death in Federal Courts: Expectations and Realities of the Federal Death Penalty Act of 1994*, 32 U. Rich. L. Rev. 939 (1998).

Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L. Rev. 1 (1995) (summarizing capital procedure and current status of death penalty cases in U.S.; arguing that public should realize that increasing number of crimes eligible for death penalty is self-defeating tactic; differentiating most depraved killers for capital punishment is more effective use of judicial and public resources currently drained by capital caseload).

Jeffrey C. Matura, *When Will It Stop? The Use of the Death Penalty for Non-Homicide Crimes,* 24 J. Legis. 249 (1998).

David J. Novak, *Anatomy of the Federal Death Penalty Prosecution: A Primer for Prosecutors*, 50 S.C. L. Rev. 645 (1999).

Peyton Robinson, *Judge Over Jury: Judicial Discretion In The Federal Death Penalty Under the Drug Kingpin Act*, 45 U. Kan. L. Rev. 1491 (1997).

5.2 Federal Capital Procedure

The 1994 Act (18 U.S.C. §§ 3591–3598) created a new federal system for sentencing, imposing, and reviewing the death sentence for certain federal crimes. Specifically, the

Act established statutory aggravating and mitigating circumstances to be considered in determining whether justification exists for a federal death sentence, established a special hearing for such determination, and established a system of appeal and review. The Attorney General sets forth policy and procedures in a Protocol to be followed in all federal cases in which a defendant is charged with an offense subject to the death penalty. Federal courts have found, however, that the Protocol (as well as the United States Attorney Manual in which it is included) does not create judicially enforceable substantive or procedural rights.

In 2006, 21 U.S.C. § 848(q)(4)-10) was repealed, and similar provisions regarding providing counsel, and expert and investigative services for capital defendant unable to pay for such fees and services, were enacted as 18 U.S.C. § 3599 (*see* § 6.2.8, *infra*).

In *United States v. Allen,* 536 U.S. 953 (2002), the U.S. Supreme Court vacated a death sentence imposed under the 1994 Act and remanded for reconsideration in light of the decision in *Ring v. Arizona*, 536 U.S. 584 (2002). In *Ring*, the Court held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. In *United States v. Allen,* 247 F.3d 741 (8th Cir. 2001), *cert. granted and judgment vacated,* 536 U.S. 953 (2002), the petitioner had asserted that the failure to allege in the indictment both the mental culpability factor from 18 U.S.C. § 3591(a) and the aggravating factors from § 3592(c) on which the government relied at sentencing for justification of imposition of the death penalty was unconstitutional under *Apprendi v. New Jersey.* For further discussion of *Apprendi* and *Ring*, see § 4.6.1. On remand the 8th Circuit held in *United States v. Allen,* 406 F.3d 940 (8th Cir. 2005) (en banc), *petition for cert. filed* (Sept. 29, 2005) (No. 05-6764), that it has been the practice of the Department of Justice since the *Ring* decision to submit mental culpability and aggravating factors to the grand jury for inclusion in the indictment and that this practice of the DOJ preserves the constitutionality of FDPA prosecutions.

Section 26.3 of Title 28 of the Code of Federal Regulations provides that the federal government's method of execution is lethal injection at a federal penal or correctional institution. However, 18 U.S.C. § 3596 provides that the method of implementing the death penalty for a federal conviction will follow that of the state in

which it is imposed, and, if there is no state death penalty, then that of another state designated by the judge. Section 3597 of Title 18 provides that "[a] United States marshal charged with supervising the implementation of a sentence of death may use appropriate State or local facilities for the purpose . . . ." The federal government's first death row and execution chamber opened in July 1999 at a penitentiary in Terre Haute, Indiana.

Supreme Court:

United States v. Allen, 536 U.S. 953 (2002) (vacating death sentence and remanding for further consideration in light of *Ring v. Arizona*, 536 U.S. 584 (2002); in case below, *United States v. Allen*, 247 F.3d 741 (8th Cir. 2001), petitioner had asserted that failure to allege in indictment both mental culpability factor from 18 U.S.C. § 3591(a) and aggravating factors from § 3592(c) on which the government relied at sentencing for justification of imposition of the death penalty was unconstitutional under *Apprendi v. New Jersey*).

Ring v. Arizona, 536 U.S. 584 (2002) (holding that capital defendants are entitled to jury determination of any fact on which legislature conditions increase in their maximum punishment; also holding that *Walton* and *Apprendi* are irreconcilable and overruling *Walton* to extent that it allowed sentencing judge, sitting without jury, to find aggravating circumstance necessary for imposition of death penalty).

Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding, in the context of noncapital sentencing, that the Due Process Clause requires that any factual determination that is required to increase a sentence that otherwise could not be imposed without the factual determination must be proven beyond a reasonable doubt to a jury).

Jones v. United States, 527 U.S. 373 (holding that Eighth Amendment does not require the court to instruct jurors in federal death penalty cases on consequences of their failure to agree on a sentence of death or life imprisonment without the possibility of parole), *reh'g denied*, 527 U.S. 1058 (1999).

Ninth Circuit:

United States v. Fernandez, et al, 231 F.3d 1240 (9th Cir. 2000) (holding district court erred by precluding the government from seeking the death penalty where the government refused to answer a discovery order requiring that it provide the defense with its confidential predecisional death penalty evaluation form and memoranda

regarding the AG's decision to seek the death penalty).

Other Circuits:

In re Sterling-Suarez, 306 F.3d 1170 (1st Cir. 2002) (holding that "promptly" as used in 18 U.S.C. § 3005, providing that following indictment of defendant on a capital crime, court "shall promptly, upon the defendant's request" assign two counsel "of whom at least 1 shall be learned in the law applicable to capital cases" means promptly after indictment, not, as government asserted, only after Attorney General has made determination to seek death penalty).

United States v. Fell, 360 F.3d 135 (2nd Cir.) (vacating district court order that had held that the federal death penalty is unconstitutional on the basis that the direction in 28 U.S.C. § 3593(c) to ignore the Federal Rules of Evidence when considering information relevant to death penalty eligibility is a violation of the Due Process Clause of the Fifth Amendment and the rights of confrontation and cross-examination guaranteed by the Sixth Amendment, the Second Circuit held that the standard set forth in § 3593(c) meets constitutional requirements because it "does not impair the reliability or relevance of information at capital sentencing hearings"), *cert. denied*, 543 U.S. 946 (2004).

United States v. Robinson, 367 F.3d 278 (5th Cir.) (holding that FDPA is not facially unconstitutional under the Indictment Clause since the government can comply with its constitutional obligations by first going to the grand jury and its statutory obligations by later filing a notice of intention to seek the death penalty; rejecting argument that FDPA violates the substantive and procedural components of Due Process Clause), *cert. denied*, 125 S. Ct. 623 (2004).

United States v. Hall, 152 F.3d 381 (5th Cir. 1998) (holding that FDPA does not require jury to return special findings regarding which mitigating factors the jury found to exist or the number of jurors who found a mitigating factor to exist), *cert. denied*, 526 U.S. 1117 (1999).

United States v. Allen, 406 F.3d 940 (8th Cir. 2005) (en banc) (on remand from the Supreme Court for reconsideration in light of *Ring v. Arizona,* holding that it has been the practice of the DOJ since the *Ring* decision to submit mental culpability and aggravating factors to the grand jury for inclusion in the indictment and that this practice preserves the constitutionality of FDPA prosecutions; also holding that although the Fifth Amendment requires that at least one statutory aggravating factor and the requisite mental state be found by the grand jury and charged in the indictment in FDPA prosecutions, the failure to do so in this pre-*Ring* case was harmless beyond a

reasonable doubt), *petition for cert. filed* (Sept. 29, 2005) (No. 05-6764) .

District Courts in Other Circuits:

United States v. Green, 372 F. Supp. 2d 168 (D. Mass. 2005) (granting defendants' motion that allegations of prior unadjudicated crimes not charged in the indictment and unrelated to the current prosecution be struck from the notice of intent to seek the death penalty; limiting ruling to prior unadjudicated crimes, and distinguishing cases holding to the contrary, noting that they were decided prior to *Blakely v. Washington,* 542 U.S. 296 (2004)).

United States v. Haynes, 269 F. Supp. 2d 970 (W.D. Tenn. 2003) (holding that the direction in 28 U.S.C. § 3593(c) to ignore the Federal Rules of Evidence when considering information relevant to death penalty eligibility was not a violation of the Due Process Clause of the Fifth Amendment or the rights of confrontation and cross-examination guaranteed by the Sixth Amendment; also holding that the Federal Death Penalty Act's silence regarding grand jury's role in finding mens rea and aggravating factors did not render the statute unconstitutional)

United States v. Llera Plaza, 179 F. Supp. 2d 444 (E.D. Pa. 2001) (denying defendant's motion to preclude penalty phase hearing and/or imposition of death penalty and holding that Federal Death Penalty Act was not unconstitutional on asserted basis that it unconstitutionally restricted mitigating evidence that jury may consider because it provides that sentencer may not consider race, color, religious beliefs, national origin, or sex of defendant or of any victim; also holding that Act was not unconstitutionally incomprehensible and that it adequately narrowed class of persons eligible for death penalty).

United States v. Minerd, 176 F. Supp. 2d 424 (W.D. Pa. 2001) (holding that Federal Death Penalty Act was constitutional and that Act properly delegated Congressional authority in permitting prosecution to define nonstatutory aggravating factors; also holding that statutory aggravating factors were not unconstitutionally vague).

United States v. Glover, 43 F. Supp. 2d 1217 (D. Kansas 1999) (holding that Federal Death Penalty Act did not violate Eighth Amendment by allowing use of nonstatutory aggravating factors without accompanying proportionality review).

United States v. Hammer, 25 F. Supp. 2d 518 (M.D. Pa. 1998) (rejecting claim that trial court should have used defendant's jury instruction relating to the consequences of a jury's failure to reach an unanimous verdict).

United States v. Roman, 931 F. Supp. 960 (D. R.I. 1996) (denying petitioner's motion to reveal aggravating circumstances that justify death sentence under 18 U.S.C. § 3593(a) as premature because government not yet decided to seek death penalty; holding that Department of Justice protocol does not create judicially enforceable substantive or procedural rights).

Federal Statutes:

18 U.S.C. § 3005 (2000) (providing for appointment of counsel in federal death penalty case).

18 U.S.C. § 3235 (2000) (providing venue in capital cases).

18 U.S.C. § 3281 (2000) (stating no time limitation on instituting capital proceedings).

18 U.S.C. § 3432 (2000) (setting procedures regarding indictment and list of jurors and witnesses in capital cases).

18 U.S.C. § 3591 (2000) (defining federal death sentence).

18 U.S.C. § 3592 (2000) (listing aggravating and mitigating circumstances).

18 U.S.C. § 3593 (2000) (providing for special hearing to determine whether death penalty justified).

18 U.S.C. § 3595 (2000) (providing for direct appeal and review of federal death sentence).

18 U.S.C. § 3596 (2000) (providing that federal death penalty carried out in manner prescribed by state in which sentence imposed).

18 U.S.C. § 3597 (2000) (providing for use of state facilities for implementing federal death sentence).

18 U.S.C. § 3599, *as added by* Pub. L. No. 109-177, § 222(a) (providing for appointment of counsel and for reasonably necessary expert and investigative services in capital cases).

28 C.F.R. §§ 26.1-26.5 (2001) (establishing procedures for carrying out federal death sentence in federal institution; providing lethal injection as execution method).

Federal Rules:

Fed. R. Crim. P. 7(a) (prohibiting waiver of indictment in capital cases).

Fed. R. Crim. P. 24(b) (providing twenty peremptory challenges for offenses punishable by death).

See generally:

Charles C. Boettcher, *Testing that Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591-98 (1994): United States v. Jones,* 132 F.3d 232 (5th Cir. 1998), 29 Tex. Tech L. Rev. 1043 (1998) (examining federal death penalty law prior to *United States v. Jones*; analyzing the Fifth Circuit's decision in *United States v. Jones*).

Sara L. Golden, Comment, *Constitutionality of the Federal Death Penalty Act: Is the Lack of Mandatory Appeal Really Meaningful Appeal*, 74 Temp. 429 (2001) (arguing that Federal Death Penalty Act's failure to provide for mandatory appellate review violates Eighth Amendment's ban on cruel and unusual punishment and proposing that Act be amended to require at least one level of review).

Sandra D. Jordan, *Symposium on the Seventh Circuit as a Criminal Court: Death for Drug Related Killings: Revival of the Federal Death Penalty*, 67 Chi.-Kent L. Rev. 79 (1991) (discussing and analyzing future impact of providing for death penalty in cases of drug related killings).

George Kannar, *Federalizing Death*, 44 Buff. L. Rev. 325 (1996) (summarizing legislation and procedural issues surrounding federal death penalty).

Brian Serr, *Of Crime and Punishment, Kingpins and Footsoldiers, Life and Death: The Drug War and the Federal Death Penalty Provision–Problems of Interpretation and Constitutionality*, 25 Ariz. St. L.J. 895 (1993) (arguing § 848(e) is not a substantive capital offense, but just an enhanced penalty provision for drug felonies aggravated by murder).

Richard P. Shafer, Annotation, *Validity, Construction, and Operation of Federal Death Penalty Act*, 18 U.S.C. § 3591 et seq., 195 A.L.R. Fed. 1 (2005).

Appointment of Counsel and Jury Selection Issues in Federal Death Penalty Cases, Chambers to Chambers, Vol. 10, No.1 (May 1995).

CHAPTER 6

HABEAS CORPUS PROCEEDINGS

6. HABEAS CORPUS PROCEEDINGS

6.1 Habeas Corpus Generally

Section 2241 of Title 28 of the United States Code provides federal courts with original jurisdiction over writs of habeas corpus. Under current procedure, a § 2241 petition is the proper means to challenge the execution of a sentence or to challenge confinement that is not the result of a criminal court's judgment. Challenges to the validity or lawfulness of a conviction itself, however, are properly brought through a petition for writ of habeas corpus under 28 U.S.C. § 2254 for state convictions or a motion to vacate, set aside, or correct the judgment under 28 U.S.C. § 2255 for federal convictions.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat 1214 (1996), made significant changes in the law of federal habeas corpus. The AEDPA, signed into law on April 24, 1996, amended many provisions in Chapter 153 (28 U.S.C. §§ 2241-2255) and added Chapter 154 (28 U.S.C. §§ 2261-2266), which applies exclusively to capital cases. Chapter 154 contains special optional provisions triggered by the state's establishment of a mechanism for the appointment and compensation of counsel in state postconviction proceedings.

Supreme Court:

Felker v. Turpin, 518 U.S. 651 (1996) (discussing the AEDPA in context of habeas corpus history; finding that the AEDPA does not violate Article III, Section 2 of the U.S. Constitution or violate the Constitution's ban on suspension of the writ pursuant to Article I, Section 9, clause 2).

Fay v. Noia, 372 U.S. 391 (1963) (tracing history and importance of habeas corpus).

Federal Statutes:

28 U.S.C. § 2241 (2000) (providing for writ of habeas corpus).

28 U.S.C. § 2254 (2000) (providing petition for writ of habeas corpus for relief from state convictions).

28 U.S.C. § 2255 (2000) (providing relief from federal convictions).

28 U.S.C. §§ 2241-2255 (2000) (applying to capital and noncapital cases brought by state and federal prisoners).

28 U.S.C. 2261-2266 (2000) (applying only to capital cases and providing requirements for state to "opt in").

Ninth Circuit Rules:

9th Cir. R. 22-1–22-6 (applying to habeas cases and direct criminal appeals in capital cases).

See generally:

A.B.A. Panel Discussion, *Dead Man Walking Without Due Process? A Discussion of the Anti-Terrorism and Effective Death Penalty Act of 1996*, 23 N.Y.U. Rev. L. & Soc. Change 163 (1997) (discussing the AEDPA and the panelists' ongoing concern with due process violations in capital cases).

Charles F. Baird, *The Habeas Corpus Revolution: A New Role for State Courts?*, 27 St. Mary's L.J. 297 (1996) (portraying recent changes in and impact of Supreme Court habeas corpus jurisprudence and addressing question of whether Supreme Court's reduction in federal oversight should be accompanied by greater measure of review by state courts).

John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Practice and Procedure*, 47 S.C. L. Rev. 271 (1996) (outlining federal habeas corpus procedure, with special reference to death sentencing issues).

Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y. L. Sch. J. Hum. Rts. 375 (1998) (discussing the history of habeas corpus as it pertains to the current debate over the scope of habeas relief).

Betty Binns Fletcher, *The Death Penalty in America: Can Justice Be Done?*, 70 N.Y.U. L. Rev. 811 (1995) (addressing issues for the federal judiciary in providing habeas corpus review in capital cases; concluding "backwards" system overall expends immense effort and resources at appellate review, but too often fails to provide adequate representation at trial).

Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 Notre Dame L. Rev. 1079 (1995) (reassessing common law history of

original habeas corpus act and evolution of Supreme Court's interpretation of the Act and anticipating Congress' habeas reform).

Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 Cal. L. Rev. 485 (1995) (examining Supreme Court habeas corpus jurisprudence and arguing that Court's reform efforts have failed the goals that Court set out to further).

Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 Am. Crim. L. Rev. 1 (2002) (proposing reforms to the current federal habeas corpus statute).

Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. Marshall L. Rev. 337 (1997) (addressing habeas corpus historically and in light of changes brought by habeas reform act).

Joseph L. Hoffman, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 Ind. L.J. 817 (1993) (arguing that both habeas corpus jurisprudence and death penalty law in general unduly emphasize process rather than substance; suggesting that recent limitations on habeas review represent an effort to limit the scope of death penalty review).

Brian M. Hoffstadt, *The Deconstruction and Reconstruction of Habeas,* 78 S. Cal. L. Rev. 1125 (2005) (arguing that reconstruction of habeas review is necessary or else the writ will "remain an unjustified, theoretical outlier under any view of federal courts law."

James S. Leibman, *Opting for Real Death Penalty Reform*, 63 Ohio St. L. J. 315 (2002) (arguing for change to system in which capital defendants would agree to give up existing postconviction review rights in return for better qualified trial counsel).

Scott Moss, *Recent Development, An Appeal by Any Other Name: Congress' Empty Victory Over Habeas Rights*, 32 Harv. C.R.-C.L. L. Rev. 249 (1997) (analyzing *Felker* and constitutionality of the AEDPA).

Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 Harv. L. Rev. 1578 (1998) (summarizing the AEDPA's modifications of habeas corpus law; reviewing leading cases interpreting the AEDPA and concluding that Congress' goal of curtailing habeas corpus, as expressed by the AEDPA, will be achieved in part as a

result of the statutory interpretation employed by courts to avoid the AEDPA's restrictions in the first place).

Kathleen Patchel, *The New Habeas*, 42 Hastings L.J. 939 (1991) (analyzing the Supreme Court's limitation of habeas review through the development of the doctrines of procedural default, successive petitions, and nonretroactivity; arguing that the Court has elevated finality concerns at the expense of other values).

Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process,"* 74 N.Y.U. L. Rev. 313 (1999) (discussing the history and current state of habeas corpus in the context of the Thomas Thompson case).

Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 Geo. Wash. L. Rev. 362 (1991) (discussing history of modern habeas corpus jurisprudence and arguing that the Supreme Court's retroactivity decisions have eliminated meaningful federal habeas review of state judgments).

Christopher E. Smith, *Federal Habeas Corpus Reform: The States' Perspective*, 18 Just. Sys. J. 1 (1995) (assessing impact and efficacy of Supreme Court's judicial policy-making on habeas corpus from perspective of states' attorneys).

Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 Mich. L. Rev. 862 (1994) (longing for constitutional right to habeas corpus).

J. Thomas Sullivan, *A Practical Guide to Recent Developments in Federal Habeas Corpus for Practicing Attorneys*, 25 Ariz. St. L.J. 317 (1993) (outlining very briefly the structure of federal habeas review).

J. Thomas Sullivan, *"Reforming" Federal Habeas Corpus: The Cost to Federalism: The Burden on Defense Counsel, and the Loss of Innocence*, 61 UMKC L. Rev. 291 (1992) (arguing that recent Supreme Court habeas decisions undermine the enforcement of federal rights in state courts, impose unreasonable burdens on defense counsel, encourage ineffective assistance of counsel claims, and retreat from the Court's earlier emphasis on the importance of innocence).

Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 Loy. U. Chi. L.J. 523 (1996) (presenting commentary on and transcript of panel discussion held in August 1995 on proposed habeas reform legislation, and related issues).

Nicole Veilleux et al., *Habeas Relief for State Prisoners*, 84 Geo. L.J. 1400 (1996)

(summarizing law of habeas corpus).

Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with it and How to Fix it?,* 33 Conn L. Rev. 919 (Spring 2001) (proposing that AEDPA be amended to make it easier for death row inmates to present evidence of innocence and to permit federal courts to review de novo claims of prosecutorial misconduct or ineffective assistance of counsel in capital cases).

Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff. L. Rev. 381 (1996) (reviewing principal changes of 1996 habeas corpus reform to existing law, focusing on process of federal habeas corpus adjudication and new § 2254(d) governing effect federal courts must give to state court judgments of federal claims).

6.1.1 Retroactivity of the AEDPA

Chapter 154 of Title 28 of the United States Code specifically provides that its provisions apply to cases pending on or after the date of enactment of the AEDPA, but Chapter 153 is silent as to its effective date. In *Lindh v. Murphy*, 521 U.S. 320 (1997), the Supreme Court held that the provisions amending Chapter 153 "generally apply only to cases filed after the Act became effective" on April 24, 1996. Prior to *Lindh*, a split among the circuits existed as to whether Chapter 153 applied to pending cases. The Ninth Circuit in *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir.) (en banc), *cert. denied*, 522 U.S. 1008 (1997), concluded that it did not apply.

The Ninth Circuit has considered several cases presenting the question of when a case is "pending" for purposes of general application of the AEDPA. In *Calderon v. United States Dist. Ct. for the Cent. Dist. of Cal. (Beeler)*, 128 F.3d 1283 (9th Cir. 1997), *cert. denied*, 522 U.S. 1099, *cert. denied*, 523 U.S. 1061, *and overruled en banc*, 163 F.3d 530 (9th Cir. 1998), the Ninth Circuit initially held that a habeas case is "pending" within the meaning of the AEDPA and *Lindh* only when the petition is filed.

In *Calderon v. United States Dist. Ct. for the Cent. Dist. of Cal. (Kelly V)*, 163 F.3d 530 (9th Cir. 1998) (en banc), *cert. denied*, 526 U.S. 1060 (1999), an en banc panel of the Ninth Circuit reconsidered *Beeler* in light of the Supreme Court's decision in *Hohn v. United States*, 524 U.S. 236 (1998). The *Kelly V* court determined that *Hohn* necessitated the overruling of *Beeler* and held that a petition for the appointment

of counsel to prepare and file a habeas petition coupled with a motion for a stay of execution also suffices as a "pending" case. Abrogating *Kelly V*, the Supreme Court in *Woodford v Garceau,* 538 U.S. 202 (2003), held that a case does not become "pending" for purposes of the AEDPA until actual application for habeas corpus relief is filed in federal court. The Court therefore held that the AEDPA applies to a habeas application filed *after* the AEDPA's effective date even though the applicant sought either appointment of counsel or a stay or execution (or both) *before* the AEDPA's effective date. *Id.* at 206. The Court concluded that if on the AEDPA's effective date "the state prisoner had before a federal court an application for habeas relief seeking an adjudication on the *merits* of the petitioner's claim, then amended § 2254(d) does not apply." *Id.* at 207.

Additionally, a remaining question, not expressly addressed in *Lindh*, exists as to whether courts should apply the retroactivity analysis set forth in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), to cases filed after the AEDPA's effective date. *See* §§ 6.2.1.1, 6.2.2.1, and 6.2.3.2.1.

Supreme Court:

Woodford v Garceau, 538 U.S. 202 (2003) (holding that AEDPA applies to a habeas application filed *after* AEDPA's effective date even though the applicant sought either appointment of counsel or a stay or execution (or both) *before* AEDPA's effective date; abrogating *Calderon v. United States Dist. Ct. for the Cent. Dist. of Cal. (Kelly V)*, 163 F.3d 530 (9th Cir. 1998) (en banc).

Hohn v. United States, 524 U.S. 236 (1998) (relying on *Ex Parte Quirin* in determining that an application for certificate of appealability constitutes a "case" within the meaning of 28 U.S.C. § 1254, and holding that the Supreme Court has jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability under 28 U.S.C. § 2253(c)).

Lindh v. Murphy, 521 U.S. 320 (1997) (holding negative implication of Chapter 154 retrospective application provision means that new provisions of Chapter 153 apply only to cases filed after the AEDPA became effective).

Felker v. Turpin, 518 U.S. 651 (1996) (applying the AEDPA to prisoner's second petition despite the fact that prisoner filed first petition prior to AEDPA's enactment).

McFarland v. Scott, 512 U.S. 849, 856 (1994) (holding that for purposes of 21 U.S.C. § 848(q)(4(B), which provides for the appointment of counsel for capital defendants in postconviction proceedings, a "post conviction proceeding" is pending when a request for the appointment has been made).

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (setting forth standard for retroactivity of new statutes, preventing retroactive application of statute where doing so attaches new legal consequences to events completed before enactment).

Ex Parte Quirin, 317 U.S. 1 (1942) (holding that a request for leave to file a habeas petition constituted a case in a district court over which the court of appeals could assert jurisdiction; "Presentation of the petition for judicial action is the institution of a suit. Hence the denial by the district court of leave to file petitions in these causes was the judicial determination of a case or controversy . . . .").

Ninth Circuit:

Calderon v. United States Dist. Ct. for the Cent. Dist. of Cal. (Kelly V), 163 F.3d 530, 540 (9th Cir. 1998) (en banc) (holding, in light of *Hohn v. United States,* that "a petition for the appointment of counsel to prepare and file a habeas petition, coupled with a motion for a stay of execution, also suffices as a pending case"), *cert. denied*, 526 U.S. 1060 (1999), abrogated by *Woodford v Garceau,* 538 U.S. 202 (2003), above.

Calderon v. United States Dist. Ct. for the Cent. Dist. of Cal. (Beeler), 128 F.3d 1283, 1288–89 (9th Cir. 1997) (holding that a habeas case is "pending" within the meaning of the AEDPA and *Lindh* only when the petition is filed), *cert. denied*, *cert. denied*, 522 U.S. 1099, *cert. denied*, 523 U.S. 1061 (1998), *and overruled en banc*, 163 F.3d 530 (9th Cir. 1998).

Jeffries v. Wood, 114 F.3d 1484, 1494 (9th Cir.) (en banc) (AEDPA does not apply to cases filed before enactment date; reviewing legislative history and finding that congressional intent clear–lack of retroactive application provision in Chapter 154 means Congress did not intend it to apply retrospectively), *cert. denied*, 522 U.S. 1008 (1997).

District Courts in Ninth Circuit:

Leavitt v. Arave, 927 F. Supp. 394 (D. Idaho 1996) (holding that the AEDPA was intended to apply to all pending habeas cases; statutes defining scope of habeas actions deal with "prospective relief" and thus applying AEDPA to pending applications does not have retroactive effect).

Other Circuits:

Mueller v. Angelone, 181 F.3d 557 (4th Cir. 1999) (reading *Lindh* to permit application of the AEDPA to cases filed after enactment only where the effect of doing so is not impermissibly retroactive under *Landgraf*; undertaking *Landgraf* analysis to determine applicability of AEDPA to first habeas petition filed after enactment of AEDPA and concluding *Landgraf* did not prohibit application).

Gosier v. Welborn, 175 F.3d 504 (7th Cir. 1999) (holding that the AEDPA applied to petitioner who sought appointment of counsel before effective date of AEDPA but did not file habeas petition until after AEDPA became effective).

Williams v. Coyle, 167 F.3d 1036, 1037 (6th Cir. 1999) (holding that a habeas case is not pending for purposes of *Lindh* until the application for the writ is filed pursuant to 28 U.S.C. § 2242).

Rivera v. Sheriff of Cook County, 162 F.3d 486, 489 (7th Cir. 1998) (citing *Lindh* for the proposition that AEDPA provisions necessarily apply to petitions filed after enactment of the AEDPA).

Fields v. Johnson, 159 F.3d 914, 915 (5th Cir. 1998) (same as above).

Green v. French, 143 F.3d 865, 868 (4th Cir. 1998) (same as above), *cert. denied*, 525 U.S. 1090 (1999).

Neelley v. Nagle, 138 F.3d 917, 921 (11th Cir.1998) (same as above), *cert. denied*, 525 U.S. 1075 (1999).

Pratt v. United States, 129 F.3d 54, 58 (1st Cir. 1997) (holding that the AEDPA applied to second § 2255 petition even though prisoner filed first petition prior to the AEDPA), *cert. denied*, 118 U.S. 1807 (1998).

Nobles v. Johnson, 127 F.3d 409 (5th Cir. 1997) (holding that case is "filed" for retroactivity analysis when petition is actually filed, not when motion to proceed in forma pauperis or for appointment for counsel is made), *cert. denied*, 523 U.S. 1139 (1998).

Holman v. Gilmore, 126 F.3d 876 (7th Cir. 1997) (holding that the AEDPA applied to state capital prisoner's petition, filed after AEDPA's effective date, despite petitioner's pre-AEDPA request for counsel to assist with filing of petition), *cert. denied*, 522 U.S. 1150 (1998).

6.1.2 State Waiver of AEDPA's Application

Other Circuits:

Davis v. Executive Director of Dept. of Corrections, 100 F.3d 750, n.1 (10th Cir. 1996) (noting that both parties asserted the inapplicability of the AEDPA and that the state affirmatively waived its application), *cert. denied*, 520 U.S. 1215 (1997).

Watkins v. Meloy, 95 F.3d 4 (7th Cir. 1996) (stating that the provisions of AEDPA are waivable because they do not affect the subject matter jurisdiction of federal courts).

6.1.3 Mode of Challenging Sentence

The Supreme Court has determined that any action that challenges the underlying conviction resulting in imprisonment is properly considered a petition for a writ of habeas corpus. Actions that challenge the conditions of confinement may be brought under 42 U.S.C. § 1983. *See Gomez v. United States Dist. Ct. for the N. Dist. of Cal.*, 503 U.S. 653 (1992).

Supreme Court:

Hill v. Crosby, 126 S. Ct. 1189 (2006) (mem.) (granting *certiorari* and a stay of execution, with the following questions presented: "1. Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254?; 2. Whether, under this Court's decision in *Nelson [v. Campbell* (*see below*)*]*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983?").

Nelson v. Campbell, 541 U.S. 637 (2004) (without reaching the question of how to categorize method-of execution claims generally, holding that 42 U.S.C. § 1983 is an appropriate vehicle for petitioner's Eighth Amendment claim seeking a temporary stay and permanent injunctive relief and alleging that the use of a "cut-down" procedure constituted cruel and unusual punishment).

Lonchar v. Thomas, 517 U.S. 314 (1996) (explaining *Gomez* as holding that the habeas rules apply to a last minute § 1983 method of execution claim).

Gomez v. United States Dist. Ct. for the N. Dist. of Cal., 503 U.S. 653 (1992) (refusing

to consider eleventh-hour § 1983 challenge to execution method (cyanide gas) and holding that action was an obvious attempt to avoid the application of *McCleskey*).

Ninth Circuit:

Fierro v. Terhune, 147 F.3d 1158 (9th Cir. 1998) (considering inmates' § 1983 action challenging state's execution method; holding that inmates lacked standing because they were not currently subject to execution by unconstitutional method).

Other Circuits:

Felder v. Johnson, 180 F.3d 206 (5th Cir. 1999) (denying petitioner's challenge to method of execution as procedurally barred; noting that several circuits have applied habeas requirements to suits challenging methods of execution even when they are denominated civil rights claims).

Williams v. Hopkins, 130 F.3d 333 (8th Cir.) (holding that § 1983 claim challenging constitutionality of electrocution was functional equivalent of habeas petition subject to procedural requirements for successive petitions and, therefore, district court lacked jurisdiction to hear claim), *cert. denied*, 522 U.S. 1010 (1997).

In re Sapp, 118 F.3d 460 (6th Cir. 1997) (holding that rules applying to successive petitions similarly apply to § 1983 petitions which challenge the underlying sentence of death, including claim that method of execution is cruel and unusual).

Hill v. Hopper, 112 F.3d 1088 (11th Cir. 1997) (a per se challenge to a method of execution mandated by state law must be brought as a habeas petition, not under § 1983), *cert. denied*, 520 U.S. 1203 (1997).

Schneider v. Bowersox, 105 F.3d 397 (8th Cir. 1997) (stating that § 1983 action cannot be used to evade procedural requirements of habeas petition).

Felker v. Turpin, 101 F.3d 95 (11th Cir.) (treating § 1983 challenge to method of execution as a second habeas petition and concluding that claim was subject to procedural requirements for bringing second or successive petitions), *cert. denied*, 519 U.S. 989 (1996).

6.2 Habeas Corpus Procedure

6.2.1 First Petition Filing Deadlines

The AEDPA created statutes of limitations for filing § 2254 or § 2255 petitions in federal court. For general petitions, the deadline is one year from the date on which: (1) the judgment became final; (2) the removal of the impediment, created by the state or federal government, to filing; (3) the Supreme Court recognized the right asserted and made the right retroactively applicable to cases on collateral review, or (4) the factual predicate of the claim could have been discovered by due diligence. In *Clay v. United States,* 537 U.S. 522 (2003), the United States Supreme Court held that a petitioner's judgment of conviction becomes "final" within the meaning of 28 U.S.C. § 2255 paragraph 6(1) one year after the time for filing a petition for a writ of certiorari expires.

For capital habeas petitions in cases falling under the "opt-in" provisions, however, the time limit for a § 2254 petition is 180 days from "final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review." See *infra* § 6.2.16.3.

Tolling of the one-year or 180-day time limitations may occur while a state postconviction or other collateral review is pending. The Supreme Court has held that "other collateral review" is modified by "state;" consequently, § 2254 does not allow for tolling when a federal habeas petition is pending. *Duncan v. Walker*, 533 U.S. 167 (2001).

The Supreme Court also has held that a state postconviction application is "properly filed," pursuant to 28 U.S.C. § 2244(d)(2), when its "delivery and acceptance are in compliance with the applicable laws and rules governing filing." *Artuz v. Bennett*, 531 U.S. 4 (2000). Answering a question reserved by the *Artuz* Court, the Supreme Court held that a state postconviction petition rejected by a state court as untimely is not "properly filed" within the meaning of § 2244(d)(2). *Pace v. DiGuglielmo,* 125 S. Ct. 1807 (2005). The Court said that a petition filed after a time limit, and which does not fit within any exceptions to that limit, is no more "properly filed" than a petition filed after a time limit that permits no exception and that under

petitioner's theory, a state prisoner could toll the statute of limitations at will simply by filing untimely state postconviction petitions. *Id.* at 1812.

In *Calderon v. United States Dist. Ct. for the Cent. Dist. of Cal. (Beeler)*, 128 F.3d 1283 (9th Cir. 1997), *cert. denied*, 522 U.S. 1099, *cert. denied*, 523 U.S. 1061, *and overruled en banc on other grounds*, 163 F.3d 530 (9th Cir. 1998), the Ninth Circuit held that a court may equitably toll AEDPA's limitation provisions where "extraordinary circumstances" are present.

Because the one-year limitation is not jurisdictional and may be subject to equitable tolling, the Ninth Circuit, in accordance with the Second, Fifth and Tenth Circuits, has held that AEDPA's one-year statute of limitation does not violate the Suspension Clause. *Green v. White*, 223 F.3d 1001(9th Cir. 2000). However, the Eleventh Circuit has suggested that the statute of limitations could violate the Supremacy Clause if a petitioner was asserting an actual innocence claim. *Wyzkowski v. Department of Corrections*, 226 F.3d 1213 (11th Cir. 2000).

Some courts have avoided AEDPA's statute of limitations and the associated tolling issues by "relating back" the filing of an untimely federal habeas proceeding to the filing of a previously filed federal habeas proceeding pursuant to Federal Rule of Civil Procedure 15(c). The "relation back" doctrine is currently a source of conflicting opinion among the courts. *See* § 6.2.4, *infra*.

In *Lonchar v. Thomas*, 517 U.S. 314 (1996), the Supreme Court held that serious delay in filing a federal habeas corpus petition does not constitute a violation of general "equitable" rules separate from established habeas corpus statutes and precedent.

Supreme Court:

Evans v. Chavis, 126 S. Ct. 846 (2006) (holding in noncapital case that unexplained delay of at least six months between California Court of Appeal's denial of state noncapital habeas petition and the filing of notice of appeal from that decision in the California Supreme Court could not be "reasonable" under state law and thus state habeas petition was not timely filed and statute of limitations under AEDPA was not tolled; also holding that absent clear direction or explanation from the California Supreme Court about the meaning of "reasonable time" in the present context, or (2) clear indication that a particular request for appellate review was timely or untimely,

the Ninth Circuit must itself examine the delay in each case and determine what the state courts would have held in respect to timeliness).

Pace v. DiGuglielmo, 125 S. Ct. 1807 (2005) (holding in noncapital case that state postconviction petition rejected by state court as untimely is not "properly filed" within the meaning of § 2244(d)(2)) and that petitioner's federal habeas petition was time barred).

Johnson v. United States, 125 S. Ct. 1571 (2005) (in the case of a prisoner's collateral attack on a federal sentence (noncapital) on the ground that the state conviction used to enhance that sentence was later vacated, holding that the state court order is a matter of "fact" supporting a claim under 28 U.S.C. § 2255, discovery of which triggers the refreshed 1-year limitations period under the fourth paragraph of § 2255; also holding that the statute of limitations in § 2255 para. 6(4) begins to run when the petitioner receives notice of the order vacating the prior conviction provided, however, that petitioner sought the state court order vacating the sentence with due diligence, after entry of judgment in the federal case with the enhanced sentence).

Clay v. United States, 537 U.S. 522 (2003) (holding in noncapital case that for purpose of starting the clock on § 2255's one-year limitation period, the judgment becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction).

Carey v. Saffold, 536 U.S. 214 (2002) (holding that (1) as used in 28 U.S.C. § 2244(d)(2), "pending" covers time between lower state court's decision and filing notice of appeal to higher state court; and (2) same "pending" rule applies to California's unique collateral review system, even though that system involves not notice of appeal but filing within "reasonable time" of further original state habeas petition in higher court; rejecting contention that state petition is not "pending" during interval between lower court's entry of judgment and timely filing of notice of appeal in next court as being inconsistent with ordinary meaning of "pending," which means in present context, until completion of collateral review process; remanding to Ninth Circuit to reconsider timeliness issue, with instructions to evaluate any special conditions justifying petitioner's delay in filing in state court and any other relevant considerations).

Duncan v. Walker, 533 U.S. 167 (2001) (holding that a federal habeas petition is not an "application for State post-conviction or other collateral review," and therefore does not toll the 28 U.S.C. § 2244(d)(2) statute of limitations).

Artuz v. Bennett, 531 U.S. 4 (2000) (holding that a state postconviction application is "properly filed," pursuant to 28 U.S.C. § 2244(d)(2), when its "delivery and acceptance

are in compliance with the applicable laws and rules governing filing; declining to adopt state's position that § 2244(d)(2) requires an application in state court to be free of procedural bars to qualify as "properly filed").

Lonchar v. Thomas, 517 U.S. 314 (1996) (holding that a district court may not dismiss a petition for delay based on ad hoc "equitable" reasons separate from habeas corpus statutes and precedent; rather, Rule 9 governs).

Sawyer v. Whitley, 505 U.S. 333 (1992) (stating that "[w]e 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.").

Gomez v. United States Dist. Ct. for the N. Dist. of Cal., 503 U.S. 653 (1992) (dismissing petition, stating "[t]his claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process.").

Houston v. Lack, 487 U.S. 266, 270 (1988) (establishing prison "mailbox rule").

Vasquez v. Hillery, 474 U.S. 254, 264–65 (1986) (holding state must show it was prejudiced in its ability to respond to allegations in petition; prejudice to state's ability to successfully convict petitioner again is irrelevant).

Ninth Circuit:

Welch v. Carey, 350 F.3d 1079 (9th Cir. 2003) (en banc) (distinguishing *Carey v. Saffold*, 536 U.S. 214 (2002), and holding in noncapital case that a state petition was not "pending" for purposes of tolling of the statute of limitations under 28 U.S.C. § 2244(d)(2) when there was a four-and-one-half-year gap between a petition in the California Superior Court and a petition, raising different claims, in the California Supreme Court), *cert denied*, 541 U.S. 1078 (2004).

Spitsyn v. Moore, 345 F.3d 796 (9th Cir. 2003) (holding based on unique facts of noncapital murder case that the statute of limitations, 28 U.S.C. § 2244(d), was equitably tolled where an attorney was retained to prepare and file a habeas petition, failed to do so, and disregarded requests to return files pertaining to the case until well after the petition was due.)

Rohan ex rel. Gates v. Woodford, 334 F.3d 803 (9th Cir.) (holding that a district court must stay capital habeas proceedings during the petitioner's incompetence, rather than appointing a "next friend" and requiring the friend to pursue the habeas petition on the

petitioner's behalf; following *Calderon v. U.S. District Court (Kelly V)*, 163 F.3d 530 (9th Cir. 1998) (en banc), and distinguishing *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the panel construed 21 U.S.C. § 848(q)(4)(B) (providing for statutory right to counsel in habeas proceedings) to incorporate a statutory right to competence, and held that the denial of the stay violated this right because the petitioner raised claims that could potentially benefit from his ability to communicate rationally), *cert. denied*, 540 U.S. 1069 (2003).

Jenkins v. Johnson, 330 F.3d 1146 (9th Cir. 2003) (holding that for purposes of determining whether the statute of limitations was tolled under 28 U.S.C. § 2254(d)(2), the petitioner's Oregon state court petition for postconviction relief was "properly filed" even though it was dismissed either as untimely or as successive and remanding for the district court to consider whether: (1) the post-conviction petition was pending for a sufficient period even though the petitioner's appeal to the Oregon Court of Appeals was untimely; or (2) the petitioner was entitled to equitable tolling due to the state court's failure to mail a notice of judgment to petitioner's counsel; but see dissent of O'Scannlain, J. in which he stated that Or. Rev. Stat. § 138.510, Oregon's timeliness requirement for postconviction petitions, was a "condition to filing," rather than a "condition to obtaining relief" and that Oregon law was not ambiguous as to whether the timeliness requirement contained a good cause exception).

Smith v. Ratelle, 323 F.3d 813 (9th Cir. 2003) (holding in a noncapital case that *pro se* petitioner was entitled to equitable tolling because district court had erroneously dismissed his earlier, timely habeas petition due to failure to exhaust one remaining claim without first giving him opportunity to file amended petition withdrawing unexhausted claim as alternative to dismissal), *cert. denied*, 542 U.S.945 (2004).

Smith v. Duncan, 297 F.3d 809 (9th Cir. 2002) (en banc) (holding that state court petitions attacking earlier conviction could toll statute of limitations under § 2244(d)(2) because even though earlier conviction was not "pertinent judgment" attacked in federal habeas petition, federal petition claimed that petitioner's current sentence was inappropriately enhanced by the earlier conviction and thus, state court petitions made "pertinent claim" under § 2244(d)(2)).

Jiminez v. Rice, 276 F.3d 478 (9th Cir. 2001) (holding that 28 U.S.C. § 2244(d)(2) does not toll AEDPA limitations period while federal habeas petition is pending).

Huizar v. Carey, 273 F.3d 1220 (9th Cir. 2001) (holding that state habeas corpus petition is deemed filed for purposes of equitable tolling under AEDPA when prisoner hands petition to prison officials for mailing to state court, and diligently follows up with state court once prisoner fails to receive disposition within reasonable period of time, even if petition was never received or filed by state court).

Frye v. Hickman, 273 F.3d 1144 (9th Cir. 2001) (holding in noncapital case that miscalculation of limitations period by habeas petitioner's retained counsel and his negligence in general did not constitute extraordinary circumstances sufficient to warrant equitable tolling of limitations period under AEDPA), *cert. denied*, 535 U.S. 1055 (2002).

Jorss v. Gomez, 266 F.3d 955 (9th Cir. 2001) (holding that statute of limitations is equitably tolled when district court's erroneous dismissal of prior habeas corpus petition accounts for petitioner's failure to timely file petition).

Wixom v. Washington, 264 F.3d 894 (9th Cir. 2001) (holding that state claim is no longer "pending" for purposes of tolling limitations period for filing federal habeas corpus petition under AEDPA when petitioner's appeal in state court is denied, and petitioner fails to appeal denial within the prescribed time), *cert. denied,* 534 U.S. 1143 (2002).

Bunney v. Mitchell, 262 F.3d 973 (9th Cir. 2001) (per curiam) (as to petitioner whose conviction became final before AEDPA was enacted, statute of limitations for filing federal petition for habeas corpus was tolled until 30 days after decision of California Supreme Court summarily denying her petition for habeas corpus was filed).

Herbst v. Cook, 260 F.3d 1039 (9th Cir. 2001) (holding that although district court has authority to raise AEDPA statute of limitations sua sponte, court must give federal habeas corpus petitioner prior notice and opportunity to respond before dismissing petition as time-barred).

Hasan v. Galaza, 254 F.3d 1150 (9th Cir. 2001) (remanding for hearing to establish when, with exercise of due diligence, factual predicate could have been discovered to support ineffective assistance of counsel claim, in turn allowing for a timely filing pursuant to 28 U.S.C. § 2254(d)(1)(D)).

Tillema v. Long, 253 F.3d 494 (9th Cir. 2001) (holding tolling of limitations period applies to time when state petition pending, notwithstanding that state petition did not include claim later asserted in federal petition; alternatively holding that equitable tolling applied to time after court dismissed petition to exhaust without giving option to petitioner to proceed with exhausted claims pursuant to *Rose v. Lundy*).

Anthony v. Cambra, 236 F.3d 568 (9th Cir. 2000) (holding mailbox rule properly applied to state postconviction petition to determine tolling of federal statute of limitation), *cert. denied,* 533 U.S. 941 (2001).

Whalem/Hunt v. Early, 233 F. 3d 1146 (9th Cir. 2000) (en banc) (remanding for

evidentiary hearing to determine whether petitioner is entitled to an "impediment" finding or to equitable tolling where petitioner's declaration stated that the prison library did not contain the 1996 AEDPA until June 1998, petitioner's conviction became final on July 23, 1996 and petitioner filed his first state postconviction petition in December 1997).

Green v. White, 223 F.3d 1001 (9th Cir. 2000) (holding that AEDPA's one-year statute of limitation does not violate the Suspension Clause, because the one-year limitation is not jurisdictional and may be subject to equitable tolling).

Bowen v. Roe, 188 F.3d 1157 (9th Cir. 1999) (holding that the period of direct review in § 2244(d) includes the period within which a petitioner can file a petition for writ of certiorari from the U.S. Supreme Court whether or not the petitioner actually files such a certiorari petition).

Miles v. Prunty, 187 F.3d 1104 (9th Cir. 1999) (finding extraordinary circumstances sufficient to justify equitable tolling of the AEDPA's statute of limitations where prison officials failed to honor inmate's timely request to draw the habeas filing fee from his prison trust account and mail the fee and petition to the district court for filing; noting, in dicta, that the prison mailbox rule "would appear to apply" to habeas petition filed under the AEDPA, and recognizing that a majority of other circuits have determined that the mailbox rule so applies).

Nino v. Galaza, 183 F.3d 1003 (9th Cir. 1999) (concluding that for purposes of § 2244(d) the time for filing habeas petition is tolled for the entire period during which petitioner is pursuing and exhausting state remedies–through proper use of the state courts–including the intervals between dispositions at one state level and filing of a petition at the next), *cert. denied*, 529 U.S. 1104 (2000).

Calderon v. United States Dist. Ct. for the Cent. Dist. of Cal. (Kelly V), 163 F.3d 530 (9th Cir. 1998) (en banc) (holding that prisoner's incompetency is an "extraordinary circumstance beyond the prisoner's control" such that where there is a threshold showing of incompetency, a sufficient showing has been made for equitably tolling the statute of limitation; determining that a court order or judicial error, depriving petitioner of opportunity to bring petition, tolls the statute), *cert. denied*, 526 U.S. 1060 (1999).

Calderon v. United States Dist. Ct. for the Cent. Dist. of Cal. (Beeler), 128 F.3d 1283, 1288–89 (9th Cir. 1997) (holding that one-year statute of limitation for filing of habeas petitions can be equitably tolled if "extraordinary circumstances" beyond a prisoner's control make it impossible to file a petition on time), *cert. denied*, 522 U.S. 1099, *cert. denied*, 523 U.S. 1061, *and overruled en banc on other grounds*, 163 F.3d 530 (9th Cir.

1998).

Caldwell v. Amend, 30 F.3d 1199 (9th Cir. 1994) (applying *Houston* rule to Rule 50(b) filing; stating that "the adversity of interests between prisoners and prison officials central to *Houston* and its progeny . . . commends extension of *Houston*'s filing exception for *pro se* habeas petitioners).

Telink, Inc. v. United States, 24 F.3d 42 (9th Cir. 1994) (citing *Pulley* and stating that in order for laches to bar writ of error coram nobis, government must first make prima facie showing of prejudice as result of petitioner's delay; respondent's showing shifts burden to petitioner to show either no prejudice, or reasonable diligence in filing claim).

Harris v. Vasquez, 949 F.2d 1497 (9th Cir. 1990) (holding petitioner's *Ake* claim barred for delay under Rule 9(a) where petitioner had background material relied upon for claim more than five years after *Ake*; delay prejudiced state because petitioner's trial psychiatrists now unavailable).

Harris v. Pulley, 885 F.2d 1354, 1366 (9th Cir. 1988) (applying Rule 9(a) "laches" and finding respondent prejudiced by delay due to witness' inability to recall important facts but also finding that petitioner's counsel acted with reasonable diligence because nothing in trial record would have put him on notice of the claim at an earlier date).

Guizar v. Estelle, 843 F.2d 371 (9th Cir. 1988) (holding that court may accept resubmitted petition with only exhausted claims *nunc pro tunc* to date of original filing).

District Courts in Ninth Circuit:

Dennis v. Woodford, 65 F. Supp.2d 1093 (N.D. Cal. 1999) (denying without prejudice petitioner's motion for extension of time to file habeas petition; holding petitioner's motion–to equitably toll § 2241(d) statute of limitation based on nine month delay in appointing counsel–premature because petitioner failed to make a factual showing as to why the petition could not be prepared in the remaining three months).

Barrett v. Yearwood, 63 F. Supp.2d 1245 (E.D. Cal. 1999) (disagreeing with the Central District and reading § 2244(d)(2)'s "properly filed application for State postconviction or other collateral review" language to include a properly filed federal petition, and holding that the AEDPA's statute of limitations is tolled during the time a federal habeas petition is pending).

McClain v. Hill, 52 F. Supp. 2d 1133 (C.D. Cal. 1999) (barring amendment to habeas petition where original petition was filed prior to expiration of the AEDPA's statute of limitations, and the amendment after expiration, because amended claims did not "relate back" to original petition).

Sperling v. White, 30 F. Supp. 2d 1246 (C.D. Cal. 1998) (reading § 2244(d)(2)'s "properly filed application for State postconviction or other collateral review" language to exclude a properly filed federal habeas petition, and holding that the AEDPA's limitations period was not tolled during the time petitioner's prior federal habeas petition, dismissed for failure to exhaust, was pending; discussing and disapproving "relation back" doctrine).

United States v. Zuno-Arce, 25 F. Supp. 2d 1087 (C.D. Cal. 1998) (stating that foreclosure of a constitutional claim where there has been a colorable factual innocence showing would likely constitute a due process violation or an improper suspension of habeas relief; extending the miscarriage of justice gateway to claims otherwise barred by the AEDPA's statute of limitation).

Bolds v. Newland, No. C 97-2103, 1997 WL 732529 (N.D. Cal. Nov. 12, 1997) (holding ignorance of law and lack of legal assistance do not constitute extraordinary circumstances which toll the statute of limitations).

United States v. Van Poyck, 980 F. Supp. 1108, 1111 (C.D. Cal. 1997) (determining that inability to secure transcripts from court reporters and lockdowns at prison lasting several days allegedly eliminating access to law library were not extraordinary circumstances justifying equitable tolling of limitations period).

Other Circuits:

Wyzykowski v. Department of Corrections, 226 F.3d 1213 (11th Cir. 2000) (remanding for determination of whether petitioner could make showing of actual innocence before reaching constitutional question of whether Suspension Clause required exception to statute of limitations for actual innocence.)

Federal Statutes:

28 U.S.C. § 2244(d)(1) (2000) (setting one-year filing deadline).

28 U.S.C. § 2244(d)(2) (2000) (setting exemption from one-year deadline during time properly filed application for state postconviction or other collateral review pending).

28 U.S.C. § 2255 (2000) (setting one-year filing deadline for § 2255 cases).

28 U.S.C. § 2263(a) (2000) (setting 180-day deadline for capital § 2254 petition in "opt-in" state).

28 U.S.C. § 2263(b) (2000) (setting tolling provisions for 180-day deadline).

Federal Rules:

Fed. R. Habeas Corpus 9(a) (provision regarding dismissal for delayed or successive petitions was deleted as unnecessary as of Dec. 1, 2004, in light of one-year statute of limitations for § 2254 petitions; Fed. R. Habeas Corpus 9(b) redesignated as Fed. R. Habeas Corpus 9).

Fed. R. Civil Procedure 15(c) (stating when amendment may relate back to original pleading).

See generally:

Angela Carson, Comment, *Lonchar v. Thomas: Protecting the Great Writ*, 13 Ga. St. U. L. Rev. 809 (1997) (examining modern abuse of the writ doctrine in light of *Lonchar v. Thomas*).

Alan Ellis, Peter Goldberger & Nancy Simmons, *It's Not Too Late: Time Period for Filing § 2255 Motions Under the New Habeas Corpus Reform Law*, The Champion, July 1996, at 21 (addressing constitutional and procedural issues of new § 2255 filing deadlines).

Notice of Adoption of Interim Local Rules 22.1 and 22.2, United States Court of Appeals for the First Circuit, Massachusetts Lawyers Weekly at 27 (Sept. 30, 1996) (adopting interim rules accommodating new time limitations and procedural rules of AEDPA).

Peter Sessions, Note, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. Cal. L. Rev. 1513 (1997) (arguing that the AEDPA's statute of limitations is fundamentally flawed; conceding its probable constitutionality and, in light of that conclusion, making a policy argument against its implementation).

Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital*

Habeas Corpus Cases, 77 N.Y.U. L. Rev. 699 (2002) (discussing apparently unintended consequences of AEDPA's successive petition provisions, including the foreclosure of certain types of constitutional claims and the injection of numerous procedural complexities that arguably undermine reliability and fairness).

6.2.1.1 Retroactivity of First Petition Filing Deadlines

Most courts have determined that the AEDPA's statutes of limitation have retroactive effect under *Landgraf* and that, in light of *Lindh*, the limitations periods do not run against prisoners prior to the AEDPA's enactment date. Most courts have determined that the one-year limit begins on the day after AEDPA's enactment (April 25, 1996) and that a "reasonable time" is the one-year time period. *See* §§ 6.1.1, 6.2.2.1 and 6.2.3.2.1.

Ninth Circuit:

Patterson v. Stewart, 251 F.3d 1243 (9th Cir. 2002) (holding that Fed R. Civ. P. 6(a) governs the calculation of the one-year grace period afforded prisoners whose convictions became final before AEDPA's enactment; holding one-year grace period commences on April 25, 1996–the day *after* AEDPA's enactment).

Calderon v. United States District Ct. for the Cent. Dist. of Cal. (Beeler), 128 F.3d 1283, 1287 (9th Cir. 1997) (holding that AEDPA's one-year deadline does not run against state prisoner prior to AEDPA's enactment because such application would attach "new legal consequences to events completed prior to enactment" and thus would have impermissible retroactive effect), *cert. denied* 522 U.S. 1099, *cert. denied*, 523 U.S. 1061, *and overruled en banc on other grounds*, 163 F.3d 530 (9th Cir. 1998).

6.2.2 Successive Petition Filing Authorization

A petitioner must pass the AEDPA's "gatekeeping" hurdle before filing a second or successive (SOS) § 2254 habeas petition or § 2255 habeas motion in district court. The petitioner must obtain an order authorizing the second or successive filing from a three-judge appellate court panel. The circuit court evaluates petitioner's request for authorization according to the following statutory criteria set forth in § 2244(b)(3), which provides:

> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection. [i.e. requirements of § 2244(b)(2) for granting review, *see infra* § 6.2.4.1].
> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

Section 2255, in relevant part, provides the following requirements as to second or successive § 2255 motions:

> A second or successive motion must be certified as provided in § 2244 by a panel of the appropriate court of appeals to contain–
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

The law is somewhat unclear as to exactly what circumstances render a petition "second or successive" for purposes of the AEDPA. The Supreme Court held that a habeas petition, filed in district court after an initial petition was unadjudicated and dismissed for failure to exhaust state remedies, and which contained claims that were not contained in the initial unadjudicated petition, is not a second or successive petition. *Slack v. McDaniel*, 529 U.S. 473 (2000). The Supreme Court also vacated

and remanded a Ninth Circuit decision in light of *Slack*. *Shellmon v. Cambra*, 531 U.S. 1005 (2000). The appellate decision that was reversed held that a petition–originally containing one exhausted and several exhausted claims–should be dismissed with prejudice after the one exhausted claim was denied on the merits.

In *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), the Supreme Court held that where the petitioner presented a *Ford* claim (incompetence to be executed) in his initial petition–which was dismissed as not ripe because his execution was stayed at the time–petitioner could bring a subsequent *Ford* claim without running afoul of the prohibitions against successive petitions. The Court followed and affirmed the analysis of the Ninth Circuit in *Martinez-Villareal v. Stewart* (*Martinez-Villareal II*), 118 F.3d 628 (9th Cir. 1997), and compared the unripe *Ford* claim to one initially dismissed for failure to exhaust and subsequently refiled after completion of state proceedings. See *In re Turner*, 101 F.3d 1323 (9th Cir. 1997). Ultimately, the Court held that a renewed *Ford* claim, previously dismissed as unripe, was not really a second petition.

However, in *Calderon v. Thompson*, 523 U.S. 538 (1998), the Supreme Court held that a motion to recall an appellate court mandate can be considered "second or successive," triggering application of the AEDPA's restrictions. *See infra* §§ 6.2.3.1 and 6.2.3.2.

In *United States v. Villa-Gonzalez*, 208 F. 3d 1160 (9th Cir. 2000) (per curiam), the Ninth Circuit held that § 2244(b)(4) requires the district court to dismiss a claim if, after appellate court authorization pursuant to § 2244(b)(3)(A), the district court conducts a thorough review and finds that the motion does not meet the § 2244(b)(2) second or successive motion requirement.

Supreme Court:

Castro v. United States, 540 U.S. 375 (2003) (holding that federal court cannot recharacterize a *pro se* litigant's motion as a first § 2255 motion unless: it first informs the litigant of its intent to recharacterize; warns the litigant that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on "second or successive" motions; and provides the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims that the litigant believes he or she has).

Shellmon v. Cambra, 531 U.S. 1005 (2000) (granting certiorari, vacating and

remanding Ninth Circuit's judgment that petition–containing one exhausted claim denied on the merits and several unexhausted claims–should be dismissed with prejudice; remanded in light of *Slack v. McDaniel*).

Slack v. McDaniel, 529 U.S. 473 (2000) (holding that a habeas petition, filed in district court after an initial petition was unadjudicated on the merits and dismissed for failure to exhaust state remedies, and which contained claims that were not contained in the initial unadjudicated petition, is not a second or successive petition).

Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) (affirming the Ninth Circuit in holding that *Ford* claim, previously dismissed as unripe, is not second or successive petition within meaning of 28 U.S.C. § 2244(b)(2)).

Calderon v. Thompson, 523 U.S. 538 (1998) (determining that a prisoner's motion to recall an appellate court mandate on the basis of the underlying merits in a capital habeas case can be regarded as second or successive and, if the court grants the motion, its action is subject to the AEDPA irrespective of whether the motion is based on new or old claims; if, in recalling the mandate, the appellate court considers new claims or evidence presented in a successive application, it is proper to regard the court's action as based on that application triggering the AEDPA's application regardless of whether the court labels the action as *sua sponte*).

Ninth Circuit:

Cooper v. Calderon, 274 F.3d 1270 (9th Cir. 2001) (per curiam) (rejecting petitioner's contention in capital case that his petition was not second or successive because claim *was* presented in his first petition, but district court erroneously failed to decide it on its merits; finding that petitioner, who now alleged that his trial counsel was ineffective for not adequately investigating confession of another person to murders and calling that person to stand to testify during petitioner's murder trial, had only obliquely referred to that person's confession in his first petition's claim of ineffective assistance of counsel and reference was insufficient to identify that petitioner was raising distinct claim of ineffective assistance of trial counsel based on that confession).

United States v. Villa-Gonzalez, 208 F.3d 1160 (9th Cir. 2000) (per curiam) (holding that § 2244(b)(4) requires the district court to dismiss a claim if, after appellate court authorization pursuant to § 2244(b)(3)(A), the district court conducts a thorough review and finds that the motion does not meet the § 2244(b)(2) second or successive motion requirement).

LaGrand (Karl) v. Stewart, 170 F.3d 1158, 1160 (9th Cir. 1999) (extending *Martinez-*

Villareal II in holding that a section 2244(b)(2) motion for leave to file a second or successive petition is unnecessary as to claim–that lethal gas is an unconstitutional execution method–brought in first petition but dismissed as unripe.

Thompson v. Calderon, 151 F.3d 918 (9th Cir.) (treating petitioner's Rule 60(b) motion for relief from judgment as a successive petition governed by the AEDPA; holding that en banc court was authorized to determine petitioner's request for successive petition authorization; finding that § 2244(b) permits a successive petition to establish death-ineligibility, but that petitioner did not satisfy the § 2244(b)(2)(B)(ii) actual innocence requirement), *cert. denied*, 524 U.S. 965 (1998).

Ortiz v. Stewart, 149 F.3d 923, 944 (9th Cir. 1998) (holding that a *Lackey* (length of capital confinement) claim, not raised in a first § 2254 petition, does not fall within either exception to the AEDPA's bar against subsequent claims), *cert. denied*, 526 U.S. 1123 (1999).

Gretzler v. Stewart, 146 F.3d 675 (9th Cir.) (affirming dismissal of second petition asserting *Lackey* claim; reasoning that petitioner could have included claim in first petition amended in 1992; rejecting contention that claim is not ripe until execution is imminent), *cert. denied*, 524 U.S. 912 (1998).

Ceja v. Stewart, 134 F.3d 1368, 1371–72 (9th Cir.) (declining to extend the *Martinez-Villareal II* reasoning to a *Lackey* claim), *cert. denied*, 522 U.S. 1085 (1998).

Woratzeck v. Stewart, 118 F.3d 648 (9th Cir. 1997) (finding that inmate failed to make a prima facie showing to justify successive petition authorization; holding that, because there is no constitutional right to a clemency hearing, petitioner's claim that former attorneys involvement as prosecutors at his clemency hearing presented a constitutional conflict of interest was not cognizable in a second petition under the AEDPA).

Martinez-Villareal v. Stewart (Martinez-Villareal II), 118 F.3d 628, 632 (9th Cir. 1997) (holding the § 2244 "gatekeeping" provisions inapplicable to *Ford* claims), *aff'd*, 523 U.S. 637 (1998).

Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997) (concluding that if petitioner makes a prima facie showing for authorization of one successive claim, then he may proceed upon entire application in district court), *cert. denied*, 523 U.S. 1082 (1998).

Greenawalt v. Stewart, 105 F.3d 1287 (9th Cir.) (dismissing request for order authorizing consideration of successive petition under § 2244(b)(2); finding no new rule of constitutional law made retroactive by the Supreme Court in claim that lethal injection for crime of first degree murder is unconstitutional), *cert. denied*, 519 U.S.

1103 (1997).

Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir.) (holding that § 2244(b)(2)(B) forecloses all successive petition reviews of constitutional claims unrelated to guilt or innocence), *cert. denied*, 519 U.S. 1102 (1997).

Nevius v. Sumner, 105 F.3d 453 (9th Cir. 1996) (interpreting § 2244(b)(3)(C) to mean authorization of entire successive petition, not just those claims meeting § 2244's requirements), *cert. denied*, 527 U.S. 1006 (1999).

In re Turner, 101 F.3d 1323 (9th Cir. 1997) (holding that § 2244(b)(3) does not apply to subsequent petitions where first petition was dismissed without prejudice for failure to exhaust).

District Courts in Ninth Circuit:

Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz. 1999) (holding that petitioner may bring a *Ford* claim in a subsequent petition without complying with the AEDPA's successive petition requirements because the reasoning of *Martinez-Villareal II* applied with equal force to the case despite petitioner's failure to raise the claim in his initial petition).

United States v. Kashiwabara, 962 F. Supp. 1278 (D. Haw. 1996) (reading § 2255's reference to § 2244 to incorporate authorization "procedures" only).

Federal Statutes:

28 U.S.C. § 2244(b)(2) (2000) (providing "gatekeeping" requirements for SOS petitions).

28 U.S.C. § 2244(b)(3) (2000) (providing authorization requirement for SOS petitions).

28 U.S.C. § 2255 (2000) (providing authorization requirement for SOS § 2255 petitions).

6.2.2.1 Retroactivity of Successive Petition Filing Authorization

In *Williams v. Calderon*, 83 F.3d 281 (9th Cir. 1996), the Ninth Circuit held that the petitioner did not have to obtain authorization under 28 U.S.C. § 2244 when the petitioner filed a successive petition prior to the AEDPA's enactment date, which is April 24, 1996. That decision is consistent with the Supreme Court's subsequent

decision, in *Lindh v. Murphy*, 521 U.S. 320 (1997), that the AEDPA does not apply to cases pending at the time of the AEDPA's enactment.

The Ninth Circuit held in *U.S. v. Villa-Gonzalez*, 208 F.3d 1160 (9th Cir. 2000), that 28 U.S.C. § 2244 authorization applied to a successive § 2255 motion filed after the AEDPA's enactment, notwithstanding that the initial § 2255 motion was filed pre-AEDPA.

Supreme Court:

Lindh v. Murphy, 521 U.S. 320 (1997) (holding that the AEDPA does not apply to habeas cases pending at the time of enactment).

Felker v. Turpin, 518 U.S. 651 (1996) (applying the AEDPA to prisoner's second petition despite the fact that prisoner filed first petition prior to AEDPA's enactment).

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (setting forth standard for retroactivity of new statutes; preventing retroactive application of statute where doing so attaches new legal consequences to events completed before enactment).

Ninth Circuit:

U.S. v. Villa-Gonzalez, 208 F.3d 1160 (9th Cir. 2000 (per curiam) (holding that 28 U.S.C. § 2244 authorization applies to a successive § 2255 motion filed after the AEDPA's enactment, notwithstanding that the initial § 2255 motion was filed pre-AEDPA).

Williams v. Calderon, 83 F.3d 281, 285 (9th Cir. 1996) (declining to require authorization for successive petition filed prior to the AEDPA's enactment).

District Courts in Ninth Circuit:

Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz. 1999) (noting the court's prior order that petition alleging new *Ford* claim be filed as a new habeas action, not subject to the AEDPA's successive petition restrictions, but otherwise subject to the AEDPA, where petitioner filed his initial petition (without the *Ford* claim) prior to the AEDPA's enactment).

6.2.3 Federal Procedural Default–Subsequent Petitions

Although *res judicata* is inapplicable in a habeas proceeding, *Calderon v. United States Dist. Ct. for the Cent. Dist. of Cal. (Kelly V)*, 163 F.3d 530 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999), 28 U.S.C. § 2244 limits federal court consideration of any § 2254 petition filed subsequent to the first federal habeas petition. Prior to the AEDPA, § 2244(b) permitted a district court to dismiss a subsequent petition unless the petitioner predicated the writ on new grounds and the petitioner had not "abused the writ."

In 1996 the AEDPA significantly changed the standard of review requiring dismissal of all successive petitions, *see* § 6.2.3.1, and dismissal of abusive petitions unless the petitioner satisfies the standard set forth in § 2244(b). *See* § 6.2.3.2.

In *Slack v. McDaniel*, 529 U.S. 473 (2000), the Court held that a habeas petition–filed after an initial petition was unadjudicated and dismissed for failure to exhaust state remedies–is not a second or successive petition, notwithstanding that additional claims were included in the subsequent petition. Even though both of Slack's petitions were filed before AEDPA's enactment, the Court's analysis probably applies to post-AEDPA petitions as well: "[W]e do not suggest the definition of second or successive would be different under AEDPA." *Id*. at 486.

Supreme Court:

Castro v. United States, 540 U.S. 375 (2003) (holding that federal court cannot recharacterize a *pro se* litigant's motion as a first § 2255 motion unless: it first informs the litigant of its intent to recharacterize; warns the litigant that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on "second or successive" motions; and provides the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims that the litigant believes he or she has; also holding that if these warning are not given, the motion cannot be considered to have been a § 2255 motion for purposes of applying to later motions the law's "second or successive" restrictions).

Slack v. McDaniel, 529 U.S. 473 (2000) (holding that a habeas petition–filed after an unadjudicated initial petition was dismissed for failure to exhaust state remedies–is not a second or successive petition, notwithstanding that additional claims were included in the subsequent petition).

Angelone v. Bennett, 519 U.S. 959 (1996) (Stevens, J., dissenting) (stating that legislative reforms limiting federal court authority to entertain successive petitions increases the importance of full and fair first petition review and thus federal court should give greater, rather than less, scrutiny to capital inmates' first petitions).

Ninth Circuit:

United States v. Seesing, 234 F.3d 456 (9th Cir. 2001) (stating that when a prisoner files a *pro se* request of the court, the court cannot recharacterize the request as a § 2255 motion without giving the prisoner either the option to consent or the option to withdraw the motion so that the prisoner does not lose the right to file a comprehensive first motion).

Neuschafer v. Whitley, 860 F.2d 1470, 1474 n.3 (9th Cir. 1988) (distinguishing "abusive" and "successive" petitions).

See generally:

Jane A. Gordon, Comment, *Pleading Rule 9 of the Rules Governing Habeas Corpus: Sua Sponte Departure From Precedent and Congressional Intent*, 38 Emory L.J. 489 (1989) (exploring the principles governing Rule 9(a) and (b) pleading; discussing whether court may raise Rule 9 *sua sponte*, or whether it is affirmative defense).

John B. Morris, Jr., Note, *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 Yale L.J. 371 (1985) (analyzing various types of successive petitions and different procedural situations in which they arise).

6.2.3.1 Petitions Raising Same Grounds

Prior to AEDPA, 28 U.S.C. § 2254 provided for the dismissal of a petition alleging the same grounds for relief as those raised in an earlier petition where the prior determination was on the merits. Section 2244(b)(1) now simply provides: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." *See supra* § 6.2.2.

Supreme Court:

Calderon v. Thompson, 523 U.S. 538 (1998) (determining that in a § 2254 case, a prisoner's motion to recall the mandate on the basis of the merits of the underlying

decision can be regarded as second or successive for purposes of § 2244(b), and that if the court grants such a motion, its action is subject to the AEDPA irrespective of whether it is based on old claims).

Alabama v. Evans, 461 U.S. 230 (1983) (vacating stay of execution based on finding that successive petition sought to re-litigate previously decided issues without justification; finding no merit to sole new claim presented).

Sanders v. United States, 373 U.S. 1 (1963) (ruling that denial of prior § 2254 petition or § 2255 motion should be given controlling weight only if (1) same ground presented in subsequent petition was determined adversely to petitioner on prior petition, (2) prior determination was on the merits, (3) ends of justice would not be served by reaching merits of subsequent petition).

Ninth Circuit:

Calderon v. United States Dist. Ct. for the Cent. Dist. of Cal. (Kelly V), 163 F.3d 530 (9th Cir. 1998) (en banc) (holding that, even after the AEDPA, res judicata doctrine does not apply to a federal habeas petition regardless of the nature of the prior proceeding), *cert. denied*, 526 U.S. 1060 (1999).

Williams v. Calderon, 83 F.3d 281 (9th Cir. 1996) (finding no cause or prejudice sufficient to justify successive claims previously raised, or abusive claims not previously raised).

Campbell v. Blodgett, 997 F.2d 512 (9th Cir. 1992) (rejecting claims raised in prior petition as successive where subsequent claims based upon same factual and legal precedents).

Howard v. Lewis, 905 F.2d 1318 (9th Cir. 1990) (holding that dismissal of federal habeas petition on procedural default grounds is a determination on the merits for purposes of the *Sanders* successive petition doctrine).

Molina v. Rison, 886 F.2d 1124, 1129 (9th Cir. 1989) (stating that a successive claim is improper if gravamen of legal claim is the same, regardless of whether the basic claim is supported by new or different legal arguments).

Hamilton v. Vasquez, 882 F.2d 1469, 1473 (9th Cir. 1989) (holding that dismissal without prejudice for exhaustion does not constitute a dismissal on merits and, thus, subsequent filing is not a successive petition in violation of *Sanders*).

Johnson v. Lumpkin, 769 F.2d 630, 637 (9th Cir. 1985) (holding that dismissal with prejudice of prior habeas petition does not necessarily constitute a merit decision for *Sanders* purposes).

Federal Statutes:

28 U.S.C. § 2244(b)(1) (2000) (requiring dismissal of all § 2254 petitions raising same grounds as prior petition).

6.2.3.1.1 Ends of Justice Exception

In *Sanders v. United States*, 373 U.S. 1 (1963), the Supreme Court held that in order for a federal court to consider a claim previously addressed in a habeas proceeding, the petitioner must demonstrate that the previous decision was not on the merits or that reconsideration of the merits would serve the ends of justice. Courts typically defined the "ends of justice" by objective factors such as, but not limited to, whether a full and fair hearing occurred on the original petition or whether an intervening change in the facts or applicable law occurred. However, in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), a Supreme Court plurality limited consideration of the "ends of justice" to cases in which the petitioner supplements the claim with a colorable showing of factual innocence.

Moreover, the post-AEDPA version of 28 U.S.C. § 2244(b)(1)–"A claim . . . that was presented in a previous application shall be dismissed"–does not include the "ends of justice" exception for previously presented claims to be raised again in a subsequent petition.

Supreme Court:

Sawyer v. Whitley, 505 U.S. 333 (1992) (holding that in order to prove actual innocence, petitioner must show fair probability that rational trier of fact would have entertained reasonable doubt re: existence of facts which are prerequisites under state or federal law for imposition of death penalty).

Kuhlmann v. Wilson, 477 U.S. 436 (1986) (plurality) (holding "ends of justice" served where exception to dismissal of successive petition made only when the petitioner

supplements constitutional claim with colorable showing of factual innocence).

Sanders v. United States, 373 U.S. 1 (1963) (permitting re-litigation of successive claim where previous adjudication was not on merits, or where reconsideration of the claim serves the ends of justice).

Ninth Circuit:

Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (en banc) (emphasizing that a petitioner need not prove that he is actually innocent in order to pass through the *Schlup* gateway; petitioner need only present evidence of innocence that undermines confidence in the outcome of the trial; "the claim is procedural, not substantive"), *cert. denied*, 523 U.S. 1133 (1998).

Richmond v. Ricketts, 774 F.2d 957, 960 (9th Cir. 1985) (holding that where petitioner did not appeal the denial of previously litigated claims because they were not the basis for relief, reaching those claims serves Rule 9(b) ends of justice).

Federal Statutes:

28 U.S.C. § 2244(b)(1) (2000) (prohibiting review of successive petitions).

See generally:

George W. Sherrell IV, Note, *Successive Chances for Life: Kuhlmann v. Wilson, Federal Habeas Corpus and the Capital Petitioner*, 64 N.Y.U. L. Rev. 455 (1989) (summarizing *Kuhlmann* and arguing that standard for review of successive petitions is too restrictive).

6.2.3.1.2 Recalling the Mandate

In *Calderon v. Thompson*, 523 U.S. 538 (1998), the Supreme Court addressed the issue of whether a circuit court's mandate recall is subject to successive petition analysis. Although the court held AEDPA inapplicable, in reaching its holding it stated that a prisoner's motion to recall an appellate court mandate on the basis of the underlying merits in a capital habeas case would be subject to § 2244(b). The Court explained that because the Ninth Circuit acted *sua sponte* and recalled the mandate based on the merits of Thompson's first petition, the mandate recall did not contravene the letter of

AEDPA. However, the Supreme Court also found that while AEDPA did not govern the case, the appellate court was nevertheless required to act in a manner consistent with the statute. Accordingly, the Supreme Court held that a federal court of appeals abuses its discretion if, absent a miscarriage of justice, it recalls *sua sponte* a mandate to revisit the merits of an earlier decision denying habeas relief. The Court determined on the specific facts of *Thompson* that the Ninth Circuit abused its discretion recalling its mandate.

Supreme Court:

Bell v. Thompson, 125 S. Ct. 2825 (2005) (holding that, assuming Fed. R. App. P. 41 authorizes a stay of a mandate following a denial of *certiorari* and that a court may stay the mandate without entering an order, the Sixth Circuit's decision to do so here was an abuse of discretion; also holding that Sixth Circuit did not accord appropriate level of respect to state's judgment where it withheld its mandate for over five months--based on evidence supporting only arguable constitutional claim--while the state prepared to carry out the execution; commenting that while state's reliance interest was not as strong in a case where, unlike *Calderon v. Thompson*, the mandate has not issued, the finality and comity concerns that animated *Thompson* were implicated in the present case).

Calderon v. Thompson, 523 U.S. 538 (1998) (determining that a motion to recall a mandate can be considered successive under the AEDPA; holding that it is an abuse of discretion for a court of appeals to recall a mandate *sua sponte* absent a miscarriage of justice; finding that the Ninth Circuit abused its discretion in recalling its mandate).

Calderon v. Thompson, 523 U.S. 538 (1998) (Souter, J., dissenting) (noting that nothing in the AEDPA speaks to the courts of appeals' inherent power to recall a mandate, so long as the power is not abused to enable litigation of otherwise forbidden SOS claims; stating that, "[w]hatever policy the court is pursuing, it is not the policy of the AEDPA").

Ninth Circuit:

Nevius v. Sumner, 105 F.3d 453 (9th Cir. 1996) (denying capital habeas petitioner's motion to recall the mandate to reopen proceedings and present new claims, recognizing that recall would undermine *McCleskey* and AEDPA), *cert. denied*, 527

U.S. 1006 (1999)

See generally:

Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process,"* 74 N.Y. L. Rev. 313 (1999) (discussing the Thomas Thompson case and asserting that the Supreme Court's *Calderon* decision implicitly extends the rule holding defendants liable for procedural errors made by their attorneys to holding defendant's liable for procedural errors made by their judges).

6.2.3.1.3 Rule 60(b)

In *Gonzalez v. Crosby,* 125 S. Ct. 2641 (2005), the Supreme Court held that if a motion under Fed. R. Civ. P. 60(b) for relief from judgment contains one or more "claims," it is subject to AEDPA's restrictions on successive habeas petitions. The Court also held that a Rule 60(b) motion can be said to bring a claim if it seeks to add a new ground for relief from the state conviction or attacks the federal court's previous resolution of a claim on the merits, but not if it merely attacks a defect in the integrity of the federal habeas proceedings. *Id.* at 2648. The Court concluded that if neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, allowing the Rule 60(b) motion to proceed as denominated creates no inconsistency with the habeas statute or rules. *Id.*

Supreme Court:

Gonzalez v. Crosby, 125 S. Ct. 2641 (2005) (holding that where neither the Rule 60(b) motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, allowing the motion to proceed on its own terms creates no inconsistency with the habeas statute or rules; accordingly, a Rule 60(b) motion that challenged only the district court's previous ruling on AEDPA's statute of limitations was not the equivalent of a successive habeas petition and did not require a certificate of appealability).

Abdur'Rahman v. Bell, 537 U.S. 88 (2002) (per curiam) (dismissing writ of certiorari as improvidently granted; but see dissenting opinion of Stevens, J. expressing view that there was a need for clarification of the availability of Federal Rule of Civil Procedure 60(b) motions to challenge the integrity of final orders entered in habeas proceedings, and agreeing with the view that the difference between a second and successive habeas

motion and a Rule 60(b) motion lies in the harm intended to be cured: a second or successive habeas petition is meant to remedy a constitutional violation, while a Rule 60(b) motion is designed to cure procedural violations in an earlier proceeding that raise questions about that proceedings integrity).

6.2.3.2 Petitions Raising Different Grounds

Prior to enactment of the AEDPA, Rule 9(b) of the rules governing § 2254 and § 2255 cases provided for the dismissal of a subsequent petition where the court found that petitioner's failure to assert new or different grounds in an earlier petition constituted an "abuse of the writ." In *Sanders v. United States*, 373 U.S. 1 (1963), the Supreme Court ruled that a petition constitutes an "abuse of the writ" if the petitioner: (a) deliberately withheld the new grounds from a prior petition, (b) is pursuing needless piecemeal litigation, or (c) has raised the claims only to vex, harass, or delay.

In 1991, the Supreme Court substantially revised the abuse of the writ standard in *McCleskey v. Zant*, 499 U.S. 467 (1991). The *McCleskey* Court held that in order to avoid dismissal of a new claim as an abuse of the writ, a petitioner must show (1) cause for the failure to raise the claim previously and (2) prejudice resulting therefrom, or (3) a miscarriage of justice. The Court lifted this "cause and prejudice" standard from its procedural default cases. To demonstrate cause, a petitioner must show that some objective factor external to the defense impeded counsel's efforts to raise the claim in state court. The petitioner must then show actual prejudice from the claimed error. The Advisory Committee Notes to former Rule 9(b) provided that a retroactive change in the law and newly discovered evidence constituted acceptable cause for failing to raise a claim in an earlier petition.

In 1996, Congress enacted the AEDPA which amended § 2244(b)(2) to prohibit review of subsequent petitions raising new claims unless one of two conditions are met. Section 2244(b)(2) provides:

> A claim presented in a second or successive habeas corpus application under § 2254 that was not presented in a prior application shall be dismissed unless–
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review

> by the Supreme Court, that was previously unavailable; or
> (B)(I) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Supreme Court:

Slack v. McDaniel, 529 U.S. 473 (2000) (holding that a pre-AEDPA habeas petition–filed after an initial petition was unadjudicated and dismissed for failure to exhaust state remedies–is not a second or successive petition, notwithstanding that additional claims were included in the subsequent petition; suggesting that the definition of second or successive would be the same under AEDPA.).

Felker v. Turpin, 518 U.S. 651 (1996) (holding that the AEDPA codified abuse of the writ doctrine in 28 U.S.C. § 2244(b)).

Gomez v. United States Dist. Ct. for the N. Dist. of Cal., 503 U.S. 653 (1992) (holding that petitioner's last-minute § 1983 claim, that execution by gas violates the Eighth Amendment, was abusive where it could have been raised in earlier habeas petitions)

McCleskey v. Zant, 499 U.S. 467 (1991) (holding that claims in subsequent petition that were not alleged in previous petitions will be dismissed as an abuse of the writ unless petitioner can show: (a) cause for failure to raise claim previously, and prejudice resulting therefrom, or (b) factual innocence).

Sanders v. United States, 373 U.S. 1 (1963) (setting forth abuse of writ standard prior to *McCleskey*; holding that since res judicata is not applicable in habeas proceedings, federal court must reach merits of subsequent claims unless: (a) the claims were deliberately withheld or abandoned, or (b) the purpose of the petition is to vex, harass, or delay; re-litigation of successive claim is permitted if the ends of justice is thereby served).

Ninth Circuit:

Babbitt v. Woodford, 177 F.3d 744 (9th Cir.) (barring petitioner's claim that trial counsel's racial bias created structural error because factual predicates underlying claim

could have been discovered through exercise of due diligence and, even if proven, claims would not establish actual innocence), *cert. denied,* 526 U.S. 1107 (1999).

Siripongs v. Calderon, 167 F.3d 1225 (9th Cir.) (analyzing facts and holding that petitioner's claim that prosecutors withheld exculpatory evidence did not satisfy either element of 28 U.S.C. § 2244(b)(2)(B) so as to establish cause for his default), *cert. denied*, 525 U.S. 1131 (1999)

Calderon v. United States Dist. Ct. for the Cent. Dist. of Cal. (Kelly V), 163 F.3d 530 (9th Cir. 1998) (stating that habeas petitioner's failure to present all possible grounds for relief in the defensive posture of an opposition to state's mandamus petition did not turn later petition into an abuse of the writ; opposition to a mandamus petition is not a substitute for a habeas petition), *cert. denied*, 526 U.S. 1060 (1999).

Turner v. Duncan, 158 F.3d 449 (9th Cir. 1998) (holding that state waived abuse of writ argument by failing to raise it when it filed objections to magistrate judge's recommendations).

United States v. Allen, 157 F.3d 661 (9th Cir. 1998) (holding that a ground is successive if the basic thrust or gravamen of the legal claim is the same, regardless of whether the basic claim is supported by new and different legal arguments; identical grounds may often be proved by different factual allegations).

Thompson v. Calderon, 151 F.3d 918 (9th Cir.) (quoting *Sawyer* and interpreting last "prong" of § 2244(b)(2) as permitting petitioner to show by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found petitioner death eligible under state law; finding that petitioner did not meet the § 2244(b)(2)(B)(ii) actual innocence standard), *cert. denied*, 524 U.S. 965 (1998).

Ortiz v. Stewart, 149 F.3d 923, 944 (9th Cir. 1998) (holding that a *Lackey* (length of capital confinement) claim, not raised in a first § 2254 petition, does not fall within either exception to the AEDPA's bar against subsequent claims), *cert. denied*, 526 U.S. 1123 (1999).

Villafuerte v. Stewart, 142 F.3d 1124 (9th Cir. 1998) (refusing to allow pursuit of new claims brought in second petition, including claim of racial bias by judge later suspended for use of racial epithets, because petitioner failed to meet § 2244(b)(2)(B)'s requirements).

Calderon v. United States Dist. Ct. for the N. Dist. of Cal. (Taylor), 134 F.3d 981 (9th Cir.) (noting that proposed second amended petition, adding newly exhausted claims to

first amended petition held in abeyance while petitioner pursued unexhausted claims, could be barred as an abuse of the writ, but finding that state's challenge is premature until petitioner attempts to re-amend), *cert. denied*, 525 U.S. 920 (1998).

Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (en banc) (allowing petitioner to pass through *Schlup* actual innocence gateway, emphasizing that petitioner need not prove that he is actually innocent, but instead must present evidence such that a court cannot have confidence in the outcome of the trial; the claim is procedural, not substantive), *cert. denied*, 523 U.S. 1133 (1998).

Woratzeck v. Stewart, 118 F.3d 648 (9th Cir. 1997) (precluding inmate's claims under the AEDPA where inmate failed to make a prima facie showing that he could not have uncovered the claim through prior exercise of due diligence).

United States v. Lorentsen, 106 F.3d 278 (9th Cir. 1997) (denying movant's successive § 2255 motion because it relied on new statutory interpretation, rather than new constitutional rule, and because the interpretation was not made retroactive to cases on collateral review).

Greenawalt v. Stewart, 105 F.3d 1287 (9th Cir.) (finding no new rule of constitutional law made retroactive by the Supreme Court in claim that penalty of death by lethal injection for first degree murder is unconstitutional), *cert. denied*, 519 U.S. 1103 (1997).

Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir. 1997) (holding that § 2244(b)(2)(B) forecloses all successive petition reviews of constitutional claims unrelated to guilt or innocence), *cert. denied*, 519 U.S. 1102 (1997).

Nevius v. McDaniel, 104 F.3d 1120, 1121 (9th Cir. 1997) (finding that petitioner made a prima facie showing of new rule of constitutional law and granting request for leave to file a second habeas petition).

Farmer v. McDaniel, 98 F.3d 1548 (9th Cir. 1996) (holding that subsequent habeas corpus petition alleging "new and different" grounds for relief is subject to Rule 9(b) abuse of writ scrutiny, even though dismissal of prior petition was not based on merits), *abrogated by Slack v. McDaniel*, 529 U.S. 473 (2000).

Harris v. Vasquez, 949 F.2d 1497 (9th Cir. 1990) (finding that *McCleskey* abuse of writ standard does not create new rule and thus is retroactive under *Teague*), *cert. denied*, 503 U.S. 910 (1992).

Richmond v. Lewis, 948 F.2d 1473 (9th Cir. 1990) (holding that where district court granted relief from sentence on one ground, failure to appeal denial of relief on other grounds does not constitute an abuse of the writ), *rev'd on other grounds*, 506 U.S. 40 (1992).

Molina v. Rison, 886 F.2d 1124, 1127 (9th Cir. 1989) (defining, prior to *McCleskey*, "abusive" petition as one in which petitioner has: (a) deliberately withheld the new grounds from a prior petition, (b) pursued needless piecemeal litigation, or (c) raised the claims only to vex, harass, or delay).

Deutscher v. Whitley, 884 F.2d 1152, 1155 (9th Cir. 1989) (stating, prior to *McCleskey*, that district court's decision not to dismiss petition for abuse of the writ is reviewed for abuse of discretion), *vacated on other grounds*, 500 U.S. 901 (1992).

Hamilton v. Vasquez, 882 F.2d 1469, 1473 (9th Cir. 1989) (stating that re-filed petition following dismissal of prior petition without prejudice is not abusive).

Neuschafer v. Whitley, 860 F.2d 1470 (9th Cir. 1988) (holding that petitioner did not abuse writ in bringing claims in second petition that were left out of first petition for lack of exhaustion).

See generally:

Alan Ellis, et al., *It's Not Too Late Part II: Filing Second and Successive 2255 Motions Under the New Habeas Corpus Reform Law*, 21-Feb Champion 16 (1997) (arguing that while the AEDPA was supposedly enacted to restrict abusive petitions, it actually restricts the postconviction rights of prisoners).

Steven M. Goldstein, *Application of Res Judicata Principles to Successive Federal Habeas Corpus Petitions in Capital Cases: The Search for an Equitable Approach*, 21 U.C. Davis L. Rev. 45 (1987) (analyzing standards of review for successive petitions and, focusing on capital cases, attempting to resolve confusion).

David D. Kammer, Note, *Restricting New-Claim Successive Applications for Federal Writs of Habeas Corpus*, 60 U. Cin. L. Rev. 1405 (1992) (summarizing *McCleskey* and related law on successive petitions).

Andrea A. Kochan, *The Anti-Terrorism and Effective Death Penalty Act of 1996: Habeas Corpus Reform*?, 52 Wash. U. J. Urb. & Contemp. L. 399 (1997) (arguing that the AEDPA actually exacerbates the problems in habeas corpus jurisprudence and

severely restricts prisoners' habeas corpus rights).

Mark M. Oh, *The Gateway for Successive Habeas Petitions: An Argument for Schlup v. Delo's Standard for Actual Innocence Claims*, 19 Cardozo L. Rev. 2341 (1998) (arguing that while the AEDPA's actual innocence standard appears to overrule the prior Supreme Court standard, the AEDPA's standard should be abandoned because it violates due process).

Deborah L. Stahlkopf, *A Dark Day for Habeas Corpus: Successive Petitions under the Anti-Terrorism and Effective Death Penalty Act of 1996*, 40 Ariz. L. Rev. 1115 (1998) (describing the effects of the new gatekeeper provisions under the AEDPA, how the provisions affect inmate's ability to bring successive claims, and the implications of such restrictions).

Cheryl R. Sweeney, *McCleskey v. Zant, The Cause and Prejudice Standard in Capital Punishment Cases*, 24 U. Tol. L. Rev. 231 (1992) (analyzing history and evolution of habeas corpus writ and new standard set forth in *McCleskey*).

6.2.3.2.1 Retroactivity of § 2244(b)(2)

In *Felker v. Turpin*, 518 U.S. 651 (1996), the Supreme Court retroactively applied § 2244(b)(2) to a petitioner who had already completed his first habeas proceeding without specifically addressing the retroactivity issue. However, the Supreme Court decided *Felker* prior to *Lindh v. Murphy*, 521 U.S. 320 (1997). In *Lindh*, the Court held that the AEDPA does not apply to cases that were pending at the time of the AEDPA's enactment.

In *U.S. v. Villa-Gonzalez*, 208 F.3d 1160 (9th Cir. 2000), the Ninth Circuit held that the application of § 2244 to a post-AEDPA successive § 2255 motion is not a retroactive application of the AEDPA, notwithstanding that the initial § 2255 motion was filed pre-AEDPA.

Supreme Court:

Lindh v. Murphy, 521 U.S. 320 (1997) (holding that negative implication of Chapter 154's retrospective application provision means that new provisions of Chapter 153 apply only to cases filed after the AEDPA became effective).

Felker v. Turpin, 518 U.S. 651 (1996) (applying new § 2244(b)(2) to pending case where petitioner had already completed first habeas corpus proceeding).

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (setting forth standard for retroactivity of new statutes, preventing retroactive application of statute where doing so attaches new legal consequences to events completed before enactment).

Ninth Circuit:

U.S. v. Villa-Gonzalez, 208 F.3d 1160 (9th Cir. 2000) (holding that the application of § 2244 to a post-AEDPA successive § 2255 motion is not a retroactive application of the AEDPA, notwithstanding that the initial § 2255 motion was filed pre-AEDPA).

Other Circuits:

Mueller v. Angelone, 181 F.3d 557 (4th Cir.) (concluding that the Court in *Lindh* did not foreclose the possibility that in some cases filed after enactment, certain of the AEDPA's provisions might not be applicable because of an impermissible retroactive effect; conducting *Landgraf* analysis, however, and finding application of AEDPA proper), *cert. denied*, 527 U.S. 1065 (1999).

Graham v. Johnson, 168 F.3d 762 (5th Cir. 1999) (rejecting petitioner's argument that fourth habeas petition filed after enactment of AEDPA was continuation of third petition, pending at the time of enactment and subsequently dismissed; reading *Lindh* to recognize implicit congressional intent as satisfying *Landgraf* clear statement requirement and holding that AEDPA's gatekeeping provisions apply), *cert. denied*, 529 U.S. 1097 (2000).

In re Minarik, 166 F.3d 591 (3rd Cir. 1999) (holding that the AEDPA's ambiguity regarding retroactive application of its gatekeeping procedures to a second petition, where the first petition was filed before the AEDPA, necessitates *Landgraf* analysis; applying AEDPA under *Landgraf* because petitioner failed to show he would be permitted a second petition under pre-AEDPA law).

6.2.3.2.2 Types of Claims Constituting Cause and Prejudice Under Pre-AEDPA Law

6.2.3.2.2.1 New Fact Claims

Prior to the AEDPA, a prisoner could excuse a federal procedural default by demonstrating sufficient cause for the failure to previously raise the claim. A subsequent petition grounded on new facts or evidence not available at the time of an earlier petition met the sufficient cause requirement under pre-AEDPA law of excusing the failure to raise the claim earlier. The Supreme Court's opinion in *Herrera v. Collins*, 506 U.S. 390 (1993), however, emphasized that new evidence of innocence alone is not sufficient cause. A new innocence claim must include a claim of constitutional error. *See infra* § 6.3.2.5.

Supreme Court:

Herrera v. Collins, 506 U.S. 390 (1993) (holding that actual innocence claim based on new evidence is not cognizable on habeas and cannot serve as exception to abuse of writ without identification of some constitutional error).

McCleskey v. Zant, 499 U.S. 467 (1991) (holding that where petitioner had sufficient evidence to support a *Massiah* claim before filing first petition, new evidence discovered later was not "cause" for a *Massiah* claim first raised in a second petition and thus petitioner abused the writ).

Ninth Circuit:

Harris v. Pulley, 885 F.2d 1354, 1370–71 (9th Cir. 1988) (holding, prior to *McCleskey*, that newly developed scientific evidence is cause for failure to include claim in prior petition), *cert. denied*, 493 U.S. 1051 (1990).

See generally:

Kathleen C. Boyd, Note, *The Paradox of Actual Innocence in Federal Habeas Corpus After Herrera v. Collins*, 72 N.C. L. Rev. 479 (1994) (reviewing *Herrera* and analyzing the resulting confusion regarding claims of innocence in federal habeas corpus cases).

6.2.3.2.2.2 New Law Claims

A change in the law subsequent to the filing of the first habeas petition is sufficient cause, under pre-AEDPA law, for failing to earlier include the claim based on such law, provided that the new law is retroactive under *Teague v. Lane*, 489 U.S. 288 (1989). Under AEDPA, the Supreme Court would have to hold the new law should be applied retroactively.

Federal Statutes:

28 U.S.C. § 2244(b)(2)(A) (2000).

6.2.3.2.2.3 Tactically Withheld Claims

Prior to *McCleskey v. Zant*, 499 U.S. 467 (1991), the Ninth Circuit held in *Neuschafer v. Whitley*, 860 F.2d 1470 (9th Cir. 1988), that a petitioner does not deliberately abuse the writ where he omitted unexhausted claims from his first petition because he believed in good faith that the claims would be barred until exhausted. Thereafter, the Supreme Court held in *McCleskey* that where a petitioner was aware of a ground supporting a prior petition but deliberately withheld it, the petitioner could not maintain a subsequent petition raising that ground.

Supreme Court:

McCleskey v. Zant, 499 U.S. 467 (1991) (prohibiting petitions raising grounds previously available but deliberately withheld).

Ninth Circuit:

Hamilton v. Vasquez, 882 F.2d 1469, 1473 (9th Cir. 1989) (finding, prior to *McCleskey*, no abuse of writ where there was no affirmative indication in the record that petitioner made a conscious decision to deliberately withhold claim).

Neuschafer v. Whitley, 860 F.2d 1470 (9th Cir. 1988) (finding, prior to *McCleskey*, no abuse of writ where petitioner did not bring certain unexhausted claims in a prior petition due to a good faith belief that their inclusion would require dismissal under

Rose), *cert. denied*, 493 U.S. 906 (1989).

District Courts in Ninth Circuit:

Ainsworth v. Vasquez, 759 F. Supp. 1467 (E.D. Cal. 1991) (adopting procedural suggestion in Judge Alarcón's *Neuschafer* concurrence; stating that magistrate judges have discretion to hold hearings to determine existence of additional claims, including unexhausted claims; hearings, so limited, do not unduly infringe on attorney-client privilege).

6.2.3.2.3 Exception to Procedural Default Bar: Miscarriage of Justice

The Supreme Court in *McCleskey v. Zant*, 499 U.S. 467 (1991), created a "fundamental miscarriage of justice" exception to the pre-AEDPA Rule 9(b) abuse of the writ bar. The Court, however, appeared to limit the "miscarriage of justice" exception to claims of factual innocence. Subsequently, in *Herrera v. Collins*, 506 U.S. 390 (1993), the Court emphasized that courts may not hear a federal habeas claim of actual innocence unless the petition also alleges a federal constitutional violation.

However, in *Schlup v. Delo*, 513 U.S. 298 (1995)–a case involving a successive habeas petition asserting that a constitutional trial error caused the conviction of an innocent defendant–the Court held that the standard for reviewing such actual innocence claims is whether a constitutional violation "probably resulted in the conviction of one who is actually innocent," as set forth in *Murray v. Carrier*, 477 U.S. 478 (1986).

The current version of 28 U.S.C. § 2244(b)(2), amended by the AEDPA in 1996, does not include the "miscarriage of justice" exception to the abuse of the writ bar. Most courts having an opportunity to determine how an actual innocence claim operates post-AEDPA have avoided directly addressing the issue. In *United States v. Zuno-Arce*, 25 F. Supp. 2d 1087 (C.D. Cal. 1998), however, the Central District of California held that foreclosure of a constitutional claim where there has been a colorable factual innocence showing would likely constitute a due process violation or an improper suspension of habeas relief. The court, therefore, extended the miscarriage of justice gateway to claims otherwise procedurally barred by the AEDPA's statute of limitation.

Supreme Court:

Dretke v. Haley, 541 U.S. 386 (2004) (holding in a noncapital habeas case that a federal court faced with allegations of actual innocence, whether of the sentence or of the crime charged, must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default; in the present posture of the case, the Supreme Court declined to extend the actual innocence exception to procedural default of constitutional claims challenging the noncapital sentencing error).

Calderon v. Thompson, 523 U.S. 538 (1998) (distinguishing the *Schlup* and *Sawyer* miscarriage of justice standards and finding that petitioner's new evidence did not meet either standard).

Schlup v. Delo, 513 U.S. 298 (1995) (holding that the *Murray* standard, rather than the more stringent *Sawyer* standard, governs the miscarriage of justice inquiry when a capital habeas petitioner raises an actual innocence claim to avoid procedural bar).

Herrera v. Collins, 506 U.S. 390 (1993) (holding that an actual innocence claim does not establish an exception to abuse of the writ unless accompanied by a claim of federal constitutional violation).

Sawyer v. Whitley, 505 U.S. 333 (1992) (stating that actual innocence standard for fundamental miscarriage of justice exception requires clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found petitioner eligible for death penalty under applicable state law).

McCleskey v. Zant, 499 U.S. 467 (1991) (holding that claims in subsequent petition not alleged in previous petitions will be dismissed as an abuse of writ unless petitioner can show: (a) cause and prejudice, or (b) a miscarriage of justice in the form of factual innocence).

Smith v. Murray, 477 U.S. 527 (1986) (emphasizing that the miscarriage of justice exception addresses actual, not legal, innocence).

Murray v. Carrier, 477 U.S. 478 (1986) (setting forth the "probably resulted in the conviction of one who is actually innocent" actual innocence standard).

Kuhlmann v. Wilson, 477 U.S. 436 (1986) (holding that to show "fundamental miscarriage of justice," petitioner must make "colorable showing of actual innocence").

Ninth Circuit:

Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (en banc) (emphasizing that the *Schlup* gateway is a procedural mechanism for consideration of otherwise barred claims, as opposed to a substantive, independent avenue to relief; thus, petitioner need only present evidence of innocence which undermines confidence in the outcome of the trial, not establish *Herrera/Sawyer* actual innocence), *cert. denied*, 523 U.S. 1133 (1998).

Coley v. Gonzales, 55 F.3d 1385 (9th Cir. 1995) (finding no miscarriage of justice via actual innocence because no showing under *Schlup*).

Clark v. Lewis, 1 F.3d 814 (9th Cir. 1993) (finding no miscarriage of justice where no constitutional error occurred).

Deutscher v. Whitley, 991 F.2d 605 (9th Cir. 1993) (holding that in order to show actual innocence of death penalty in a weighing state, petitioner must show by clear and convincing evidence that, but for some constitutional error, the sentencing body would have weighed the aggravating and mitigating evidence differently and elected a sentence other than death), *opinion withdrawn and superseded on reh'g*, 16 F.3d 981 (9th Cir. 1994).

District Courts in Ninth Circuit:

United States v. Zuno-Arce, 25 F. Supp. 2d 1087 (C.D. Cal. 1998) (holding that foreclosure of a constitutional claim where there has been a colorable factual innocence showing would likely constitute a due process violation or an improper suspension of habeas relief; extending the miscarriage of justice gateway to claims otherwise procedurally barred by the AEDPA's statute of limitation; finding that movant failed to make sufficient showing of actual innocence).

Harding v. Lewis, 795 F. Supp. 953 (D. Ariz. 1992) (holding that petitioner did not make necessary showing of factual innocence under miscarriage of justice exception).

See generally:

Kathleen C. Boyd, Note, *The Paradox of Actual Innocence in Federal Habeas Corpus After Herrera v. Collins*, 72 N.C. L. Rev. 479 (1994) (reviewing *Herrera* and analyzing the resulting confusion regarding innocence claims in federal habeas corpus cases).

Vernon E. Googe III, *Herrera v. Collins–Federal Habeas Corpus Review and Claims of Actual Innocence*, 27 Ga. L. Rev. 971 (1993) (focusing on *Herrera* and analyzing the dilemma for federal courts in habeas cases alleging innocence).

Robert C. Stacy II, Note, *Schlup v. Delo: The Result of Curbing Unlimited Jurisdiction by Limiting Discretion*, 74 N.C. L. Rev. 897 (1996) (focusing on miscarriage of justice exception to procedural default rules and *Schlup* standard and predicting future problems in application of *Schlup* because of inconsistencies in Supreme Court habeas jurisprudence).

Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. Rev. 303 (1993) (analyzing *Herrera* and Supreme Court's new "innocence-focus" in habeas cases).

6.2.3.2.4 Burden of Proof–Abuse of the Writ

Prior to the AEDPA, the Court in *McCleskey v. Zant*, 499 U.S. 467 (1991), held that in order to establish an abuse of the writ or successive petition bar, the state must plead with clarity and particularity. In response to the state's pleading, the petitioner carries the burden of showing by a preponderance of the evidence that no abuse of the writ exists. While a hearing on the abuse question is not automatic, a petitioner is entitled to an opportunity to explain the alleged abuse.

The current version of 28 U.S.C. § 2244(b)(3) requires a court of appeals order authorizing the filing of a subsequent petition in the district court. *See* § 6.2.2. Thus, for successive petitions filed pursuant to the current version of § 2244(b), the court of appeals will have already determined that a given petition under review makes a *prima facie* showing that the petition meets the § 2244(b)(2) requirements.

Supreme Court:

McCleskey v. Zant, 499 U.S. 467 (1991) (holding that the government satisfies its burden of pleading abuse of the writ if it notes, with clarity and particularity, petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner abused the writ; burden then shifts to petitioner to show cause for failing to raise the claim, and prejudice therefrom).

6.2.3.2.5 Successive Motions Under § 2241(c)

See also § 6.4.3 addressing section 2255 successive motions.

Ninth Circuit:

Greenawalt v. Stewart, 105 F.3d 1287, 1287–88 (9th Cir.) (holding that state prisoner may not avoid the limitations imposed on successive petitions by styling his petition as one pursuant to § 2241 rather than § 2254), *cert. denied*, 519 U.S. 1103 (1997).

6.2.4 Amended Petitions

Section 2242 of Title 28 of the United States Code provides that a petitioner may amend a petition for writ of habeas corpus pursuant to Federal Rule of Civil Procedure 15. After a brief period in which a party may amend as of right, the district court has sole discretion to grant leave to amend. In *Foman v. Davis*, 371 U.S. 178 (1962), the Supreme Court enumerated four factors relevant to determining whether to deny a motion for leave to amend: (1) undue delay, (2) bad faith or dilatory motive, (3) futility of amendment, and (4) prejudice to the opposing party. The Ninth Circuit, in *Howey v. United States*, 481 F.2d 1187 (9th Cir. 1973), held that these factors are not of equal weight and found that denial should occur only where prejudice or bad faith exists. However, in *Bonin v. Calderon*, 59 F.3d 815 (9th Cir. 1995), the Ninth Circuit stated that futility alone may be sufficient to deny a motion to amend.

In the context of death penalty habeas petitions, amended petitions take on special significance in light of the doctrines limiting successive and abusive petitions where the petitioner knew or should have known of the amended claims at the time of initial filing, *see supra* §§ 6.2.2, 6.2.3 and *infra* § 6.3.3, and in light of AEDPA's statute of limitation. *See supra* § 6.2.1. In *Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000), *cert. denied,* 533 U.S. 941 (2001), the Ninth Circuit allowed for two amendments to a habeas petition. First, the petitioner moved to amend a mixed petition dismissed without prejudice, to include only the exhausted claim. The Ninth Circuit affirmed the district court's exercise of equitable power to accept petitioner's amendment *nunc pro tunc* to the date of original filing, notwithstanding that the initial petition was dismissed. The Ninth Circuit also ruled that Anthony's later amended

petition incorporating the newly exhausted claims–which by itself would be barred by the statute of limitation–related back to the date of original filing. The *Anthony* court felt the relation back was appropriate because the state was on notice of the newly exhausted claims since they were included in the first federal petition.

In a noncapital case, the Supreme Court held in *Mayle v. Felix*, 125 S. Ct. 2562 (2005), that an amended habeas petition does not relate back when it asserts a new ground for relief supported by facts that differ in both time and type from those set forth in the original pleading. The Court rejected the view that the relevant transaction for purposes of Fed. R. Civ. P. 15(c)(2) was the petitioner's state-court trial and conviction; however, the Court held that so long as the original and the amended petitions state claims that are tied to a common core of operative facts, relation back will be in order.

Finally, if a state "opts in" to the AEDPA's special capital provisions, *see infra* § 6.2.16, then, according to the AEDPA, a petitioner may amend a habeas corpus petition only if it meets the grounds for successive petitions specified in § 2244(b). *See supra* §§ 6.2.2 and 6.2.3.2.

Supreme Court:

Mayle v. Felix, 125 S. Ct. 2562 (2005) (holding in a noncapital case that an amended habeas petition does not relate back when it asserts a new ground for relief supported by facts that differ in both time and type from those set forth in the original pleading).

Foman v. Davis, 371 U.S. 178 (1962) (analyzing amendment of petitions under Rule 15; listing factors for consideration of amendment: undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by prior amendments, undue prejudice, futility, etc.).

Ninth Circuit:

Anthony v. Cambra, 236 F.3d 568 (9th Cir. 2000) (holding district court properly exercised equitable power to accept petitioner's amendment–dismissing unexhausted claims in mixed petition–*nunc pro tunc* to the date of original filing, notwithstanding that the initial petition was dismissed; also holding petitioner's later amended petition incorporating the newly exhausted claims–which by itself would be barred by the

statute of limitation–related back to the date of original filing since the state was on notice of the newly exhausted claims which were included in the first habeas petition, but see Fernandez, J., dissenting), *cert. denied,* 533 U.S. 941 (2001).

Zarska v. Stewart, 182 F.3d 930 (9th Cir. 1999) (unpublished) (denying petitioner's motion to amend as futile).

Henry v. Lungren, 164 F.3d 1240 (9th Cir.) (holding that petitioner's second habeas petition, following dismissal of first petition for failure to exhaust, did not relate back to first petition for purpose of determining whether petitioner was "in custody" at time of second petition, notwithstanding rule permitting relation back of amended pleadings; district court did not retain jurisdiction over original petition because a dismissal without prejudice for failure to exhaust terminates the action), *cert. denied*, 528 U.S. 963 (1999).

Williams v. Calderon, 83 F.3d 281 (9th Cir.) (holding that post AEDPA amendment to pending petition relates back to original filing date), *cert. denied*, 517 U.S. 1183 (1996).

Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995) (applying Ninth Circuit's Rule 15 amended petition policy; affirming district court's denial of motions for leave to amend because of petitioner's abuse of the writ and the amendment's futility), *cert. denied*, 516 U.S. 1051 (1996).

Cacoperdo v. Demosthenes, 37 F.3d 504 (9th Cir. 1994) (noting amended petition as proper pleading to raise additional grounds for relief), *cert. denied*, 514 U.S. 1026 (1995).

Fetterly v. Paskett, 997 F.2d 1295, 1297 (9th Cir. 1993) (noting amended petition's potential *Rose* exhaustion problem), *cert. denied sub nom., Arave v. Fetterly*, 513 U.S. 914 (1994).

Western Shoshone Nat'l Council v. Molini, 951 F.2d 200 (9th Cir. 1991) (finding no abuse of discretion in denial of leave to file third amended complaint where delay and prejudice existed), *cert. denied*, 506 U.S. 822 (1992).

Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989) (upholding district court's denial of leave to amend where bad faith, undue delay, and prejudice were "readily apparent" and district court previously granted leave to amend).

United States v. Webb, 655 F.2d 977 (9th Cir. 1981) (following *Howey* and noting that

where no bad faith or prejudice, court cannot determine whether denial of motion for leave to amend was abuse of discretion; remanding for further proceedings).

Howey v. United States, 481 F.2d 1187 (9th Cir. 1973) (holding that delay alone, no matter how lengthy, is insufficient to deny leave to amend; courts should deny leave to amend only where the government shows prejudice or bad faith).

District Courts in Ninth Circuit:

United States v. Zuno-Arce, 25 F. Supp. 2d 1087 (C.D. Cal. 1998) (holding that after the government filed its opposition, movant had no right to amend his motion to assert additional claims without leave of court).

Bonin v. Vasquez, 807 F. Supp. 586 (C.D. Cal. 1992) (denying petitioner's motion to amend because of undue delay, prejudice, and abuse of the writ), *aff'd*, 59 F.3d 815 (9th Cir. 1995).

6.2.5 State Procedural Default–Adequate and Independent State Ground

To preserve comity and federalism, federal courts will not review a petitioner's claim denied by a state court based on independent state law adequate to support the judgment. Thus, in *Wainwright v. Sykes*, 433 U.S. 72 (1977) and later in *Coleman v. Thompson*, 501 U.S. 722 (1991), the Supreme Court held that where the state, by a state procedure, procedurally bars a defendant from raising a federal claim in state court, the defendant may not then raise that claim in a federal petition absent a showing of "cause" for the procedural default and "actual prejudice" from the failure to raise the claim, or a demonstration that failure of the court to consider the claims will result in a fundamental miscarriage of justice. In *Sykes*, the defendant failed to object at trial to the admission of statements allegedly obtained in violation of *Miranda*. The Court held that the state rule requiring contemporaneous objection to such evidence represented an adequate and independent state procedural ground barring federal habeas review absent a demonstration of cause and prejudice or a miscarriage of justice.

In *English v. United States*, 42 F.3d 473 (9th Cir. 1994), the Ninth Circuit stated that federal courts in habeas proceedings will not find a procedural bar simply because the petitioner failed to raise the claim at trial or on appeal. Procedural default

is triggered by the violation of a state procedural rule, not the mere failure to raise a claim. In *English*, no state procedural rule required the petitioner to raise or waive his particular claim.

Supreme Court:

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) (stating that a prisoner who fails to timely present his claims in a petition for discretionary review to a state court of last resort has not properly presented his claims to the state court, and therefore procedurally defaults his claims).

Lambrix v. Singletary, 520 U.S. 518 (1997) (stating that the independent and adequate state ground doctrine applies to bar federal habeas claims defaulted under state law, even though such doctrine is not technically jurisdictional when federal court considers state prisoner's federal habeas petition).

Sochor v. Florida, 504 U.S. 527 (1992) (holding that pretrial motion challenging state's "heinousness" aggravating factor does not preserve claim for federal review where defendant procedurally defaulted claim by failing to object after factor was read to jury).

Coleman v. Thompson, 501 U.S. 722 (1991) (barring petitioner from federal review where state judgment clearly relied on state rule of appellate procedure independent of federal claim and adequate to support judgment; expanding *Sykes*' cause and prejudice standard to all procedural defaults).

Harris v. Reed, 489 U.S. 255 (1989) (holding that state court's adequate and independent finding of procedural default bars federal review unless petitioner shows cause and prejudice for default or fundamental miscarriage of justice).

Murray v. Carrier, 477 U.S. 478 (1986) (holding that where a state prisoner defaulted on federal claims in state court pursuant to independent and adequate state procedural rule, the procedural default doctrine bars federal habeas review unless prisoner demonstrates cause for the default and actual prejudice as result of alleged violation of federal law, or that failure to consider claim will result in a fundamental miscarriage of justice).

Wainwright v. Sykes, 433 U.S. 72 (1977) (barring petitioner who failed to comply with state contemporaneous objection rule from federal relief unless he showed both cause for and prejudice from default).

Ninth Circuit:

Bennett v. Mueller, 322 F.3d 573 (9th Cir.) (considering whether habeas petition was procedurally defaulted and holding that California Supreme Court's denial of state court habeas petition "on the merits and for lack of diligence" for untimeliness constituted an independent state ground; reversing on the issue whether the state ground was adequate and remanding for district court to reconsider this issue with the ultimate burden of proof on the state; noting that on this record, the court could not conclude that California had regularly and consistently applied the untimeliness bar in habeas cases), *cert. denied*, 540 U.S. 948 (2003).

Hill v. Roe, 321 F.3d 787 (9th Cir. 2003) (holding in noncapital case that California Supreme Court's citation of *In re Waltreus,* 62 Cal.3d 218 (1965) (habeas petition "ordinarily cannot serve as a second appeal") in denying habeas petition was neither a ruling on the merits nor a denial on procedural grounds, and therefore there was not an independent and adequate state procedural ground that would bar federal habeas review; also holding that petitioner did not have ultimate burden of proving the California Supreme Court's citation to *People v Hill,* 9 Cal.3d 784 (1973) (cannot raise in state habeas an issue that has been litigated at trial and considered on direct appeal unless it relates to innocence or guilt) was not an independent and adequate state procedural ground that would bar federal review).

Kibler v. Walters, 220 F.3d 1151 (9th Cir. 2000) (finding claim procedurally defaulted notwithstanding state supreme court denied claim without stating basis for denial), *cert. denied,* 531 U.S. 1086 (2001).

Wood v. Hall, 130 F.3d 373, 376 (9th Cir. 1997) (holding that when a state prisoner defaults a claim by violating a state procedural rule that would constitute an adequate and independent basis to bar direct review in the U.S. Supreme Court, he may not raise the claim in federal habeas, absent a showing of cause and prejudice), *cert. denied sub nom.*, *Wood v. Cook*, 523 U.S. 1129 (1998).

Forrest v. Vasquez, 75 F.3d 562 (9th Cir.) (holding that California Rule of Court 28(b) is an adequate and independent state ground barring federal habeas review), *cert. denied*, 519 U.S. 832 (1996).

English v. United States, 42 F.3d 473 (9th Cir. 1994) (finding no procedural default–and thus no need to evaluate cause and prejudice–in defendant's failure to earlier raise objection to magistrate presiding over jury selection because Supreme Court's *Gomez* case not yet a rule).

Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992) (explaining independent and adequate requirement).

Tacho v. Martinez, 862 F.2d 1376, 1380 n.5 (9th Cir. 1988) (applying *Sykes* cause and prejudice test to default involving a successive state habeas petition).

Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905, 907–09 (9th Cir. 1986) (applying *Sykes* standard to *pro se* petitioner's failure to appeal a dismissal of postconviction relief to state supreme court).

District Courts in Ninth Circuit:

Paradis v. Arave, 667 F. Supp. 1361 (D. Idaho 1987) (noting that under Idaho law there can be no procedural default, by failure to object, arising from the sentence of death and sentencing procedure at trial level).

See generally:

Carole C. Cooke, Note, *Procedural Defaults at the Appellate Stage and Federal Habeas Corpus Review*, Stan. L. Rev. 463 (1986) (examining standard that federal courts should use in deciding whether to review a "procedurally defaulted" state claim).

Stephanie Dest, Comment, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. Chi. L. Rev. 263 (1989) (analyzing procedural default and habeas jurisprudence).

James W. Dobbins, Note, *Applying Wainwright v. Sykes to State Alternative Holdings and Summary Affirmances*, 53 Fordham L. Rev. 1357 (1985) (analyzing *Wainwright* and Supreme Court decisions on state procedural default of federal review).

Saul B. Goodman & Jonathan B. Sallet, *Wainwright v. Sykes: The Lower Federal Courts Respond*, 30 Hastings L.J. 1683 (1979).

Jason M. Halper, Note, *Harris v. Reed: A New Look at Federal Habeas Jurisdiction Over State Petitioners*, 58 Fordham L. Rev. 493 (1989) (addressing cause and prejudice standard and *Harris*, arguing that *Harris* will either eviscerate cause and prejudice test or compel changes in state court opinion writing).

Note, *On the Threshold of Wainwright v. Sykes: Federal Habeas Court Scrutiny of State Procedural Rules and Rulings*, 83 Mich. L. Rev. 1393 (1985) (examining specific

problems raised by *Sykes* that must be resolved in determining whether a state ruling is based on adequate state procedural ground).

6.2.5.1 Independent State Ground

Where a state bars a federal claim based, at least in part, upon its determination of federal law, the state's bar is not an independent state ground barring federal habeas review under *Sykes*. In *Ake v. Oklahoma*, 470 U.S. 68, 74–75 (1985), the Supreme Court held that the state court's rejection of petitioner's claim under the due process clause that the state improperly denied him a court-appointed psychiatrist was dependent on the state court's antecedent ruling on federal law–that indigent defendants are not entitled to a psychiatrist–and, thus, was not an independent state ground.

Supreme Court:

Stewart v. Smith, 536 U.S. 856 (2002) (per curiam) (holding, following answering of certified question by Arizona Supreme Court, that because finding of waiver of ineffective assistance of counsel claim under Arizona's Rule 32.2(a)(3) does not require examination of merits of claim, it is independent of federal law; reversing judgment in capital case that had held state procedural default ruling on ineffective assistance of counsel claim did not rest on independent state grounds).

Stewart v. Smith, 534 U.S. 157 (2001) (per curiam) (as to Ninth Circuit decision holding petitioner's ineffective assistance of counsel claim not to be procedurally defaulted because Arizona's Rule 32.2 requires that state court consider nature of claim before finding it procedurally defaulted, certifying question to Arizona Supreme Court as follows: at time of respondent's Rule 32 petition in 1995, did question whether asserted claim was of "sufficient constitutional magnitude" to require a knowing, voluntary, and intelligent waiver for purposes of Rule 32.2(a)(3) depend on the merits of the particular claim or merely on the particular right alleged to be violated), *answer to certified question conformed to,* 536 U.S. 856 (above) .

Ake v. Oklahoma, 470 U.S. 68, 74–75 (1985) (holding that state procedural rule does not constitute an independent state ground where determination depended on state court's antecedent ruling on federal law).

Ninth Circuit:

La Crosse v. Kernan, 244 F.3d 702 (9th Cir. 2001) (holding California's untimeliness bar is not a basis for procedurally defaulting and dismissing federal petition where state post conviction petition dismissed pursuant to state untimeliness bar before California Supreme Court decided *In Re Robbins*).

Washington v. Cambra, 208 F.3d 832 (9th Cir.) (following *Park* and reversing district court's dismissal of petition on California's *Dixon* default rule), *cert denied*, 531 U.S. 919 (2000).

Park v. California, 202 F.3d 1146 (9th Cir.) (holding that a federal habeas petitioner is not procedurally defaulted on federal constitutional claims where state supreme court had to make a decision on the federal merits as part of its denial on state procedural grounds; holding California's *Dixon* rule not an independent state law ground), *cert. denied*, 531 U.S. 918 (2000).

Bargas v. Burns, 179 F.3d 1207 (9th Cir. 1999) (rejecting petitioner's claim that state's order impermissibly "interweaves" state and federal law), *cert. denied*, 529 U.S. 1073 (2000).

Ceja v. Stewart, 97 F.3d 1246 (9th Cir. 1996) (holding that state decision adopting mixed arguments of preclusion and waiver is not independent and adequate state law ground), *cert. denied*, 522 U.S. 971 (1997).

Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993) (finding that even if petitioner failed to fairly present to state supreme court, court's affirmance of death sentence necessarily included a determination of federal law and thus did not constitute an independent state ground barring habeas challenge), *cert. denied sub nom.*, *Arave v. Beam*, 511 U.S. 1060 (1994).

District Courts in Ninth Circuit:

Protsman v. Pliler, 318 F. Supp.2d 1004 (S.D. Cal. 2004) (in a case in which the noncapital habeas petitioner was tried after the *Robbins* decision was issued by the California Supreme Court, holding that the application of the *Dixon* case, barring use of habeas petition to raise claims that could have been raised on direct appeal, was not "interwoven with federal law" and thus the *Dixon* bar was an independent state ground barring federal review).

McClain v. Hill, 52 F. Supp. 2d 1133 (C.D. Cal. 1999) (finding that petitioner's claims were not defaulted because state's ruling was not based on independent state ground).

Turner v. Calderon, 970 F. Supp. 781 (E.D. Cal. 1997) (noting the court's determination that California's *Dixon* rule is an independent state ground which bars federal review).

See generally:

Patrik M. Griego, Note, *The "Great Writ" May Once Again Deliver Justice to the Most Deserving Prisoners: An Analysis of Arizona Rule of Criminal Procedure 31.2(B) in Light of Beam v. Paskett*, 39 Ariz. L. Rev. 311 (1997) (addressing question left open by *Beam* as to how Ninth Circuit interprets Arizona Rule 31.2(b), automatic capital appeal statute).

6.2.5.1.1 Alternative Rulings on Federal Law Do Not Negate Independent State Ground

The Supreme Court, in *Harris v. Reed*, 489 U.S. 255 (1989), held that where a state court explicitly and alternatively rules on both independent state grounds and the merits of a federal claim, the independent state ground supports a procedural bar. Assuming the bar is "adequate," federal courts may not conduct a habeas review of the federal claim. Where it is not clear that the state ground is an alternative holding, the federal courts must deem the state's decision to be based on the federal merits. *See infra* § 6.2.5.1.2.

Supreme Court:

Sochor v. Florida, 504 U.S. 527 (1992) (holding that a procedural bar is independent if the "state court's opinion 'indicates clearly and expressly' that the state ground is an alternative holding").

Harris v. Reed, 489 U.S. 255 (1989) (stating that "a state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state courts judgment, even when the state court also relies on federal law.").

Ninth Circuit:

Loveland v. Hatcher, 231 F.3d 640 (9th Cir. 2000) (holding Nevada Supreme Court's ruling denying postconviction appeal based on state procedural bar was an independent and alternate basis for denying relief, notwithstanding that relief also denied on the merits).

McKenna v. McDaniel, 65 F.3d 1483, 1488–89 (9th Cir. 1995) (finding that state court's refusal to entertain claims, at best, represented a refusal to exercise discretion to hear the claims, and was thus insufficient for the state to invoke the procedural bar doctrine), *cert. denied*, 517 U.S. 1150 (1996).

Carriger v. Lewis, 971 F.2d 329 (9th Cir. 1992) (holding ineffective assistance claim procedurally defaulted where claim was not raised on direct appeal and the state supreme court denied claim on procedural grounds and the merits), *cert. denied*, 507 U.S. 992 (1993).

Thomas v. Lewis, 945 F.2d 1119 (9th Cir. 1991) (holding that federal court should not presume that state courts denial of habeas claim was not independent and adequate where state court denied claim on a procedural bar, but also reaches the merits).

Russell v. Rolfs, 893 F.2d 1033, 1035-36 (9th Cir. 1990) (stating, "[i]t is significant in our interpretation that the Washington Supreme Court decided not to exercise its discretionary power–as contrasted with refusing to hear [defendant]'s case because of a procedural bar").

Bruni v. Lewis, 847 F.2d 561, 563 (9th Cir. 1988) (holding that when state appellate court alternatively bases its ruling on the merits and procedural grounds, and state supreme court dismisses petition without explanation, there is no procedural bar to reaching merits on federal habeas review).

District Courts in Ninth Circuit:

Karis v. Vasquez, 828 F. Supp. 1449 (E.D. Cal. 1993) (holding that state court decision regarding claims reviewable in second habeas petition appeared to rely equally on state and federal grounds and, thus, was inadequate to bar federal review).

6.2.5.1.2 Ambiguous Rulings Presumed Not Independent

If a state ruling leaves some question as to whether it is based upon state or federal law, it is difficult to determine whether it constitutes an independent state ground barring federal review under *Sykes*. In *Harris v. Reed*, 489 U.S. 255 (1989) and later in *Coleman v. Thompson*, 501 U.S. 722 (1991), the Supreme Court established that where a state decision "fairly appears" to rest primarily on federal grounds or is "interwoven" with federal law, it will be presumed not to rest independently on state law unless the last state court rendering a judgment "clearly and expressly states that its judgment rests on a state ground." In *Coleman*, the Court clarified that the presumption applies only to ambiguous state decisions that appear to rely on federal law and does not require all state decisions, whether or not ambiguous, to include a "clear and express" statement of the ground for judgment.

Supreme Court:

Ylst v. Nunnemaker, 501 U.S. 797 (1991) (reversing the Ninth Circuit and ruling that where one reasoned state judgment rejected a federal claim, later unexplained orders upholding that judgment or rejecting same claim are presumed to rest upon same ground).

Coleman v. Thompson, 501 U.S. 722 (1991) (stating that court will not presume independent and adequate state ground when a state court decision "fairly appears" to rest primarily on federal law, or to be interwoven with federal law, and when adequacy and independence of any state law ground is not clear from face of opinion; declining to expand *Harris* presumption to *all* state opinions, only those "fairly appearing" to rest on federal grounds or "interwoven" with federal law).

Teague v. Lane, 489 U.S. 288 (1989) (holding that *Harris* rule does not apply where claim was not fairly presented to the state court; in such cases federal court should apply procedural bar where state court would if given the opportunity).

Harris v. Reed, 489 U.S. 255 (1989) (holding that where state decision appears to rest primarily on federal grounds or is interwoven with federal law, decision does not rest independently on state law unless "clearly and expressly" indicated).

Ninth Circuit:

Gretzler v. Stewart, 112 F.3d 992 (9th Cir. 1997) (holding that petitioner did not procedurally default ineffective assistance of counsel claim where state court did not clearly set forth an independent and adequate state basis for rejecting the claim, chose to reach the merits of the claim, and did so by applying federal law), *cert. denied*, 522 U.S. 1081 (1998).

Calderon v. United States Dist. Ct. for the E. Dist. of Cal. (Bean), 96 F.3d 1126 (9th Cir. 1996) (finding that state court's ambiguous order, failing to specify which of petitioner's claims were rejected under each of two cited state doctrines, did not bar federal collateral review under procedural default doctrine), cert. denied, 520 U.S. 1204 (1997).

Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994) (holding that since state court did not cite to a particular procedural rule and discussed "the merits" of claim, state's decision was not independent and adequate and did not bar federal review), *cert. denied*, 513 U.S. 1183 (1995).

Carriger v. Lewis, 971 F.2d 329, 333 (9th Cir. 1992) (en banc) (holding that when state's decision relies on both state procedural grounds and federal grounds, state court must make "clear and express statement" of alternative reliance on state procedural grounds to avoid federal review), *cert. denied*, 507 U.S. 992 (1993).

Russell v. Rolfs, 893 F.2d 1033, 1035 (9th Cir. 1990) (holding that if state court does not "clearly and expressly" rely on procedural default, federal court will address merits), *cert. denied*, 501 U.S. 1260 (1991).

Vickers v. Ricketts, 798 F.2d 369, 373 (9th Cir. 1986) (holding that federal court may address merits, despite petitioner's failure to request instruction at trial, because state court did not invoke procedural bar), *cert. denied*, 479 U.S. 1054 (1987).

District Courts in Ninth Circuit:

Karis v. Vasquez, 828 F. Supp. 1449 (E.D. Cal. 1993) (holding that state court decision regarding claims reviewable in second habeas petition appeared to rely equally on state and federal grounds, thus ground was inadequate to bar federal review).

6.2.5.2 Adequate State Ground

6.2.5.2.1 Firmly Established, Regularly Applied

In order for an adequate state ground to bar federal review under *Sykes*, the state must apply state law that is "firmly established" and "regularly applied" at the time of the default. In *Ulster County Ct. v. Allen*, 442 U.S. 140, 147–50 (1979), the Court reasoned that "if neither the state legislature nor the state courts indicate that a federal claim is barred by some state procedural rule, a federal court implies no disrespect for the state by entertaining the claim."

Supreme Court:

Ford v. Georgia, 498 U.S. 411, 423–24 (1991) (holding that only a firmly established state practice, regularly followed at the time applied, will bar habeas review).

Dugger v. Adams, 489 U.S. 401, 410–12 n.6 (1989) (holding state procedural rule adequate because state supreme court consistently applied the rule in the "vast majority" of cases).

James v. Kentucky, 466 U.S. 341, 348–51 (1984) (holding state procedural rule not independent and adequate where defendant asked trial court for jury "admonition" and the state supreme court refused to hear appeal because defendant had not asked for an "instruction"; distinction between "admonition" and "instruction" not consistently applied by state court).

Hathorn v. Lovorn, 457 U.S. 255, 262–63 (1982) (stating that state procedural ground is not adequate unless "strictly or regularly followed").

Harris v. Reed, 489 U.S. 255 (1989) (noting that where state fails to apply procedural rule in instant case–i.e., decides federal claim on merits–then rule is not regularly applied and is inadequate state ground to bar habeas review).

Ulster County Ct. v. Allen, 442 U.S. 140, 147–50 (1979) (holding that state procedural rule triggers *Sykes* only if state regularly applies it; where state court reaches merits notwithstanding procedural default, federal court may consider merits).

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (holding state procedural bar dependent and inadequate where criminal defendant "could not fairly be deemed to have been apprised of its existence," even though it may retrospectively appear to form part of consistent procedural pattern).

Ninth Circuit:

Bennett v. Mueller, 322 F.3d 573 (9th Cir.) (considering in noncapital case whether habeas petition was procedurally defaulted and holding that California Supreme Court's denial of state court habeas petition "on the merits and for lack of diligence" for untimeliness constituted an independent state ground but noting that on this record, the court could not conclude that California had regularly and consistently applied the untimeliness bar in habeas cases), *cert. denied*, 540 U.S. 948 (2003).

Petrocelli v. Angelone, 248 F.3d 877 (9th Cir. 2001) (holding that Nevada's application of its procedural bar rule pertaining to a claim not raised in a prior proceeding is not consistently applied or well-established).

Lambright v. Stewart, 241 F.3d 1201 (9th Cir. 2001) (concluding district court erred in dismissing ineffective assistance of counsel claim based on state procedural default; finding that Arizona rule requiring that ineffective assistance of counsel claim be raised on direct appeal did not bar federal habeas review because it was so unclear that it did not provide habeas petitioner with fair opportunity to seek relief in state court and that at time of purported default, no Arizona case required a defendant to raise ineffective assistance of counsel claim on appeal), *cert. denied*, 534 U.S. 1188 (2002).

Loveland v. Hatcher, 231 F.3d 640 (9th Cir. 2000) (finding Nevada's postconviction statute of limitations consistently applied in 1993).

Jackson v. Calderon, 211 F.3d 1148 (9th Cir. 2000) (finding no "untimeliness" procedural default where petitioners' California habeas petition filed two days after *In Re Clark* decision), *cert. denied,* 531 U.S. 1072 (2001).

Bargas v. Burns, 179 F.3d 1207 (9th Cir. 1999) (holding that procedural default can occur even if state case law does not specifically set out rule requiring appeal from state's denial of postconviction relief, as opposed to bringing claim in second state petition), *cert. denied*, 529 U.S. 1073 (2000).

Poland v. Stewart, 169 F.3d 573 (9th Cir.) (holding that for a state procedural rule to be adequate, it must be firmly established and regularly followed at the time applied), *cert.*

denied, 528 U.S. 845 (1999).

Fields v. Calderon, 125 F.3d 757 (9th Cir. 1997) (holding that "trigger" for deciding whether state procedural rule was firmly established is time at which state claim could have been brought, not time of federal petition), *cert. denied*, 523 U.S. 1132 (1998).

Binford v. Rhode, 116 F.3d 396 (9th Cir. 1997) (holding that federal claims are barred only if mandatory state law rule precluded claims as of current date; if claims could still be raised in state court, ultimate federal review was not precluded, but claims first must be exhausted).

Calderon v. United States Dist. Ct. for the E. Dist. of Cal. (Hayes), 103 F.3d 72 (9th Cir. 1996) (holding that inconsistent application of state timeliness requirement before conclusion of direct appeal precludes its use as adequate and independent state bar to relief), *cert. denied*, 521 U.S. 129 (1997).

Calderon v. United States Dist. Ct. for the E. Dist. of Cal. (Bean), 96 F.3d 1126 (9th Cir. 1996) (extending *Morales* to habeas claim filed after *In re Clark* because defendant's procedural default, if any, occurred before *Clark*; expressing no opinion whether *Clark* sufficiently clarified California's timeliness requirements to render them adequate to bar federal review; timeliness requirements were inadequate to support default), *cert. denied*, 520 U.S. 1204 (1997).

Morales v. Calderon, 85 F.3d 1387 (9th Cir.) (holding that, prior to December 1992 when petitioner filed his first state habeas petition, California's habeas time requirements were not clear, consistently applied, or well-established), *cert. denied*, 519 U.S. 1001 (1996).

Moran v. McDaniel, 80 F.3d 1261 (9th Cir. 1996) (holding that as of 1996, Nevada Supreme Court consistently applied its procedural rules to bar review of untimely claim, absent showing of cause and lack of state prejudice).

Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994) (holding that because state rule was discretionary and inconsistently enforced, it was not an adequate and independent procedural basis for default), *cert. denied*, 513 U.S. 1183 (1995).

Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994) (holding that state rule must be clear, consistently applied, and well-established at the time of purported default to constitute adequate and independent basis to support procedural default).

Hunter v. Aispuro, 982 F.2d 344 (9th Cir. 1992) (holding that unexplained denial from

state supreme court could not rest on independent and adequate state grounds), *cert. denied*, 510 U.S. 887 (1993).

Vickers v. Ricketts, 798 F.2d 369, 373 (9th Cir. 1986) (holding that federal court may address merits, despite petitioner's failure to request instruction at trial, because state court did not invoke procedural bar), *cert. denied*, 479 U.S. 1054 (1987).

District Courts in Ninth Circuit:

Coleman v. Calderon, No. C 89-1906, 1996 WL 83882 (N.D. Cal. Feb. 20, 1996) (questioning methodology and conclusion of *Deere*; stating that analysis should be based on state court opinion rather than argument; holding that California has not consistently and regularly applied timeliness rule), *aff'd on other grounds*, 150 F.3d 1105 (9th Cir.), *rev'd on other grounds*, 525 U.S. 141, *and cert. denied*, 525 U.S. 1058 (1998).

Deere v. Calderon, 890 F. Supp. 893 (C.D. Cal. 1995) (finding that California Supreme Court has consistently applied timeliness procedural bar in death penalty cases since *In re Clark*; approving application of state's procedural bar).

Odle v. Calderon, 884 F. Supp. 1404 (N.D. Cal. 1995) (finding that California did not "regularly and uniformly" apply *In re Dixon* rule at time of defendant's direct appeal and state habeas, and therefore no bar to federal review).

Karis v. Vasquez, 828 F. Supp. 1449 (E.D. Cal. 1993) (holding that California Supreme Court has not yet consistently applied its procedural rules).

6.2.5.3 State Ruling on Merits Negates Procedural Default

When a state court does not apply an available state procedural bar, choosing instead to rule on the merits, then the court's ruling is not based on the state procedure and does not bar federal review. *But see* § 6.2.5.1.1 for a discussion of when state court bases ruling on both procedural grounds and the merits.

Supreme Court:

Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) (holding that if the last state court reaches the merits of a state claim, there is no procedural bar).

Ninth Circuit:

Walker v. Endell, 850 F.2d 470, 473–74 (9th Cir. 1987) (holding that state court's plain error review of merits negates petitioner's procedural default), *cert. denied*, 488 U.S. 926, and *cert. denied*, 488 U.S. 981 (1988).

Huffman v. Ricketts, 750 F.2d 798, 801 (9th Cir. 1984) (holding no bar to federal habeas review where state declines to apply procedural bar and adjudicates federal claim on merits).

6.2.5.4 Waiver

In *Jenkins v. Anderson*, 447 U.S. 231 (1980), the Supreme Court held that a state's failure to argue procedural default results in a waiver of the bar. The Supreme Court, in *Trest v. Cain*, 522 U.S. 87 (1997), reiterated the holding after the AEDPA's enactment and additionally held that the court of appeal is not required to raise the issue of procedural default *sua sponte*. The *Trest* court, however, declined to resolve the inter-circuit conflict as to whether a habeas court may consider a procedural default that the state has at some point waived or failed to raise.

In *Boyd v. Thompson*, 147 F.3d 1124 (9th Cir. 1998), the Ninth Circuit held that a district court may raise the defense of procedural default *sua sponte* if to do so serves the interests of justice, comity, federalism, and judicial efficiency. More recently, in *Windham v. Merkle*, 163 F.3d 1092 (9th Cir. 1998), the Ninth Circuit extended *Boyd* and held that the court may raise the procedural default defense *sua sponte* in the court of appeals but must remand the case to provide the petitioner the opportunity to justify the default or demonstrate miscarriage of justice. In

Supreme Court:

Trest v. Cain, 522 U.S. 87 (1997) (holding that a court of appeals is not required to raise the issue of procedural default *sua sponte*; instead, a state is normally obligated to raise and preserve the defense in the district court in order to thereafter prevent waiver).

Jenkins v. Anderson, 447 U.S. 231, 234 n.1 (1980) (holding that state's failure to argue state procedural bar in lower courts results in waiver of the bar).

Ninth Circuit:

Vang v. Nevada, 329 F.3d 1069 (9th Cir. 2003) (holding in noncapital case, that because the state filed a length response in which it did not rely on procedural bar, the district court erred in *sua sponte* applying that defense as to three claims and that Nev. Rev. Stat. § 34.810, which bars claims on collateral review if they could have been brought on direct appeal, was an independent and adequate procedural bar as to two other claims).

Windham v. Merkle, 163 F.3d 1092 (9th Cir. 1998) (holding that court of appeal may raise procedural default *sua sponte*, but state's failure to raise procedural default as a defense to the alleged discriminatory use of peremptory challenges requires remand to allow the defendant to show resulting cause and prejudice justification for procedural default or miscarriage of justice).

Boyd v. Thompson, 147 F.3d 1124, 1127 (9th Cir. 1998) (holding that a district court may raise the defense of procedural default *sua sponte* if to do so serves the interests of justice, comity, federalism, and judicial efficiency).

Wilmer v. Johnson, 30 F.3d 451 (9th Cir.) (holding that state waived *Teague* defense by failing to raise it in district court), *cert. denied*, 513 U.S. 970 (1994).

Francis v. Rison, 894 F.2d 353 (9th Cir. 1990) (holding that where respondent argued that petitioner failed to exhaust rather than argue procedural default, respondent waived any procedural default).

Batchelor v. Cupp, 693 F.2d 859, 863–64 (9th Cir. 1982) (holding that if state does not raise procedural default at district court level, the appellate court will deem it waived), *cert. denied*, 463 U.S. 1212 (1983).

6.2.5.5 Estoppel

In *Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990), *cert. denied*, 510 U.S. 1260 (1991), the Ninth Circuit held that a state's prior argument that petitioner had not exhausted state remedies estopped the state from arguing in federal court that petitioner's claims were procedurally defaulted on state grounds. The *Russell* court reasoned that the state, having persuaded the district court to deny federal review because appellant had an adequate and available state remedy, could not later oppose appellant's petition for

relief on the theory that he was actually procedurally barred in state court.

Ninth Circuit:

Ortiz v. Stewart, 149 F.3d 923 (9th Cir. 1998) (distinguishing *Russell* in holding that state was not estopped where state had not argued to federal court that petitioner had an adequate and available state remedy or that petitioner would receive a hearing on the merits of his state claim), *cert. denied*, 526 U.S. 1123 (1999).

Russell v. Rolfs, 893 F.2d 1033 (9th Cir. 1990) (holding that state was estopped from arguing that petitioner was procedurally defaulted on state claims where state had previously opposed petitioner's federal habeas petition on the grounds that petitioner had failed to exhaust), *cert. denied*, 510 U.S. 1260 (1991).

6.2.5.6 Exception to Procedural Default Bar: Cause and Prejudice

6.2.5.6.1 Cause

Under *Wainwright v. Sykes*, 433 U.S. 72 (1977), a federal habeas court will reach the merits of a procedurally defaulted claim if the petitioner demonstrates legally sufficient "cause" for the default and actual "prejudice" from the alleged constitutional error. In *Murray v. Carrier*, 477 U.S. 478 (1986), the Supreme Court clarified the meaning of "cause" under *Sykes* noting that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." Thus, attorney error short of constitutionally ineffective assistance of counsel does not constitute sufficient cause under *Sykes*.

The *Murray* Court indicated, however, that adequate cause would include, among other things, "a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . or that some interference by officials . . . made compliance impracticable." The Court also found that a new law where the "tools to construct the new constitutional claim" were not available at time of default and that state withholding of necessary information constitute cause. However, the Court found that futility, illiteracy of a *pro se* defendant, and counsel error short of ineffective assistance of counsel do not constitute cause.

In *Edwards v. Carpenter*, 529 U.S. 446 (2000), the Supreme Court was presented with the question "whether a federal habeas court is barred from considering an ineffective-assistance-of-counsel claim as "cause" for the procedural default of another claim when the ineffective-assistance claim has itself been procedurally defaulted." The Court held that a procedurally defaulted ineffective assistance of counsel claim can serve as cause to excuse the procedural default of another habeas claim (here insufficiency of the evidence) only if the petitioner can satisfy the "cause and prejudice" standard with respect to the ineffective assistance of counsel claim itself.

Supreme Court:

Edwards v. Carpenter, 529 U.S. 446 (2000) (holding that a procedurally defaulted ineffective assistance of counsel claim can serve as cause to excuse the procedural default of another habeas claim (here insufficiency of the evidence) only if the petitioner can satisfy the "cause and prejudice" standard with respect to the ineffective assistance of counsel claim itself).

Murray v. Carrier, 477 U.S. 478 (1986) (clarifying meaning of "cause" under *Sykes*).

Wainwright v. Sykes, 433 U.S. 72 (1977) (barring petitioner who failed to comply with state contemporaneous objection rule from federal relief unless he shows both cause for the default and prejudice therefrom).

Ninth Circuit:

Manning v. Foster, 224 F.3d 1129 (9th Cir. 2000) (holding–in noncapital § 2254 proceeding–that petitioner may assert as cause for procedural default actions of prior counsel which, even though not constitutionally defective, were not attributable to him because they were both unauthorized and tainted by a conflict of interest; remanding for determination of cause regarding whether trial counsel's actions prevented petitioner form learning of and vindicating his habeas corpus rights where trial counsel failed to file an appeal and told petitioner his only recourse was a motion to reconsider sentence).

Hiivala v. Wood, 195 F.3d 1098 (9th Cir. 1999) (per curiam) (rejecting "cause" argument where petitioner argued he was prevented by state officials from filing state

post conviction personal restraint petition but facts indicated petitioner had sufficient opportunity to file petition), *cert denied*, 529 U.S. 1009 (2000).

LaGrand (Karl) v. Stewart, 133 F.3d 1253 (9th Cir.) (holding that a petitioner may establish cause by showing that a factor external to the defense prohibited counsel from complying with state procedural rules), *cert. denied*, 525 U.S. 971 (1998).

Martinez-Villareal v. Lewis, 80 F.3d 1301 (9th Cir. 1996) (holding that district court erred in granting relief where petitioner shows no cause and prejudice for failing to conform to state procedure, thus excusing procedural default of ineffective assistance claims), *cert. denied*, 519 U.S. 1030 (1996), *and stay granted*, 118 F.3d 625 (9th Cir. 1997).

Magby v. Wawrzaszek, 741 F.2d 240 (9th Cir. 1984) (stating that "cause" is legitimate excuse for default, and "prejudice" is actual harm resulting from alleged constitutional violation).

District Courts in Ninth Circuit:

Coleman v. Ignacio, 164 F.R.D. 679 (D. Nev. 1996) (holding that petitioner made sufficient cause and prejudice showing to excuse procedural default of first state habeas petition on timeliness grounds; finding that petitioner's first and only opportunity to appeal conviction was first state habeas petition, that petitioner was literally denied counsel for state petition, and much of delay was caused by state court and former defense counsel).

See generally:

Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus* (Part Two), 30 U. Rich. L. Rev. 303 (1996) (examining the development of the cause and prejudice standard).

Steven J. Rurka, Comment, *Habeas Corpus–The Supreme Court Defines the Wainwright v. Sykes "Cause" and "Prejudice" Standard*, 19 Wake Forest L. Rev. 441 (1983) (analyzing Supreme Court's definitions of cause and prejudice and evaluating effect of these definitions on habeas corpus relief).

Tung Yin, *A Better Mouse Trap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 Am. J. Crim. L. 203 (1998) (discussing the emergence and technical elements of the cause

and prejudice standard).

6.2.5.6.1.1 New Law/Novel Claims

Supreme Court:

Stewart v. LaGrand (Walter), 526 U.S. 115 (1999) (per curiam) (holding that petitioner could not show cause for default of execution method claim where constitutionality of gas executions was being debated at time of petitioner's direct appeal; holding that petitioner waived execution method claim by choosing lethal gas instead of state's default method, lethal injection).

Breard v. Greene, 523 U.S. 371 (1998) (per curiam) (holding that alleged novelty of petitioner's Vienna Convention claim did not excuse his procedural default).

Dugger v. Adams, 489 U.S. 401 (1989) (holding no cause for failure to object to jury instructions later held unconstitutional because state law provided basis for trial objection).

Murray v. Carrier, 477 U.S. 478 (1986) (holding that lack of legal or factual basis for objection at time of trial constitutes cause).

Reed v. Ross, 468 U.S. 1 (1984) (holding that counsel's failure to object to trial instruction that was declared unconstitutional six years later constitutes cause under *Sykes*).

Engle v. Isaac, 456 U.S. 107 (1982) (holding no cause for failure to object to jury instruction later held unconstitutional because "tools for making federal constitutional claim were available" at time of default).

Ninth Circuit:

LaGrand (Karl) v. Stewart, 173 F.3d 1144 (9th Cir.) (holding that plain futility of Eighth Amendment claim, coupled with the subsequent development of information regarding the nature of lethal gas execution, was such that factual or legal basis for the claim was not reasonably available to petitioner at the time he pursued his direct appeal in state court and therefore is cause for not raising the claim prior to a first federal habeas petition), *stay vacated*, 525 U.S. 1173, *and cert. dismissed*, 526 U.S. 1061 (1999).

Villafuerte v. Stewart, 111 F.3d 616 (9th Cir. 1997) (holding that petitioner failed to

show cause to overcome default of his claim that, after state supreme court reversed cruelty finding as part of aggravating factor of committing murder in especially cruel and depraved manner, it failed to reweigh aggravating and mitigating evidence), *cert. denied*, 522 U.S. 1079 (1998).

Deutscher v. Whitley, 884 F.2d 1152, 1156 (9th Cir. 1989) (holding cause exists if claim is novel and had no reasonable basis at time of default), *vacated on other grounds*, 500 U.S. 901 (1992).

See generally:

Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Colum. L. Rev. 888, 959 n.500 (1998) (discussing *Breard*).

6.2.5.6.1.2 Futility Not an Excuse

Supreme Court:

Engle v. Isaac, 456 U.S. 107 (1982) (holding that futility of presenting objection to state court is insufficient to establish cause).

Ninth Circuit:

LaGrand (Karl) v. Stewart, 173 F.3d 1144 (9th Cir.) (distinguishing *Engle* and holding that a petitioner shows cause for failing to raise a claim regarding the unconstitutionality of lethal gas as an execution method on direct appeal when state law authorizing that method had recently been upheld and no reported cases anywhere held that it was unconstitutional), *stay vacated*, 525 U.S. 1173, *and cert. denied*, 526 U.S. 1061 (1999).

Rupe v. Wood, 93 F.3d 1434 (9th Cir. 1996) (holding that petitioner did not procedurally default claim by failing to re-offer polygraph evidence at resentencing where state supreme court had explicitly held evidence inadmissible on prior direct appeal; attempt to re-offer would have been futile because trial court was bound by prior supreme court ruling), *cert. denied*, 519 U.S. 1142 (1997).

Noltie v. Peterson, 9 F.3d 802, 805–06 (9th Cir. 1993) (analyzing and rejecting petitioner's claim that futility doctrine excused his failure to present a claim to state court).

Sweet v. Cupp, 640 F.2d 233, 236 (9th Cir. 1981) (adopting "futility doctrine" as excuse for procedural default).

6.2.5.6.1.3 Incompetence of Defendant

Ninth Circuit:

Boyd v. Thompson, 147 F.3d 1124 (9th Cir. 1998) (holding that *pro se* petitioner's unfamiliarity with notice of appeal procedure did not excuse default where petitioner refused counsel three times).

Martinez-Villareal v. Lewis, 80 F.3d 1301 (9th Cir.) (holding that procedural default applies to mental incompetence claims), *cert. denied*, 519 U.S. 1030 (1996), *and stay granted*, 118 F.3d 625 (9th Cir. 1997).

Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905, 907–09 (9th Cir. 1986) (holding that *pro se* petitioner's illiteracy is not "cause" for failure to appeal denial of postconviction relief to state supreme court).

6.2.5.6.1.4 State Withholding Necessary Information

Supreme Court:

Strickler v. Greene, 527 U.S. 263 (1999) (finding that petitioner's reasonable reliance on prosecution's open file policy established cause for procedural default of *Brady* claim).

Amadeo v. Zant, 486 U.S. 214 (1988) (holding that *Sykes* cause exists where petitioner failed to raise jury challenge at trial because state concealed memorandum concerning jury race disparity).

Ninth Circuit:

Paradis v. Arave, 130 F.3d 385, 394 (9th Cir. 1997) (holding that petitioner demonstrated cause and prejudice sufficient to overcome default of *Brady* claim by showing that document subpoena had been quashed prior to hearing held in first habeas proceeding and that same documents were not provided in response to pretrial discovery request).

Wood v. Hall, 130 F.3d 373 (9th Cir. 1997) (rejecting petitioner's *Brady* claim as procedurally barred where petitioner failed to show cause for defaulting the claim in state court), *cert. denied sub nom.*, *Wood v. Cook*, 523 U.S. 1129 (1998).

6.2.5.6.1.5 Ineffective Assistance of Counsel

Supreme Court:

Coleman v. Thompson, 501 U.S. 722 (1991) (holding that, since petitioner had no constitutional right to counsel on state habeas corpus, he cannot claim ineffective assistance of counsel in such proceeding; ineffective assistance is not "cause" for failure to appeal from a denial of state habeas).

Smith v. Murray, 477 U.S. 527 (1986) (holding that counsel's failure to raise claim on direct appeal, thereby procedurally defaulting it, was not ineffective assistance of counsel, and thus is not cause under *Sykes*).

Murray v. Carrier, 477 U.S. 478 (1986) (stating that cause must be due to some objective factor external to defense; attorney error short of ineffective assistance of counsel does not establish cause for procedural default; cause and prejudice test applies to failure to raise claim on appeal).

Ninth Circuit:

Hoffman v. Arave, 236 F.3d 523 (9th Cir.) (holding Idaho Code § 19-2719's forty-two day statute of limitations for filing a postconviction petition in a capital case violates the Sixth Amendment because it denies the petitioner any meaningful review of his ineffective assistance of counsel claims), *cert. denied*, 534 U.S. 944 (2001).

Loveland v. Hatcher, 231 F.3d 640 (9th Cir. 2000) (reversing and remanding for evidentiary hearing whether petitioner's reliance on trial counsel to file direct appeal is sufficient to excuse his state procedural default where state postconviction petition dismissed as untimely).

Poland v. Stewart, 169 F.3d 573 (9th Cir.) (holding that on federal habeas corpus, appellate counsel's failure to recognize or properly and timely raise a procedurally defaulted claim on postconviction collateral review does not constitute cause that excuses the default), *cert. denied*, 528 U.S. 845 (1999).

Vansickel v. White, 166 F.3d 953 (9th Cir.) (holding that ignorance of law that allows

twenty peremptory challenges in a capital case, instead of the ten as provided, was "probably not" cause to excuse procedural default), *cert. denied*, 528 U.S. 965 (1999).

Ortiz v. Stewart, 149 F.3d 923 (9th Cir. 1998) (holding that because there is no constitutional right to an attorney in a state or federal habeas proceeding, it follows that there can be no deprivation of effective assistance in such proceedings), *cert. denied*, 526 U.S. 1123 (1999).

Correll v. Stewart, 137 F.3d 1404, 1416 (9th Cir.) (holding that mere ignorance or inadvertence of defense counsel does not furnish sufficient cause to excuse procedural default), *cert. denied*, 525 U.S. 984, *and cert. denied*, 525 U.S. 996 (1998).

Bonin v. Calderon, 77 F.3d 1155, 1158 (9th Cir.) (finding that ineffective assistance of counsel is cause for procedural default only if it amounts to an independent constitutional violation), *cert. denied*, 516 U.S. 1143 (1996).

Deutscher v. Whitley, 884 F.2d 1152, 1156 (9th Cir. 1989) (holding that ineffective assistance of counsel constitutes cause; establishing that *Strickland* prejudice standard is sufficient for procedural default), *vacated on other grounds*, 500 U.S. 901 (1992).

Garrison v. McCarthy, 653 F.2d 374, 378 (9th Cir. 1981) (stating that in cases of attorney inadvertence or ignorance, a lesser showing of incompetency of counsel should be sufficient for cause).

See generally:

Barry Friedman, *A Tale of Two Habeas*, 73 Minn. L. Rev. 247 (1988) (comparing and analyzing *Smith v. Murray* and *Murray v. Carrier* and their holdings that, absent a showing of ineffective assistance of counsel, federal habeas petitioners must suffer consequences of lawyer's mistakes).

John C. Jeffries & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. Chi. L. Rev. 679 (1990) (reviewing law governing federal collateral review of claims not properly raised in state court).

Anne M. Voights, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 Colum. L. Rev. 1103 (1999) (discussing the restrictions on federal habeas review, procedural default, and ineffective assistance of counsel).

6.2.5.6.2 Actual Prejudice

In *United States v. Frady*, 456 U.S. 152 (1982), the Supreme Court held that to establish prejudice under *Sykes,* a petitioner must show "not merely that the errors at trial created a *possibility* of prejudice, but that they worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions."

Supreme Court:

Strickler v. Greene, 527 U.S. 263 (1999) (finding that petitioner could not show prejudice that would excuse default of *Brady* claim).

Murray v. Carrier, 477 U.S. 478, 494 (1986) (stating that "prejudice" is a showing that petitioner was denied fundamental fairness).

Reed v. Ross, 468 U.S. 1, 12 (1984) (holding that prejudice exists where, but for the alleged error, petitioner might not have been convicted).

United States v. Frady, 456 U.S. 152 (1982) (establishing that prejudice under *Sykes* requires more than plain error; petitioner must establish that error worked to his or her substantial disadvantage and permeated trial with error of constitutional dimension).

Ninth Circuit:

LaGrand (Karl) v. Stewart, 173 F.3d 1144 (9th Cir.) (holding that prospect of death by allegedly unconstitutional means established prejudice excusing default), *stay vacated*, 525 U.S. 1173, *and cert. dismissed*, 526 U.S. 1061 (1999).

Vansickel v. White, 166 F.3d 953 (9th Cir. 1999) (holding that to establish prejudice based on ineffective assistance of counsel under *Strickland*, petitioner must demonstrate a reasonable probability that the result would have been different but for counsel's unprofessional errors; the court also considers whether the result was fundamentally unfair or unreliable under *Lockhart*).

Correll v. Stewart, 137 F.3d 1404 (9th Cir.) (requiring petitioner to show that errors worked to actual and substantial disadvantage, infecting the entire trial, in order to establish sufficient prejudice to overcome default), *cert. denied*, 525 U.S. 984, *and cert. denied*, 525 U.S. 996 (1998).

District Courts in Ninth Circuit:

Turner v. Calderon, 970 F. Supp. 781 (E.D. Cal. 1997) (holding that petitioner was not prejudiced, so as to excuse his procedural default, by state trial court's error in failing to *sua sponte* instruct at guilt phase that petitioner's mental state could negate specific intent to commit robbery or murder, or by any technical error in failure of guilt-phase verdict form to require jury to specifically find that petitioner intended to kill).

6.2.5.7 Exception to Procedural Default Bar: Miscarriage of Justice

The cause and prejudice requirements are designed to permit federal review where failure to do so would be fundamentally unjust. Even if there is no showing of cause and prejudice, however, a federal court may adjudicate a federal constitutional claim which, in the absence of such adjudication, would result in a fundamental miscarriage of justice. In *Murray v. Carrier*, 477 U.S. 478 (1986), the Supreme Court stated that "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."

In *Smith v. Murray*, 477 U.S. 527 (1986), the Court held that the actual innocence exception applies to one wrongly sentenced to death and, in *Sawyer v. Whitley*, 505 U.S. 333 (1992), stated that to establish actual innocence of the death penalty, a petitioner must show by clear and convincing evidence that no reasonable juror would have found petitioner death eligible.

Later, in *Schlup v. Delo*, 513 U.S. 298 (1995), the Supreme Court held that when a habeas petitioner claims actual innocence of the crime accompanied by a claim of constitutional trial error, the standard of *Murray v. Carrier*–that a constitutional violation has "probably resulted in the conviction of one who is actually innocent"–governs the miscarriage of justice inquiry rather than the more stringent *Sawyer v. Whitley* standard–requiring "clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty."

The Court, noting that challenges to a sentence of death are routine, stated that the lesser standard is appropriate because a substantial claim that constitutional

error caused the conviction of an innocent person is rare. Thus, the threat to judicial resources, finality, and comity posed by actual innocence claims is significantly less than that posed by sentencing claims. To satisfy the *Murray* actual innocence standard, a petitioner must "show that, in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt."

The Supreme Court has granted certiorari in *House v. Bell*, 125 S. Ct. 2991 (2005) (mem.), with the following as a question presented: "Did the majority below err in applying this Court's decision in *Schlup v.Delo* to hold that Petitioner's compelling new evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before the state courts – merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at the original trial?" The Supreme Court heard oral argument in *House v. Bell* on January 11, 2006.

Supreme Court:

House v. Bell, 125 S. Ct. 2991 (2005) (mem.) (granting *certiorari* with the following questions presented: "1. Did the majority below err in applying this Court's decision in *Schlup v.Delo* to hold that Petitioner's compelling new evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before the state courts – merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at the original trial? 2. What constitutes a 'truly persuasive showing of actual innocence' pursuant to *Herrera v. Collins* sufficient to warrant freestanding habeas relief?")

Calderon v. Thompson, 523 U.S. 538 (1998) (distinguishing the *Schlup* and *Sawyer* miscarriage of justice standards and finding that petitioner's new evidence did not meet either standard).

Schlup v. Delo, 513 U.S. 298 (1995) (holding that the *Murray v. Carrier* standard of requiring a habeas petitioner to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent" rather than the more stringent *Sawyer v. Whitley* standard governs the miscarriage of justice inquiry when a death sentenced petitioner raises a claim of actual innocence to avoid a procedural bar).

Sawyer v. Whitley, 505 U.S. 333 (1992) (establishing "actual innocence" standard for

capital cases; petitioner must show by clear and convincing evidence that but for a constitutional error no reasonable juror would have found petitioner death eligible under state law).

Dugger v. Adams, 489 U.S. 401 (1989) (holding that trial judge's finding of an equal number of aggravating and mitigating circumstances was insufficient to show that an alleged error in instructing jury resulted in a fundamental miscarriage of justice).

Smith v. Murray, 477 U.S. 527, 537–38 (1986) (stating that enforcement of procedural default rules in cases devoid of any substantial claim that alleged error undermined the accuracy of the guilt or sentencing determination is not fundamentally unfair; recognizing that the fundamental miscarriage of justice exception applies to the sentencing phase of a capital trial as to a petitioner who is "actually innocent" of the death penalty).

Murray v. Carrier, 477 U.S. 478 (1986) (holding that where a constitutional violation has resulted in conviction of one who is probably innocent, federal court may grant the writ without a showing of cause and prejudice).

Kuhlmann v. Wilson, 477 U.S. 436 (1986) (holding that to show "fundamental miscarriage of justice," petitioner must make a "colorable showing of actual innocence").

Engle v. Isaac, 456 U.S. 107 (1982) (holding that, in appropriate cases, the principle of comity must yield to the imperative of correcting a fundamentally unjust incarceration).

Wainwright v. Sykes, 433 U.S. 72 (1977) (holding that cause and prejudice standard does not prevent consideration of a claim where necessary to avoid a fundamental miscarriage of justice).

Ninth Circuit:

Boyd v. Thompson, 147 F.3d 1124 (9th Cir. 1998) (holding that petitioner who never asserted or presented evidence of actual innocence did not fall within miscarriage of justice exception).

Poland v. Stewart, 117 F.3d 1094, 1106 (9th Cir. 1997) (finding no actual innocence and rejecting petitioner's miscarriage of justice claim), *cert. denied*, 523 U.S. 1082 (1998).

Villafuerte v. Stewart, 111 F.3d 616 (9th Cir. 1997) (rejecting petitioner's miscarriage

of justice claim), *cert. denied*, 522 U.S. 1079 (1998).

Moran v. McDaniel, 80 F.3d 1261 (9th Cir. 1996) (rejecting actual innocence miscarriage of justice claim because petitioner failed to meet *Sawyer* standard; mere fact that sentencing panel did not find as aggravating factor that murders committed during robbery does not mean that panel found petitioner did not commit murders during robbery, or that petitioner is not otherwise guilty of felony-murder).

Noltie v. Peterson, 9 F.3d 802 (9th Cir. 1993) (rejecting miscarriage of justice exception because no showing of actual innocence).

District Courts in Ninth Circuit:

Turner v. Calderon, 970 F. Supp. 781 (E.D. Cal. 1997) (finding that petitioner did not meet the miscarriage of justice standard; holding that the miscarriage of justice exception does not apply to procedural default of claim challenging sentence).

See Generally:

Kathleen C. Boyd, Note, *The Paradox of Actual Innocence in Federal Habeas Corpus After Herrera v. Collins*, 72 N.C. L. Rev. 479 (1994) (reviewing *Herrera* and analyzing the resulting confusion regarding innocence claims in federal habeas corpus claims).

Daniel M. Bradley, Comment, *Schlup v. Delo: The Burden of Showing Actual Innocence in Habeas Corpus Review and Congress' Efforts at Reform*, 23 New Eng. J. on Crim. & Civ. Confinement 463 (1997) (examining *Schlup* and arguing it should apply only where an inmate presents evidence of innocence of the crime itself; commenting on AEDPA's changes to § 2244(b)).

Kris T. Daniel, *Sawyer v. Whitley, The Deadly Game of Procedures in Death Penalty Cases*, 61 UMKC L. Rev. 599 (1993) (analyzing impact of restrictive *Sawyer* rule on availability of habeas relief for innocence claims and on Missouri habeas jurisprudence).

Vernon E. Googe III, *Herrera v. Collins–Federal Habeas Corpus Review and Claims of Actual Innocence*, 27 Ga. L. Rev. 971 (1993) (focusing on *Herrera* and analyzing the dilemma for federal courts in habeas cases involving claims of innocence).

Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process,"* 74 N.Y. L. Rev. 313, 317 n.21 (1999) (relating inability to find any reported case in which an individual has met the *Sawyer v. Whitley* standard).

Robert C. Stacy II, Note, *Schlup v. Delo: The Result of Curbing Unlimited Jurisdiction by Limiting Discretion*, 74 N.C. L. Rev. 897 (1996) (focusing on *Schlup* standard and miscarriage of justice exception to procedural default and predicting future problems in application of *Schlup* because of inconsistencies in Supreme Court habeas jurisprudence).

Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. Rev. 303 (1993) (analyzing *Herrera* and Supreme Court's new "innocence-focus" in habeas cases).

6.2.6 Authorization of Petition on Petitioner's Behalf

Section 2242 of Title 28 of the United States Code provides that someone acting on the petitioner's behalf may sign and verify a habeas corpus petition. In *Deutscher v. Angelone*, 16 F.3d 981 (9th Cir. 1994), the Ninth Circuit held that in the absence of evidence to the contrary, a presumption exists that a petitioner is fully informed of and consents to claims raised in the petition.

If a petitioner seeks to withdraw a habeas petition or appeal, the district court is required to hold a hearing to determine whether the petitioner is competent to validly withdraw consent to forgo federal relief. *See Comer v. Stewart*, 215 F.3d 910 (9th Cir. 2000).

Ninth Circuit:

Comer v. Stewart, 215 F.3d 910 (9th Cir. 2000) (remanding for evidentiary hearing on issue whether petitioner competent to validly withdraw consent to proceed with appeal).

Lucky v. Calderon, 86 F.3d 923 (9th Cir. 1996) (holding that repeated failure to respond to attorney coupled with lack of verification and signature rebut the presumption; petitioner met shifted burden with affidavit stating that counsel was "fully authorized to file and pursue" the litigation).

Deutscher v. Angelone, 16 F.3d 981, 984 (9th Cir. 1994) (stating that a presumption exists that petitioner is fully informed of and consents to claims raised in petition).

Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (holding that lack of signature, alone, is not determinative in rebutting presumption; the district court may

disregard petitioner's failure to sign and verify petition).

Federal Statutes:

28 U.S.C. § 2242 (2000).

6.2.6.1 Next Friend Standing

In *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the Supreme Court held that an individual has standing to seek federal habeas relief as the "next friend" of a death-sentenced prisoner after providing (a) an adequate explanation why the real party in interest cannot appear on his or her own behalf, and (b) a showing that the next friend is truly dedicated to the best interests of the real party. Generally, a showing that the real party is mentally incompetent to pursue the cause satisfies the first requirement. Family members, particularly parents, generally meet the second requirement.

Supreme Court:

Demosthenes v. Baal, 495 U.S. 731 (1990) (holding that next friend must show that real party is unable to litigate own cause due to mental incapacity as prerequisite for standing; state court's finding of competency is entitled to presumption of correctness and evidentiary hearing in district court is not necessary).

Whitmore v. Arkansas, 495 U.S. 149 (1990) (concluding that next friend must show that real party is unable to litigate own cause due to mental incapacity, lack of access to court, or other similar disability, and must also show true dedication to best interests of real party; next friend fails to meet burden where evidence shows that defendant knowingly, intelligently, and voluntarily waived right to proceed, and access to court unimpeded).

Gilmore v. Utah, 429 U.S. 1012, 1016 (1977) (holding that where record establishes defendant's knowing and intelligent waiver of federal rights, court lacks jurisdiction to entertain next friend application under Article III power).

Ninth Circuit:

Dennis ex rel. Butko v. Budge, 378 F.3d 880 (9th Cir. 2004) (affirming the dismissal of a habeas petition and denying a stay of execution, the court held that the prisoner's capacity to make the decision to forego further appeals of his death sentence was not substantially affected by mental illness, and therefore the prisoner's former attorney failed to establish "next friend" status; holding that to establish next friend status one must (1) provide an adequate explanation–such as inaccessibility, mental incompetence, or other disability–why the real party in interest cannot appear to prosecute the action; and (2) the next friend must be truly dedicated to the best interests of the person on whose behalf he or she seeks to litigate), *cert. denied*, 125 S. Ct. 16 (2004).

Rohan ex rel. Gates v. Woodford, 334 F.3d 803 (9th Cir.) (holding that a district court must stay capital habeas proceedings during the petitioner's incompetence, rather than appointing a "next friend" and requiring the friend to pursue the habeas petition on the petitioner's behalf; following *Calderon v. U.S. District Court (Kelly V)*, 163 F.3d 530 (9th Cir. 1998) (en banc), and distinguishing *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the panel construed 21 U.S.C. § 848(q)(4)(B) (providing for statutory right to counsel in habeas proceedings) to incorporate a statutory right to competence, and held that the denial of the stay violated this right because the petitioner raised claims that could potentially benefit from his ability to communicate rationally), *cert. denied*, 540 U.S. 1069 (2003).

Miller ex rel. Jones v. Stewart, 231 F.3d 1248 (9th Cir.) (staying execution and remanding for hearing whether petitioner is competent to elect to die; finding that state court's *Faretta* hearing in 1998 did not address issue whether in November 2000 petitioner is competent to forgo his federal habeas appeals; finding next friend status of petitioner's former attorney sufficient for evidentiary hearing. But see dissent by Rymer, J., finding that next friend did not make threshold showing of petitioner's incompetence and concluding that evidentiary hearing not warranted), *stay vacated sub. nom. Stewart v. Miller*, 531 U.S. 986 (2000).

Vargas v. Lambert, 159 F.3d 1161 (9th Cir.) (holding that the parent of a capital prisoner establishes "next friend" standing and thereby jurisdiction sufficient to support a stay of execution with new evidence of the prisoner's deteriorated mental condition and psychosis-linked wish to die; there is essentially a per se rule that a parent meets the best interests prong of the next friend standing test), *stay vacated*, 525 U.S. 925 (1998).

Wells v. Arave, 18 F.3d 656 (9th Cir.) (rejecting "next friend" status where no

"meaningful evidence" was presented to cast doubt on state court's competence determination and therefore no further evidentiary hearing required), *order amended to add dissent*, 18 F.3d 658 (9th Cir. 1994).

Brewer v. Lewis, 989 F.2d 1021 (9th Cir. 1993) (denying mother next friend standing where no meaningful evidence of prisoner's incompetence; affidavits of doctors who never met prisoner and affidavit of doctor who speculated as to prisoner's condition were insufficient to outweigh substantial evidence demonstrating competence; state court's determination of competence entitled to presumption of correctness).

Lenhard v. Wolff, 603 F.2d 91, 93 (9th Cir. 1979) (per curiam) (holding that court-appointed counsel, discharged at defendant's request, did not have next friend standing absent some minimum showing of defendant's incompetence).

See generally:

Paul F. Brown, Note, *Third Party Standing–"Next Friends" as Enemies: Third Party Petitions for Capital Defendants Wishing to Waive Appeal*, 81 J. Crim L. & Criminology 981 (1991) (analyzing *Whitmore* in light of third party standing and next friend jurisprudence, arguing that *Whitmore* is consistent with "case and controversy" constitutional requirement).

Richard W. Garnett, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers, 77 Notre Dame L. Rev. 795* (2002) (discussing ethical responsibilities of attorneys to "death row volunteers").

G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. Crim. L. & Criminology 860 (1983) (suggesting that Supreme Court's response to prisoners' "volunteering" to be executed is inadequate, focusing on competency standards and intervention rights of next friends).

6.2.7 Representation by Foreign State

Ninth Circuit:

United Mexican States v. Woods, 126 F.3d 1220 (9th Cir. 1997) (holding that the Eleventh Amendment barred Mexico's suit, alleging treaty violations on behalf of a death-sentenced Mexican national, against the state of Arizona; suit did not fall under *Ex parte Young* exception for prospective injunctive relief), *cert. denied*, 523 U.S. 1075 (1998).

Other Circuits:

Republic of Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998) (holding that treaty violation alleged regarding death-sentenced Paraguayan national was not ongoing violation of federal treaty law, nor was relief sought prospective, so as to bring action within *Ex parte Young* exception to Eleventh Amendment immunity), *cert. denied*, 523 U.S. 371 (1998).

6.2.8 Right to and Payment of Counsel, Experts, and Investigators

Prior to 1988, courts had discretion to appoint counsel in federal habeas proceedings under the Criminal Justice Act, 18 U.S.C. § 3006A. In 1988, Congress enacted the Anti-Drug Abuse Act, 21 U.S.C. § 848(q), which, among other things, established a federal death penalty for some drug-related convictions. Section 848(q)(4)(B) entitled death-sentenced indigents pursuing § 2254 or § 2255 relief to "one or more" court appointed counsel. On March 9, 2006, subsections (g)-(r) of 21 U.S.C. § 848 were repealed and 18 U.S.C. § 3599, was enacted as part of the USA Patriot Improvement and Reauthorization Act, Pub. L. No. 109-177. Section 3599 of Title 18, contains similar provisions to those formerly contained in 21 U.S.C. § 848(q)(4)-(10). As in former § 848(q)(4)-(10), 18 U.S.C. § 3599 provides that death-sentenced indigents pursuing § 2254 or § 2255 relief are entitled to "one or more" court appointed counsel. 18 U.S.C. § 3599(a)(1). At least one appointed attorney must meet certain experience qualifications set out in § 3599(c). The statute authorizes counsel to represent the petitioner throughout every subsequent stage of judicial proceedings, including competency and executive clemency proceedings. 18 U.S.C. § 3599(e). Section 3599(f) provides for investigative, expert, and other services, when the court finds such services reasonably necessary for representation. The fee amounts authorized under 18 U. S. C. § 3599(g) must be made public upon disposition of the petition. 18 U.S.C. § 3599(g)(3).

As to the amount of compensation, fees, and expenses, § 3599 provides:

> (g)(1) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph

> up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of Title 5 on or after such date. . . .
> (2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, . . . as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. . . .

As of March 9, 2006, the maximum hourly rate for attorneys appointed under federal capital prosecutions and capital postconviction proceedings is $163 per hour [the amount was raised from $125 per hour by the Judicial Conference, under the authority conferred under former § 848(q)(10)(A)] .

In *Bonin v. Calderon*, 59 F.3d 815 (9th Cir. 1995), *cert. denied*, 516 U.S. 1051 (1996), the Ninth Circuit extended its appellate standard for reversing a conviction for failure to provide investigative funds under § 3006A to habeas corpus cases requesting funds under § 3006A or § 848(q). Under this standard, a denial of funding warrants reversal only if the petitioner shows a denial of effective assistance of counsel as a result of the failure to provide funds. Thus, the petitioner must (1) establish that reasonably competent retained counsel would require such services for a habeas petitioner who could pay for them, and (2) demonstrate, by clear and convincing evidence, prejudice from the lack of further investigation. *Id*. at 837.

Supreme Court:

McFarland v. Scott, 512 U.S. 849 (1994) (holding that because § 848(q) [now 18 U.S.C. § 3599]; creates a statutory right to counsel for capital habeas defendants, counsel should be appointed before the petition is actually filed to assist in its preparation).

Coleman v. Thompson, 501 U.S. 722, 755–56 (1991) (holding that there is no constitutional right to postconviction counsel).

In re Berger, 498 U.S. 233 (1991) (per curiam) (holding that, under § 848(q)(10) [now 18 U.S.C. § 3599]; counsel appointed in a capital habeas case should be able to recover

compensation for proceedings before Supreme Court in an amount not to exceed $5,000).

Murray v. Giarratano, 492 U.S. 1 (1989) (holding that state is not constitutionally required to provide counsel for indigent death row inmates seeking state postconviction relief).

Wainwright v. Torna, 455 U.S. 586 (1982) (holding that defendant has no constitutional right to effective assistance of counsel to pursue discretionary state appeals or Supreme Court review).

Ninth Circuit:

Calderon v. United States Dist. Ct. for the E. Dist. of Cal. (Gordon), 107 F.3d 756 (9th Cir.) (holding that state lacked standing to challenge fee request because request is *ex parte* proceeding; district court properly considered request even though no petition was pending; holding that AEDPA's amendments do not apply to pre-enactment fee requests), *cert. denied*, 522 U.S. 907 (1997).

United States v. Salemo, 81 F.3d 1453 (9th Cir. 1996) (holding that the CJA does not authorize the district court to compensate attorney whose services as legal advisor are requested by defendant; noting that judge may appoint counsel to serve exclusively for benefit of court under 5 U.S.C. § 3109, to protect the integrity of proceedings from *pro se* misconduct).

Moran v. McDaniel, 80 F.3d 1261, 1271 (9th Cir. 1996) (holding that there is no constitutional right to effective assistance of counsel in state or federal habeas proceedings).

Daniels v. United States Dist. Ct. for the Cent. Dist. of Cal., 76 F.3d 385 (9th Cir. 1995) (unpublished) (granting mandamus petition alleging insufficient grant of funds under § 848(q) [now 18 U.S.C. § 3599]; holding that district court erred in denying request for investigative funds based on faulty legal premise that death sentence is no different from other types of sentences).

Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995) (extending non-habeas standard for reversing a conviction for failure to provide investigative funds under § 3006A to habeas corpus cases requesting funds under § 3006A or § 848(q)), *cert. denied*, 516 U.S. 1051 (1996).

Chaney v. Lewis, 801 F.2d 1191, 1196 (9th Cir. 1986) (holding that, although not

required by Sixth Amendment, complexity of issues on remand and death penalty nature of case require district court to appoint counsel for petitioner).

District Courts in Ninth Circuit:

Rowland v. Calderon, No. C 94-3037 (N.D. Cal. Aug. 15, 1996) (unpublished order) (ordering petitioner to comply with amended § 848(q)(9) [now 18 U.S.C. § 3599] regarding confidentiality in order to make *ex parte* motion for funds).

McKinney v. Paskett, 753 F. Supp. 861 (D. Idaho 1990) (denying petitioner's request for an request for expert or investigative services *ex parte* haring; holding that neither 21 U.S.C. § 3006A nor 28 U.S.C. § 848(q) [now 18 U.S.C. § 3599] requires that petitioner's request for expert or investigative services be *ex parte*; citing F.R.H.C. 6 requiring a good cause showing before discovery granted and distinguishing habeas case from criminal case)

District Courts in Other Circuits:

Patrick v. Johnson, 48 F. Supp. 2d 645 (N.D. Tex. 1999) (holding that petitioner was not entitled to compensation for an investigator and experts to develop a claim that was likely defaulted; stating that § 848(q) [now 18 U.S.C. § 3599] was not designed to provide petitioners with unlimited funds to investigate speculative claims).

Federal Statutes:

18 U.S.C. § 3006A(d)(4), (e)(4) (2000) (requiring that counsel and service fee amounts be made public).

18 U.S.C. § 3599(a)-(e), *as added by* Pub. L. No. 109-177, § 222(a) (providing for appointment of counsel in capital cases).

18 U.S.C. § 3599(f), *as added by* Pub. L. No. 109-177, § 222(a) (providing for expert and investigative services reasonably necessary for representation in capital cases).

18 U.S.C. § 3599(g)(1) and (2), *as added by* Pub. L. No. 109-177, § 222(a) (creating maximum rates for counsel and expert/investigative services in capital cases).

18 U.S.C. § 3599(g)(3), *as added by* Pub. L. No. 109-177, § 222(a) (requiring that counsel and service fee amounts be made public upon disposition of the petition).

21 U.S.C. § 848(q) (2000) [repealed].

28 U.S.C. § 2254(h) (2000) (providing counsel for applicant pursuing § 2254 habeas relief who has become financially unable to afford counsel).

28 U.S.C. § 2255 (2000) (providing counsel for applicant pursuing § 2255 habeas relief who has become financially unable to afford counsel).

See generally:

Steven M. Latino, Comment, *Reversing Twenty Years of Supreme Court Postconviction Jurisprudence: Enlarging the Indigent Capital Defendant's Right to Postconviction Counsel in McFarland v. Scott*, 22 New Eng. J. on Crim. & Civ. Confinement (1996) (arguing that *McFarland* marks a total departure from Supreme Court jurisprudence of the last twenty years, and proposing an alternative method of assistance during pre-application federal habeas corpus review).

Brian L. McDermott, Comment, *Defending the Defenseless: Murray v. Giarratano and the Right to Counsel in Capital Post Conviction Proceedings*, 75 Iowa L. Rev. 1305 (1990) (summarizing and criticizing *Girarratano*; examining the "death is different" doctrine and arguing that court should have applied due process balancing test).

Geraldine S. Moohr, Note, *Murray v. Giarratano: A Remedy Reduced to a Meaningless Ritual*, 39 Am. U. L. Rev. 765 (1990) (criticizing and summarizing *Giarratano* and precedential history and concluding with proposed legislation requiring states to appoint counsel for indigent death row inmates).

Scott E. Rogers, Note, *Constitutional Law/Access to Courts–Limiting the Relief Available to Indigent Death Row Inmates Denied Meaningful Access to the Courts: Murray v. Giarratano*, 17 Fla. St. U. L. Rev. 399 (1990) (examining prisoners' constitutional right to meaningful court access; focusing on relief available to death row inmates denied access to state habeas; tracing history and *Giarratano* and arguing that it is not supported by either precedent or policy).

Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 329 (1995) (arguing that the primary obstacle to fair, consistent, non-arbitrary capital sentencing is chronic and severe underfunding of state and local indigent defense services).

6.2.8.1 State Exhaustion and Clemency Proceedings

Courts have disagreed about the utilization of 21 U.S.C. § 848(q) monies for attorneys to exhaust claims in state court. Effective March 9, 2006, 21 U.S.C. § 848(q) was repealed, and the provisions formerly contained in § 848(q)(4)-(10) were recodified as 18 U.S.C. § 3599. [*See supra* § 6.2.8.] Section 3599(a)(2) requires that federally appointed counsel represent any condemned inmate financially unable to provide counsel in any § 2254 or § 2255 postconviction proceeding. Section 3599(e) authorizes representation throughout every subsequent stage of available judicial proceedings. Although exhaustion of state remedies, see *infra* § 6.3.3, arguably constitutes such a "subsequent proceeding," most federal courts have been unwilling to pay counsel for the exhaustion of remedies in state court, following the Eleventh Circuit in *In re Lindsey*, 875 F.2d 1502 (11th Cir. 1989).

Ninth Circuit courts, however, have held that former § 848(q) authorizes payment of investigative or expert services on unexhausted or potentially unexhausted claims. The Northern District of California granted investigative funds for a *McClesky* investigation, notwithstanding that the investigation could reveal new claims requiring exhaustion. *Coleman v. Vasquez*, 771 F. Supp. 300 (N.D. Cal. 1991). The Eastern District of California, in *Gordon v. Vasquez*, 859 F. Supp. 413 (E.D. Cal. 1994), held that CJA funds can be used specifically to finance an investigation for purposes of exhaustion in state court. Notwithstanding *In Re Lindsey*, *supra*, the *Gordon* court held that the plain meaning of "every subsequent stage" in § 848(q)(8) includes exhaustion.

Finally, most courts have found clemency proceedings within the scope of the language in former § 848(q)(8) [now 18 U.S.C. § 3599(e)] regarding "every subsequent stage" and appear amenable to pay for counsel's services, although a case from the Eastern District of Texas has held that the reference to clemency proceedings in § 848(q)(8) is limited to federal clemency proceedings and was therefore inapplicable to state proceedings. *Chambers v. Johnson*, 133 F. Supp. 2d 931 (E.D. Tex. 2001). A case from the Southern District of Indiana has disagreed with the holding in *Chambers,* noting that for a petitioner challenging a death sentence through § 2254, only state clemency proceedings could be relevant. *Lowery v. Anderson*, 138 F. Supp. 2d 1123, 1125 (S.D. Ind. 2001). Although the Eighth Circuit rejected a

clemency request, this decision was based on counsel's failure to make an appropriate threshold showing of reasonable necessity under former § 848(q)(10). *Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993). The Tenth Circuit has held that counsel appointed under § 848(q)(4)(B) to represent state death row inmates in federal habeas proceedings are authorized to represent these clients in state clemency proceedings and are entitled to receive compensation for the clemency representation. *Hain v. Mullin*, 436 F.3d 1168 (10th Cir. 2006) (en banc).

Supreme Court:

McKleskey v. Zant, 499 U.S. 467 (1991) (holding claims raised in federal habeas petition not raised in previous petition may be treated as an abuse of the writ and thus require petitioner to show cause and prejudice).

Ninth Circuit:

Calderon v. United States District Court for the Eastern District of California (Gordon), 107 F.3d 756 (9th Cir. 1997) (holding, under pre-AEDPA law, that the state lacks standing to challenge an ex parte fee request submitted under § 848(q)(9); holding, pursuant to *McFarland v. Scott*, that a district court may consider § 848(q) requests notwithstanding that a petition is not pending in federal court).

Jackson v. Vasquez, 1 F.3d 885 (9th Cir. 1993) (holding that although § 848(q) authorizes federal funding for expert and investigative services, it does not authorize district court to issue *ex parte* coercive order compelling action from a state official at state expense).

District Courts in Ninth Circuit:

Gordon v. Vasquez, 859 F. Supp. 413 (E.D. Cal. 1994) (holding that CJA funds may be used for investigation of unexhausted state claims where the state court appointed CJA counsel to exhaust state claims but denied investigative funding; disagreeing with *Lindsey*, and holding plain meaning of § 848(q)8 permits attorneys to exhaust in state court and § 848(q)9 provides authorization for correlative investigative fees).

Coleman v. Vasquez, 771 F. Supp. 300 (N.D. Cal. 1991) (providing federal funds under § 848(q) for investigative services before filing habeas petition; citing *McCleskey* for rationale that first habeas petition required thorough investigation to avoid procedural

default; recognizing funds may be used to research and develop unexhausted claims but distinguishing the *McCleskey* investigation from the state court exhaustion adjudication process).

McKinney v. Paskett, 753 F. Supp. 861 (D. Idaho 1990) (holding that § 848(q) does not authorize federal payment of counsel to exhaust state remedies).

Other Circuits:

Tucker v. Scott, 66 F.3d 1418 (5th Cir. 1995) (following *Joiner* and *Sterling* and holding that petitioner has no right to assistance of federally appointed counsel to exhaust state remedies; state's refusal to appoint habeas counsel does not excuse exhaustion).

In re Joiner, 58 F.3d 143, 144 (5th Cir. 1995) (noting that *McFarland* did not decide whether § 848(q) right to counsel in "every subsequent stage of proceedings" extended to state collateral review, and thus does not change Fifth Circuit's rule that § 848(q) does not authorize federal funds for state exhaustion).

Sterling v. Scott, 57 F.3d 451 (5th Cir. 1995) (denying request for CJA counsel to be appointed and paid under § 848(q)(B)(4) to exhaust in state court; reasoning that § 2254 right to relief, including correlative right to counsel, not available until petition properly before federal court, which requires that all claims be exhausted in state court).

Hill v. Lockhart, 992 F.2d 801, 803–04 (8th Cir. 1993) (rejecting request for compensation under § 848(q) for services performed in state clemency proceedings because petitioner failed to make a threshold showing of reasonable necessity under former § 848(q)(10), including a showing that state law does not provide compensation for clemency representation).

Hain v. Mullin, 436 F.3d 1168 (10th Cir. 2006) (en banc) (holding that counsel appointed under § 848(q)(4)(B) to represent state death row inmates in federal habeas proceedings are authorized to represent these clients in state clemency proceedings and are entitled to receive compensation for the clemency representation).

In re Lindsey, 875 F.2d 1502 (11th Cir. 1989) (holding that 21 U.S.C. § 848(q)(4)(B)'s provision for appointment of counsel in death penalty cases does not entitle state death row inmate to federally-appointed counsel to exhaust in state court because by definition any state court exhaustion action is a precursor to the § 2254 right to relief).

District Courts in Other Circuits:

Lowery v. Anderson, 138 F. Supp. 2d 1123 (S.D. Ind. 2001) (holding that under § 848(q)(8) petitioner whose habeas petition was unsuccessful, but was not frivolous, was entitled to have counsel appointed and compensated for reasonably necessary services relating to state clemency proceedings where petition showed that state law provided no avenue to compensation for attorneys' services in clemency proceedings and petition was filed before attorneys provided clemency-related services; disagreeing with *Chambers v. Johnson*, below, court noted that for petitioner challenging a death sentence through § 2254, only state clemency proceedings could be relevant).

Chambers v. Johnson, 133 F. Supp. 2d 931 (E.D. Tex. 2001) (holding that reference to clemency proceedings in § 848(q)(8) is limited to federal clemency proceedings and rejecting counsel's request for compensation for services in state clemency proceedings).

Strickler v. Greene, 57 F. Supp. 2d 313 (E.D. Va. 1999) (distinguishing *Lindsey* and granting counsel's fee application for services rendered in the preparation of petitioner's state petition for executive clemency).

Patrick v. Johnson, 48 F. Supp. 2d 645 (N.D. Tex. 1999) (holding that petitioner was not entitled to compensation for an investigator and two experts to aid in the development of a claim that was procedurally barred).

Wilson v. Horn, No. 96-7838, 1997 WL 137343 (E.D. Pa. 1997) (distinguishing *McFarland* and declining to extend § 848(q) to authorize appointment of counsel to exhaust claims in state court).

Moseley v. Freeman, 977 F. Supp. 733 (M.D.N.C. 1997) (interpreting § 848(q)(4)(B) to require, absent extraordinary circumstances, completion of state direct and postconviction proceedings before requesting counsel to file § 2254 petition).

Death Row Prisoners of Pennsylvania v. Ridge, 948 F. Supp. 1278 (E.D. Pa. 1996) (stating that in "exceptional circumstances § 848(q) counsel can be appointed prior to exhaustion to assist inmate in preparing habeas corpus petition," where there is an "immediate need for habeas counsel even though there has not been exhaustion;" determination must be made in context of legislative scheme of Anti-Drug Abuse Act, AEDPA, and reasoning in *McFarland*).

United States ex rel. John Whitehead v. Page, 914 F. Supp. 1541 (N.D. Ill. 1995) (holding that § 848(q)(B)(4) cannot be construed to authorize appointing counsel as

provided in *McFarland* before claims are exhausted in state court).

Federal Statutes:

28 U.S.C. § 2254 (2000) (providing counsel for § 2254 proceedings and all subsequent proceedings).

28 U.S.C. § 2255 (2000) (providing counsel for § 2255 proceedings and all subsequent proceedings).

6.2.9 Petitioner's Presence at Habeas Proceedings

In *Sanders v. United States*, 373 U.S. 1 (1963), the Supreme Court held that a habeas petitioner is not necessarily entitled to be present at a 28 U.S.C. § 2255 habeas proceeding which collaterally challenges a federal criminal conviction. The Ninth Circuit, in *Wade v. Calderon*, 29 F.3d 1312, 1325 (9th Cir. 1994), extended *Sanders* to § 2254 proceedings. Thus, whether a petitioner may be present during habeas proceedings is entirely within the federal court's discretion.

Supreme Court:

Sanders v. United States, 373 U.S. 1, 20 (1963) (stating that in a § 2255 proceeding "not every colorable allegation entitles a federal prisoner to a trip to the sentencing court").

Machibroda v. United States, 368 U.S. 487, 495 (1962) (holding that there are some circumstances where prisoner's presence is unnecessary).

Ninth Circuit:

Wade v. Calderon, 29 F.3d 1312, 1325 (9th Cir. 1994) (holding that judge's discretion to allow prisoner's presence at collateral proceedings is the same under both § 2254 and § 2255).

6.2.10 Fifth Amendment Privilege Against Self-Incrimination

In *Bean v. Calderon*, 166 F.R.D. 452 (E.D. Cal. 1996), the Eastern District of

California ruled that while a habeas petitioner may invoke the Fifth Amendment privilege against self-incrimination, the court may, unlike in a criminal prosecution, draw an adverse inference from the invocation. The court may draw this adverse inference if the questions to which the petitioner asserts the privilege directly relate to an allegation made by petitioner in the verified petition and the questions are not otherwise objectionable.

District Courts in Ninth Circuit:

Bean v. Calderon, 166 F.R.D. 452 (E.D. Cal. 1996) (holding that habeas petitioner may invoke Fifth Amendment privilege but court may draw adverse inference from its invocation).

6.2.11 Expedited Procedures

(*See also § 6.2.16 - Chapter 154 Opt-In Procedures*)

In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Supreme Court approved expedited appeal procedures for capital habeas petitioners. The *Barefoot* Court upheld the Fifth Circuit's unprecedented expedited appeal procedure, explaining that death penalty cases were different from other cases because "unlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding." *Id*. at 888.

Supreme Court:

Barefoot v. Estelle, 463 U.S. 880 (1983) (holding that expedited procedures for consideration of federal habeas appeals are constitutionally "tolerable").

Ninth Circuit:

Campbell v. Wood, 18 F.3d 662 (9th Cir.) (holding that petitioner was not denied meaningful access to courts by limited time provided by state court for briefing unexhausted claims), *cert. denied*, 511 U.S. 1119 (1994).

District Courts in Ninth Circuit:

Riley v. Nevada, 763 F. Supp. 446 (D. Nev. 1991) (ordering preliminary injunction against Nevada Supreme Court rule shortening appellate briefing time for death penalty cases because of probable equal protection violation; expedited rule did not further interest of efficiency, nor fairly or substantially further acceleration of state appellate process; expedited rule did not violate due process, however, because reasonable and substantial relationship existed between rule and efficient resolution of death penalty cases).

Other Circuits:

Truesdale v. Moore, 142 F.3d 749 (4th Cir.) (holding order of Fourth Circuit Judicial Council setting deadlines for district courts and the circuit court to decide capital cases was proper exercise of statutory authority (28 U.S.C. § 332) and was not inconsistent with AEDPA), *cert. denied*, 525 U.S. 951 (1998).

See generally:

Julia E. Boaz, Note, *Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts*, 95 Yale L.J. 349 (1985) (arguing that Supreme Court's commitment to expediting death penalty cases, as evidenced by *Barefoot*, distorts the administration of justice in adjudicative processes).

Raymond J. Pascucci, Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 84 Cornell L. Rev. 1129, 1205 (analyzing *Barefoot* and arguing that case was wrongly decided).

6.2.12 Discovery

Rule 6 of the Rules Governing 28 U.S.C. § 2254 Cases and of the Rules Governing § 2255 Proceedings establishes that there is no automatic right to discovery in habeas proceedings, but, in its discretion and for good cause, a court may order discovery upon a party's request. In *Harris v. Nelson*, 394 U.S. 286 (1969), the Supreme Court held that a district court has discretion to order discovery when it would help the court make a reliable determination with respect to petitioner's claim. More recently, in *Bracy v. Gramley*, 520 U.S. 899 (1997), the Supreme Court held that there is no presumptive right to discovery but nevertheless determined on the facts of the case that petitioner

was entitled to discovery under Rule 6.

Rule 6 is silent regarding the propriety of discovery before a habeas corpus petition is filed, but the Ninth Circuit held in *Calderon v. United States District Ct. for the N. Dist. Of Cal. (Nicolaus)*, 98 F.3d 1102 (9th Cir. 1996), that pre-petition discovery is impermissible. Moreover, in *Calderon v. United States District Ct. for the E. Dist. of Cal. (Roberts)*, 113 F.3d 149 (9th Cir. 1997), the Ninth Circuit held that discovery is inappropriate where a federal petition contains unexhausted claims not yet dismissed or pursued in state court.

Supreme Court:

Bracy v. Gramley, 520 U.S. 899 (1997) (holding that petitioner does not enjoy presumptive right to discovery; finding that petitioner's demonstration that trial judge who took bribes was biased against defendant who did not bribe him was sufficient for discovery under Rule 6(a)).

Dobbs v. Zant, 506 U.S. 357 (1993) (remanding case after Eleventh Circuit denied petitioner an opportunity to supplement the record on appeal with a newly discovered sentencing transcript).

McCleskey v. Zant, 499 U.S. 467 (1991) (holding that petitioner's knowledge of his confession to cellmate was sufficient notice of potential *Massiah* claim such that petitioner's counsel should have investigated that claim).

Harris v. Nelson, 394 U.S. 286 (1969) (holding that when petition for habeas corpus establishes a *prima facie* case for relief, district court is authorized to use interrogatories and other discovery procedures to establish necessary facts).

Ninth Circuit:

Rich v. Calderon, 187 F.3d 1064 (9th Cir. 1999) (examining and denying petitioner's claim that he was denied the opportunity to discover and present evidence supporting his claims), *cert. denied sub nom.*, *Rich v. Woodford*, 528 U.S. 1092 (2000).

Calderon v. United States Dist. Ct. for the N. Dist. of Cal. (Thomas), 144 F.3d 618 (9th Cir. 1998) (holding that district court's discovery order allowing deposition to proceed was proper where petition was amended to delete unexhausted claims and amended petition with exhausted claims was held in abeyance while deleted claims were

exhausted).

McDaniel v. United States Dist. Ct. for the Dist. of Nevada (Jones), 127 F.3d 886 (9th Cir. 1997) (holding that capital prisoner was entitled to discovery).

Calderon v. United States Dist. Ct. for the N. Dist. of Cal. (Hill), 120 F.3d 927 (9th Cir. 1997) (granting state's petition for mandamus and following *Nicolaus* in holding that until a petitioner files a federal petition on an exhausted claim he cannot avail himself of discovery).

Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997) (rejecting state's contention that habeas petitioners are entitled only to discovery on issues that are to be considered in an already-scheduled evidentiary hearing; explaining that discovery is available at the discretion of the district court for good cause shown regardless of whether there is to be an evidentiary hearing).

Calderon v. United States Dist. Ct. for the E. Dist. of Cal. (Roberts), 113 F.3d 149 (9th Cir. 1997) (holding discovery inappropriate where federal habeas petition contains unexhausted claims that must be dismissed or pursued in state court).

Calderon v. United States Dist. Ct. for the N. Dist. of Cal. (Nicolaus), 98 F.3d 1102 (9th Cir. 1996) (holding that pre-petition discovery was impermissible because propriety of discovery depends on factual allegations in petition and because of presence of unexhausted claims; stating that habeas was never meant to be a fishing expedition for petitioners to explore their case in search of its existence; concurring opinion clarifying that once petitioner files habeas petition, it should not be dismissed for lack of evidence until court deals with discovery request).

Other Circuits:

In re Pruett, 133 F.3d 275 (4th Cir. 1997) (holding that district court lacked authority to issue *ex parte* discovery order).

Federal Rules:

Fed. R. Habeas Corpus 6 (establishing no automatic right to discovery).

6.2.12.1 Protective Order

The Ninth Circuit held in *Bittaker v. Woodford,* 331 F.3d 715 (9th Cir.) (en banc), *cert.*

denied, 540 U.S. 1013 (2003), that a protective order in a capital habeas proceeding is an appealable collateral order. The court in *Bittaker* also held that under the "fairness principle," a habeas petitioner who raises a claim of ineffective assistance of counsel does not waive the attorney-client privilege for all purposes and that the scope of the waiver extends only to litigation of the federal habeas petition, rather than extending to the possible retrial of the petitioner.

Ninth Circuit:

Bittaker v. Woodford, 331 F.3d 715 (9th Cir.) (en banc) (affirming a protective order regarding discovery in capital habeas proceedings, and holding that the order was an appealable collateral order; also holding that under the "fairness principle" a habeas petitioner who raises a claim of ineffective assistance of counsel waives the attorney-client privilege as to all communications with his allegedly ineffective lawyer, and the scope of this waiver extends only to litigation of the federal habeas petition, rather than amounting to a waiver of the attorney-client privilege for all time and all purposes, including that possible retrial of the petitioner; overruling *Anderson v. Calderon*, 232 F.3d 1053 (9th Cir. 2000), to the extent that it reached a contrary conclusion), *cert. denied*, 540 U.S. 1013 (2003).

Osband v. Woodford, 290 F.3d 1036 (9th Cir. 2002) (holding in capital habeas case in which petitioner alleged ineffective assistance of counsel that district court's denial of state's motion to reconsider magistrate judge's protective order allowing state's discovery of materials that would ordinarily have been subject to evidentiary privileges, including the attorney-client privilege, but limiting access to personnel of the attorney general's office and limiting use of the materials to proceedings incident to the petition for writ of habeas corpus pending before the court was not clear error; also holding that denial of the motion to reconsider was an appealable collateral order; further holding that to extent that *Anderson v. Calderon,* was inconsistent with *McDowell II*, court was bound by the en banc decision in *McDowell II,* which "plainly holds that protective orders like the one issued in this case do not fall outside the bounds of the very broad discretion of the district courts, and that it is not clear error to deny a motion to reconsider such an order").

Anderson v. Calderon, 232 F.3d 1053 (9th Cir. 2000) (holding district court properly denied petitioner's request for a protective order limiting the use of attorney-client communications and attorney work-product materials produced in the federal habeas proceeding to that proceeding; holding issue was one of evidentiary privilege more appropriately decided in state court should retrial occur), overruled in part by *Bittaker*

v. Woodford, 331 F.3d 715 (9th Cir. 2003) (en banc), above.

McDowell v. Calderon (McDowell II), 197 F.3d 1253 (9th Cir. 1999) (en banc) (per curiam) (holding that district court did not commit clear error when it limited access to documents discovered from trial counsel's file only for purposes of pending habeas litigation and by prohibiting disclosure to "prosecutorial personnel or agencies" for use in connection with petitioner's penalty phase retrial; reasoning that since it was debatable whether district court could so limit attorney general's use of documents, district court did not commit clear error and protective order did not fall clearly outside bounds of district court's broad discretion to fashion discovery orders), *cert. denied*, 529 U.S. 1082 (2000).

Wharton v. Calderon, 127 F.3d 1201 (9th Cir. 1997) (vacating district court's protective order, which barred respondent's interview of potential witnesses outside a deposition setting, on the ground that attorney-client privilege is evidentiary in nature, and not absolute, especially in light of petitioner's ineffective assistance claims).

6.2.13 Evidentiary Hearings

Unless a petition is summarily dismissed pursuant to Rule 4 of the Rules Governing 28 U.S.C. § 2254 proceedings (or its § 2255 counterpart), Rule 8 of the Rules Governing 28 U.S.C. § 2254 Cases (or its § 2255 counterpart) requires the judge to review the answer, transcript and record, to determine whether an evidentiary hearing is required.

In *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), the Court held that the petitioner must show cause for failing to develop the fact in state court and resulting prejudice from the denial of an evidentiary hearing. The *Keeney* Court also adopted the narrow fundamental miscarriage of justice exception to the cause and prejudice standard.

Circuit courts have held that *Keeney* did not alter the discretionary power of a district court to hold an evidentiary hearing. As the Second Circuit stated in *Pagan v. Keane*, 984 F.2d 61 (2d Cir. 1993), the purpose of the *Keeney* test is to indicate those situations where an evidentiary hearing is mandatory. In all other cases where material facts are in dispute, the district judge has discretion to hold a hearing. The Ninth Circuit also held that attachment of the presumption of correctness accorded state findings of fact does not deprive the district court of discretion to hold an evidentiary hearing.

In 1996, Congress created a specific limitation on the district court's discretion to hold an evidentiary hearing as part of the AEDPA. The AEDPA repealed previous § 2254(d) and replaced it with § 2254(e). Section 2254(e)(2) provides as follows:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that:
> (A) the claim relies on:
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

In *Williams (Michael) v. Taylor*, 529 U.S. 420 (2000) the Court held that § 2254(e)(2) codifies *Keeney's* threshold standard of diligence. Williams also held that "[d]iligence require[s] in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id*. at 437.

Supreme Court:

Williams (Michael) v. Taylor, 529 U.S. 420 (2000) (holding that pursuant to 28 U.S.C. § 2254(e)(2), which governs evidentiary hearings in federal court, a petitioner does not "fail to develop" the factual basis of a claim in state court unless there has been some lack of diligence or other greater fault on the part of the petitioner or his counsel; holding that § 2254(e)(2) codifies *Keeney's* threshold standard of diligence).

Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) (ruling that cause and prejudice, rather than deliberate bypass, is the correct standard for evaluating a habeas petitioner's failure to develop a material fact in state court and granting an evidentiary hearing; fundamental miscarriage of justice exception to cause and prejudice standard applies; O'Connor dissent stating that district courts still possess discretion to hold hearings even when not mandatory).

Hill v. Lockhart, 474 U.S. 52 (1985) (holding factual allegations insufficient to entitle evidentiary hearing where petitioner argued that guilty plea was involuntary due to ineffective assistance of counsel but did not allege that his attorney knew of petitioner's prior conviction and failed to inform him of the sentencing effect of that conviction, or allege that but for the ineffective assistance he would not have pleaded guilty).

Townsend v. Sain, 372 U.S. 293 (1963) (discussing various instances where an evidentiary hearing is mandatory; and stating that "in every case [the trial judge] has the power, constrained only by . . . sound discretion, to receive evidence bearing upon the constitutional claim"), *overruled in part*, 504 U.S. 1 (1992), *and limited by* § 2254(e)(2).

Ninth Circuit:

Beaty v. Stewart, 303 F.3d 975 (9th Cir. 2002) (remanding for evidentiary hearing on issue whether petitioner's confession to prison psychiatrist was involuntary under Fifth Amendment because he reasonably believed his statements were protected by a confidentiality agreement signed in connection with prison group therapy sessions), *cert denied*, 538 U.S. 1053 (2003).

Turner v. Calderon, 281 F.3d 851 (9th Cir. 2002) (remanding for evidentiary hearing to determine whether counsel was constitutionally ineffective for failure to investigate and present evidence of petitioner's long-term drug use and his abusive and difficult childhood, which, if true, could have altered result of penalty phase of capital murder trial)

Phillips v. Woodford, 267 F.3d 966 (9th Cir. 2001) (holding that habeas petitioner asserted colorable claim that the combined prejudicial effect of his counsel's ineffective assistance in failing to present defense that victim was killed during "shoot-out" rather than presenting only his meritless alibi defense, and state's presentation of false testimony regarding existence of plea agreement with its chief witness, required setting aside findings that rendered him eligible for death sentence and entitled him to evidentiary hearing on those two claims).

Bragg v. Galaza, 242 F.3d 1082 (9th Cir.) (applying § 2254(e) and affirming denial of evidentiary hearing because petitioner failed to request an evidentiary hearing in state court and failed to file a state habeas petition, notwithstanding that questions of fact existed regarding ineffective assistance of counsel claim), *amended on denial of petition for reh'g*, 253 F.3d 1150 (9th Cir. 2001).

Lambright v. Stewart, 241 F.3d 1201 (9th Cir. 2001) (remanding for evidentiary where

petitioner raises colorable claim of ineffective assistance of counsel and no state court granted petitioner opportunity to develop his claim), *cert. denied,* 534 U.S. 1118 (2002).

United States v. Jackson, 209 F.3d 1103 (9th Cir. 2000) (holding defendant entitled to a § 2255 evidentiary hearing where juror received phone threat during deliberations and reported event differently to trial court than to petitioner's investigator during § 2255 proceeding).

United States v. Chacon-Palomares, 208 F.3d 1157 (9th Cir. 2000) (holding § 2255 petitioner entitled to an evidentiary hearing where facts in supporting affidavit, if proven, might establish a right to relief).

Baja v. Ducharme, 187 F.3d 1075 (9th Cir. 1999) (affirming the district court in holding that petitioner was not entitled to an evidentiary hearing under § 2254(e)(2) where he failed to develop the factual basis of his ineffective assistance claim in state court or provide a reason for not doing so), *cert. denied*, 528 U.S. 1079 (2000).

Wallace v. Stewart, 184 F.3d 1112 (9th Cir. 1999) (remanding capital habeas case for evidentiary hearing on ineffective assistance claim), *cert. denied*, 528 U.S. 1105 (2000).

Caro v. Calderon, 165 F.3d 1223 (9th Cir.) (holding that prisoner was entitled to evidentiary hearing on claim of ineffective assistance at sentencing), *cert. denied*, 527 U.S. 1049 (1999).

Seidel v. Merkle, 146 F.3d 750 (9th Cir. 1998) (holding that petitioner's obligation to show cause for failure to develop facts in state court proceedings and actual prejudice resulting therefrom bore only on entitlement to evidentiary hearing and not on district court's discretion to hold hearing), *cert. denied*, 525 U.S. 1093 (1999).

Correll v. Stewart, 137 F.3d 1404 (9th Cir.) (holding that petitioner alleged facts sufficient to meet the *Strickland* standard, and that an evidentiary hearing was required in district court since, at the state's behest, no hearing was held in state court), *cert. denied*, 525 U.S. 984, *and cert. denied*, 525 U.S. 996 (1998).

Grisby v. Blodgett, 130 F.3d 365 (9th Cir. 1997) (remanding for determination, under proper standard, whether evidentiary hearing was required; overruling the district court's use of the "trial result would have been different" standard; concluding that proper standard was *Bagley*/*Agurs*' "any reasonable likelihood").

Jones v. Wood, 114 F.3d 1002 (9th Cir. 1997) (declining to apply the AEDPA to pre-act case but asserting that if the state courts simply do not conduct an evidentiary hearing, a petitioner has not failed to develop a claim's factual basis, and the AEDPA does not preclude a federal evidentiary hearing).

Campbell v. Blodgett, 978 F.2d 1502 (9th Cir.) (holding that a one-day evidentiary hearing was adequate where district court complied with *Barefoot* expedited procedures and afforded petitioner wide latitude to present evidence), *reh'g granted*, 978 F.2d 519 (9th Cir. 1992).

Hendricks v. Vasquez, 974 F.2d 1099 (9th Cir. 1992) (holding petitioner entitled to evidentiary hearing on ineffective assistance claim where state did not hold hearing and record did not establish that counsel made any tactical decisions not to call witnesses during guilt phase or not to present family testimony at sentencing).

Harris v. Vasquez, 928 F.2d 891 (9th Cir. 1991) (holding that declarations supporting petitioner's claim, brought to court's attention on motion for rehearing, required district court evidentiary hearing on claim and on abuse of the writ).

Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990) (holding that "colorable" ineffective assistance claim entitles petitioner to an evidentiary hearing).

Coleman v. McCormick, 874 F.2d 1280, 1284 (9th Cir.) (holding that counsel's conclusory statements that jurors from lower socio-economic areas were improperly excluded from jury is insufficient to require district court to hold evidentiary hearing), *cert. denied*, 493 U.S. 944 (1989).

Buffalo v. Sunn, 854 F.2d 1158, 1165 (9th Cir. 1988) (holding that where there are only conflicting affidavits regarding the facts underlying petitioner's claim of cause for procedural default, district court must hold evidentiary hearing).

Neuschafer v. McKay, 807 F.2d 839, 841–42 (9th Cir. 1987) (holding that when state trial and appellate courts come to inconsistent conclusions on a critical factual point, district court should hold evidentiary hearing rather than second-guessing one court).

Knaubert v. Goldsmith, 791 F.2d 722, 727 n.3 (9th Cir.) (holding that attachment of presumption of correctness does not deprive district court of discretion to hold an evidentiary hearing), *cert. denied*, 479 U.S. 867 (1986).

Richmond v. Ricketts, 774 F.2d 957, 961 (9th Cir. 1985) (holding that statutory presumption of correctness should not be sole determinant of whether an evidentiary

hearing is necessary).

District Courts in Ninth Circuit:

Hunter v. Vasquez, No. C-90-3275, 1996 WL 612484 (N.D. Cal. Oct. 3, 1996) (holding that § 2254(e) evidentiary hearing requirements do not have retroactive effect in terms of upsetting fair notice, reasonable expectations, or creating new legal consequences; determining that § 2254(e) essentially codified *Keeney* except that it eliminated district court discretion to hold a hearing where petitioner "failed to develop" in state court; finding that petitioner did not fail to develop where state court denied petitioner's requests for discovery, investigative funds, and a hearing).

Other Circuits:

McDonald v. Johnson, 139 F.3d 1056 (5th Cir. 1998) (holding that a habeas petitioner has not failed to develop facts where petitioner diligently sought to develop facts but was denied opportunity by state court and, thus, is entitled to federal evidentiary hearing).

Amrine v. Bowersox, 128 F.3d 1222 (8th Cir. 1997) (en banc) (remanding to district court for evidentiary hearing to determine whether *Schlup* standard had been met), *cert. denied*, 523 U.S. 1123 (1998).

Weeks v. Bowersox, 119 F.3d 1342 (8th Cir. 1997) (en banc) (affirming denial of an evidentiary hearing where petitioner sought hearing to develop facts necessary to make sufficient *Schlup* actual innocence claim to overcome procedural default), *cert. denied*, 522 U.S. 1093 (1998).

Sena v. State of New Mexico Prison, 109 F.3d 652 (10th Cir. 1997) (requiring evidentiary hearing where court of appeals concluded that substantial doubt existed as to petitioner's competence at time he entered guilty plea and no factual determination of competence was made at time of plea).

Bannister v. Delo, 100 F.3d 610 (8th Cir. 1996) (holding that evidentiary hearing is not required for actual innocence claim if development of claim would not establish actual innocence).

Parkus v. Delo, 33 F.3d 933 (8th Cir. 1994) (finding cause and prejudice for evidentiary hearing on ineffective assistance and *Brady* claims: (1) counsel failed to pursue defendant's youth mental health records simply because he was told they were

destroyed and sole defense was defendant's mental condition, and (2) prosecutor failed to furnish all records favorable to defense).

Stewart v. Nix, 31 F.3d 741 (8th Cir. 1994) (finding no cause for evidentiary hearing; facts could have been developed in state court through affidavits like those presented in federal court; *pro se* status does not excuse failure to develop facts in state court).

Hakeem v. Beyer, 990 F.2d 750 (3d Cir. 1993) (holding evidentiary hearing because factual dispute and state record did not "fairly support" finding on cause of petitioner's delay).

Buenoano v. Singletary, 963 F.2d 1433 (11th Cir. 1992) (holding that district court did not hold an adequate evidentiary hearing when it unduly restricted evidence allowed on conflict of interest claim and failed to hold hearing on ineffective assistance claim).

Meeks v. Singletary, 963 F.2d 316 (11th Cir. 1992) (holding that mere occurrence of hearing in state court does not neutralize right to evidentiary hearing on federal habeas).

James v. Singletary, 957 F.2d 1562 (11th Cir. 1992) (holding defendant entitled to evidentiary hearing on claim that substantive due process rights were violated due to incompetence to stand trial).

May v. Collins, 955 F.2d 299 (5th Cir.) (holding petitioner not entitled to evidentiary hearing on actual innocence claim where trial judge also read affidavits for state postconviction claim), *cert. denied*, 504 U.S. 901 (1992).

Agan v. Dugger, 835 F.2d 1337 (11th Cir. 1987) (remanding case for evidentiary hearing on competency and ineffective assistance claims where state held no evidentiary hearing).

Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986) (holding conflict of interest and ineffective assistance allegations sufficient to require evidentiary hearing where state court did not hold hearing).

Green v. Zant, 715 F.2d 551 (11th Cir. 1983) (holding, where state court findings were inadequate and seemed unreliable, evidentiary hearing required on juror exclusion issue).

District Courts in Other Circuits:

Bernal v. Helman, 958 F. Supp. 349 (N.D. Ill. 1997) (interpreting § 2254(e)(2) to mean that petitioner should have evidentiary hearing only "when the alleged defect resulted in the conviction of an innocent person"), *postconviction relief denied*, No. 97 C 2922, 1998 WL 325222 (N.D. Ill. 1998).

Federal Statutes:

28 U.S.C. § 2254(e)(2) (2000) (limiting district court's discretion to hold evidentiary hearing where applicant "failed to develop factual bases of claim in state court proceedings").

28 U.S.C. § 2254(d) (1994) [repealed].

Federal Rules:

Fed. R. Habeas Corpus 4 (providing for summary dismissal of § 2254 petition).

Fed. R. Habeas Corpus 8 (requiring review for evidentiary hearing or dismissal of § 2254 petition).

6.2.14 Stays of Execution

6.2.14.1 Standard for Granting Stay

Section 2251 of Title 28 of the United States Code authorizes a federal judge to stay execution of state judgments but does not specify the standards that govern review of stay petitions. In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Supreme Court stated that a stay should be granted when necessary to permit consideration of the merits and should "reflect the presence of substantial grounds upon which relief might be granted." That is, a petitioner must make a "substantial showing of the denial of a federal right." This standard does not require a showing that petitioner would prevail on the merits but does require that the issue presented is "debatable among jurists of reason" such that a court could resolve the issue differently, or that the issue is "adequate to deserve encouragement to proceed further." This is the same standard applied in granting a certificate of probable cause. *See infra* § 6.2.15.1. The *Barefoot*

Court also stressed that stays should be less readily granted on second and subsequent habeas petitions than on first petitions.

In *Lonchar v. Thomas*, 517 U.S. 314 (1996), the Supreme Court further articulated that where a petitioner presents a request for stay on a first petition and the district court cannot dismiss the petition on the merits before petitioner's scheduled execution, *Barefoot* requires the district court to issue a stay and address the merits to prevent the case from becoming moot.

Ninth Circuit Rules 22-4 and 22-5 provide the procedures for granting a stay of execution on appeal. Federal Rule of Appellate Procedure 41(d) governs the granting of a stay pending a petition to the United States Supreme Court.

If a state "opts in" to Chapter 154 of Title 28, United States Code, an automatic stay issues upon the filing of a § 2254 petition in federal court. *See infra* § 6.2.16.

Supreme Court:

Netherland v. Gray, 519 U.S. 1301 (1997) (holding that court of appeals should not grant stay of execution to permit filing of petition for writ of certiorari without first complying with procedures set out in *Barefoot* for handling applications for stays of execution).

Angelone v. Bennett, 519 U.S. 959 (1996) (Stevens, J., dissenting) (stating that congressional reform, limiting federal court authority to entertain successive petitions, increases the importance of first petition review; thus federal courts should give greater, rather than less, scrutiny to death row inmates' first petitions).

Lonchar v. Thomas, 517 U.S. 314 (1996) (holding that where district court cannot dismiss first habeas petition on merits before scheduled execution, court must issue stay and address merits to prevent case from becoming moot).

Delo v. Blair, 509 U.S. 823 (1993) (holding no substantial grounds for relief, and thus vacating stay; stating that "it is an abuse of discretion for a federal court to interfere with the orderly process of a state's criminal justice system in a case raising claims that are for all relevant purposes indistinguishable from those we recently rejected in *Herrera*").

Herrera v. Collins, 506 U.S. 390 (1993) (holding "particularly egregious" the entering

of a stay on second or subsequent petitions unless "there are substantial grounds upon which relief might be granted").

Gomez v. United States Dist. Ct. for the N. Dist. of Cal., 503 U.S. 653 (1992) (stating that a court may consider last-minute nature of application for stay in deciding whether to grant equitable relief).

Cole v. Texas, 499 U.S. 1301 (1991) (Scalia, J., as Fifth Circuit Justice) (stating, "I will in this case, and in every case on direct review, grant a stay of execution pending disposition by this Court of the petition for certiorari").

Madden v. Texas, 498 U.S. 1301 (1991) (holding that withdrawal of appellate counsel, not reasonably unforeseeable, does not constitute good cause for stay of execution and extension of time to apply for writ of certiorari).

Kyles v. Whitley, 498 U.S. 931 (1990) (Stevens, J., concurring) (noting that Court rarely grants stay requests made after state collateral review; proper route is through federal habeas).

Demosthenes v. Baal, 495 U.S. 731 (1990) (vacating stay because there was no evidentiary basis for appellate court's conclusion that district court erred in declining to conduct evidentiary hearing as there were no substantial grounds upon which relief could be granted).

Delo v. Stokes, 495 U.S. 320 (1990) (holding that court abused its discretion in granting stay pending review of clear abuse of writ).

Antone v. Dugger, 465 U.S. 200 (1984) (refusing to grant stay on successive petition where petitioner claimed counsel had not had adequate opportunity to develop facts due to "press of time" in first habeas proceeding).

Sullivan v. Wainwright, 464 U.S. 109 (1983) (denying stay where case had received repetitive and careful review during ten years of state and federal litigation).

Maggio v. Williams, 464 U.S. 46 (1983) (vacating stay where grounds for relief were insubstantial).

Autry v. Estelle, 464 U.S. 1 (1983) (denying application for stay where fewer than four justices would grant certiorari; refusing to adopt rule of automatic stay where applicant seeking review of denial of first habeas petition).

Barefoot v. Estelle, 463 U.S. 880 (1983) (holding that stay should be granted when necessary to permit consideration of the merits when certificate of probable cause is obtained by petitioner; in successive petition case, grant of stay should reflect existence of substantial grounds upon which relief might be granted).

Gilmore v. Utah, 429 U.S. 1012 (1977) (terminating stay based upon conclusion that competent defendant made knowing and intelligent waiver of any and all federal rights).

Ninth Circuit:

Clark v. Lewis, 1 F.3d 814 (9th Cir. 1993) (following *Barefoot* and applying earlier Appellate Rule 22 to deny application for stay of execution).

Brewer v. Lewis, 989 F.2d 1021 (9th Cir. 1993) (following *Barefoot*, denying application for stay because no substantial showing of denial of federal right).

Harris v. Vasquez, 901 F.2d 724 (9th Cir. 1990) (granting stay when successive petition showed "substantial grounds upon which relief might be granted"; right to competent psychiatric assistance in penalty phase is "debatable among jurists of reason," so stay is appropriate).

Federal Statutes:

28 U.S.C. § 2251, *as amended by* Pub. L. No. 109-177, § 507(f) (authorizing federal judge to grant stay of execution of state judgment).

Ninth Circuit Rules:

9th Cir. R. 22-1, 22-4, 22-5 (providing for automatic stay on first petition and one-judge temporary stay).

6.2.14.2 Jurisdiction to Enter Stay

In *McFarland v. Scott*, 512 U.S. 849 (1994), the Supreme Court held that federal courts need not wait for a federal habeas petition to be filed in order to appoint counsel or to grant a stay of execution. In 2006, however, 28 U.S.C. § 2251 was amended and now states that a proceeding is not pending under § 2251 until a habeas application is filed.

As amended, 28 U.S.C. § 2251 also provides that:

> (a)(3) If a State prisoner sentenced to death applies for appointment of counsel pursuant to section 3599(a)(2) of title 18 in a court that would have jurisdiction to entertain a habeas corpus application regarding that sentence, that court may stay execution of the sentence of death, but such stay shall terminate not later than 90 days after counsel is appointed or the application for appointment of counsel is withdrawn or denied.

The Ninth Circuit has held that a circuit court does not have jurisdiction to stay an execution warrant issued by a state outside of the Ninth Circuit, notwithstanding that imposition of the capital sentence would moot his California habeas case. *Malone v. Calderon*, 165 F.3d 1234, *reconsideration denied*, 164 F.3d 1210 (9th Cir. 1999).

Supreme Court:

McFarland v. Scott, 512 U.S. 849 (1994) (holding that jurisdiction to enter stay exists on invocation of § 848(q) right to counsel).

Ninth Circuit:

Malone v. Calderon, 165 F.3d 1234 (holding that federal appellate court lacks jurisdiction to stay the execution of a prisoner who is in the custody of state prison officials in a different circuit, despite the fact that the imposition of sentence in the foreign circuit will moot challenges to his Ninth Circuit conviction and an appurtenant *Johnson v. Mississippi* claim; foreign state officials are not subject to Ninth Circuit jurisdiction on the basis of their limited intervention in California habeas case), *reconsideration denied*, 164 F.3d 1210 (9th Cir. 1999).

Calderon v. United States Dist. Ct. for the Cent. Dist. of Cal. (Malone), 137 F.3d 1420, 1422 (9th Cir. 1998) (holding that court of appeals has jurisdiction to review the denial of injunctive relief in a habeas case pursuant to 28 U.S.C. § 1292(a)(1)).

Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991) (affirming, prior to *McFarland*, district court's stay of state prisoner's execution where prisoner had not filed habeas petition but had filed petition for appointment of counsel to assist in preparation of

habeas petition; reasoning that application for appointment constitutes part of habeas proceeding for purposes of 28 U.S.C. § 2251).

District Courts in Ninth Circuit:

Clair v. Vasquez, 827 F. Supp. 1465 (C.D. Cal. 1993) (holding, prior to *McFarland*, that court has jurisdiction to enter stay before habeas filing to allow petitioner time to seek appointed counsel according to local rules; suggesting that Rule 11 sanctions may apply if Attorney General's office contests stays in similar situations).

Brown v. Vasquez, 743 F. Supp. 729 (C.D. Cal. 1990) (holding, prior to *McFarland*, that *pro se* petitioner's applications for appointment of counsel and for stay are sufficient to confer jurisdiction under All Writs Act because applications sufficiently established court's potential habeas jurisdiction and stay necessary to preserve that potential jurisdiction), *aff'd*, 952 F.2d 1164 (9th Cir. 1991).

See generally:

Recent Case, Habeas Corpus–Stay of State Court Proceedings–Ninth Circuit Stays Execution to Appoint Counsel to Assist Prisoner in Filing Habeas Corpus Petition–Brown v. Vasquez, 105 Harv. L. Rev. 1807 (1992) (asserting that exercise of jurisdiction sanctioned by *Brown* is inconsistent with rules governing federal habeas and unnecessarily increases habeas review costs).

6.2.15 Appellate and Supreme Court Review of Habeas Action

6.2.15.1 Certificate of Probable Cause/Certificate of Appealability

Prior to the AEDPA, 28 U.S.C. § 2253 required a petitioner in state custody to obtain a "certificate of probable cause" (CPC) to establish federal appellate court jurisdiction over an appeal of the district court's denial of a habeas corpus petition. A CPC required a showing of more than good faith or an absence of frivolity.

In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Supreme Court held that a CPC requires a "substantial showing of the denial of a federal right." In a capital case, the nature of the death penalty is a proper subject of consideration in determining whether to issue a certificate, but the "severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate." A substantial showing of the denial of a

federal right does not require a showing that the petitioner would prevail on the merits. Rather, the Court held that petitioner must demonstrate one of the following: (1) the issue presented is "debatable among jurists of reason," (2) a court *could* resolve the issue in a different manner, or (3) the issue deserves further proceedings.

In 1996, the AEDPA amended § 2253 to require a "certificate of appealability" (COA) for both § 2254 and § 2255 cases. Circuit courts may grant a COA only upon a "substantial showing of the denial of a *constitutional* [not a federal] right." Also in contrast to the former CPC protocol, AEDPA requires a COA to be issued on a claim specific basis. Specifically, § 2253 provides:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> (B) the final order in a proceeding under section 2255.
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

The Federal Rules of Appellate Procedure additionally provide for a district judge to issue a certificate of appealability. Rule 22(b) provides in pertinent part:

> In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c).

The Ninth Circuit has upheld the district courts' authority under Circuit Rule 22(b) to issue COAs in § 2254 and § 2255 cases. *United States v. Asrar*, 116 F.3d 1268 (9th Cir. 1997).

In *Slack v. McDaniel*, 529 U.S. 473 (2000), the Supreme Court

acknowledged that a § 2253(c) analysis is straightforward when a district court rejects a constitutional claim on the merits: Petitioner must show that a reasonable jurist would find the district court's ruling debatable or wrong. However, the *Slack* Court held that a COA should issue in a petition denied on *procedural grounds* when jurists of reason would find debatable *both* (1) whether the petition states a valid constitutional claim and (2) whether the district court was correct in its procedural ruling. The Ninth Circuit has construed the first prong of *Slack* as requiring a facially valid claim of a constitutional right. *Lambright v. Stewart*, 20 F.3d 1022, 1026 (9th Cir. 2000). The *Slack* Court also held that an issue apparently settled by circuit law was nevertheless debatable for purposes of issuing a COA. *Slack* at 1604.

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the Court reiterated the view that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his or her petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of the claims. The Court in *Miller-El* held that a prisoner seeking a certificate of appealability need only demonstrate a substantial showing of the denial of a constitutional right. The Court further held that a petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of the petitioner's constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Miller-El,* 537 U.S. at 327.

Supreme Court:

Miller-El v. Cockrell, 537 U.S. 322 (2003) (holding that to obtain a COA, habeas petitioners must show that reasonable jurists could debate whether petition should have been resolved in different manner or that issues presented were adequate to deserve encouragement to proceed further and that until COA has been issued, courts of appeals lack jurisdiction to rule on merits of appeals from habeas petitions).

Slack v. McDaniel, 529 U.S. 473 (2000) (holding that a COA should issue in a petition denied on procedural grounds when jurists of reason would find debatable or wrong both (1) whether the petition states a valid constitutional claim and (2) whether the district court was correct in its procedural ruling).

Hohn v. United States, 524 U.S. 236 (1998) (holding that the Supreme Court has

jurisdiction under § 1254(1) to review denials of applications for COAs by a circuit judge or a panel of a court of appeals).

Lozada v. Deeds, 498 U.S. 430 (1991) (per curiam) (granting CPC because petitioner made substantial showing of denial of right to effective assistance regarding failure to appeal; issue of prejudice could be resolved differently than in district court).

Barefoot v. Estelle, 463 U.S. 880, 893 (1983) (holding that CPC should issue where petitioner makes a "substantial showing of the denial of a federal right" by demonstrating that the issue is debatable among jurists, that a court could resolve the issue in a different manner, or that the issue deserves further proceedings; penalty's severity does not warrant automatic certificate issuance).

Ninth Circuit:

Jennings v. Woodford, 290 F.3d 1006 (9th Cir. 2002) (issuing COA and holding that it was debatable under *Barefoot* standard as to whether allegations that trial counsel failed to adequately investigate and present evidence regarding petitioner's psychological and family history that (1) might have defeated the jury's finding of the requisite intent for first degree murder in the guilt phase or (2) provided sufficient mitigating evidence to warrant a sentence of life rather than death in penalty phase, and that if true, allegations amount to denial of effective assistance of counsel), *cert denied,* 539 U.S. 958 (2003).

United States v. Mikels, 236 F.3d 550 (9th Cir. 2001) (holding circuit court has jurisdiction to dismiss an appeal notwithstanding district court did not issue a COA, where petitioner did not claim the denial of a constitutional right).

United States v. Martin, 226 F.3d 1042 (9th Cir. 2000) (finding appeal presented constitutional question under *Slack*, notwithstanding that question had been resolved by Supreme Court, because issue was whether Supreme Court ruling applied to petition filed before ruling), *cert. denied*, 532 U.S. 1002 (2001).

James v. Giles, 221 F.3d 1074 (9th Cir. 2000) (applying second prong of *Slack*–in appeal from the district court's denial of a motion to extend time to file a motion for a COA–and finding debatable whether district court was correct in dismissing a mixed petition without affording the prisoner an opportunity to amend to delete unexhausted claims; finding analysis under first prong of *Slack* inapplicable pursuant to *Gatlin* because the state failed to assert that the petition failed to state a valid claim of the denial of a constitutional right).

Lambright v. Stewart, 220 F.3d 1022 (9th Cir. 2000) (holding that if petitioner has

facially alleged the denial of a constitutional right and the district court's procedural ruling is debatable, the court of appeals will grant a COA) (J. Thompson concurring, stating that court of appeals should not discuss the basis for its issuance/denial of a COA).

Solis v. Garcia, 219 F.3d 922 (9th Cir. 2000) (treating petitioner's appellate brief on uncertified issues as a request to expand the COA issued by the district court; expanding COA without discussing basis; denying claims on the merits), *cert. denied*, 534 U.S. 839 (2001).

Gatlin v. Madding, 189 F.3d 882 (9th Cir. 1999) (holding that once an appellate court issues a COA without timely objection by the state, the procedural threshold for appellate jurisdiction has been met; rejecting respondent's request to revisit the propriety of the certificate before reaching the merits of the appeal), *cert. denied*, 528 U.S. 1087 (2000).

Gerlaugh v. Stewart, 167 F.3d 1222 (9th Cir. 1999) (observing that circuit law regarding petitioner's *Lackey* claim is settled; affirming district court's denial of COA).

United States v. Asrar, 116 F.3d 1268 (9th Cir. 1997) (holding that district courts have authority under Rule 22(b) to issue COAs in § 2254 and § 2255 cases; establishing procedure for district courts' processing of notices of appeal and COA applications).

Forde v. United States Parole Comm'n, 114 F.3d 878 (9th Cir. 1997) (denying as unnecessary petitioner's request for a COA to review the denial of his § 2241; the plain language of § 2253(c)(1) did not require a COA when denying a § 2241 petition because the order denying a § 2241 petition is not a final order in a habeas proceeding arising from state court process).

Clark v. Lewis, 1 F.3d 814 (9th Cir. 1993) (applying Appellate Rule 22, which provides that if appellate panel votes unanimously to deny application for CPC, it should set forth issues presented and reasons for denial; denying certificate).

Harris v. Vasquez, 901 F.2d 724, 725 (9th Cir. 1990) (holding that petitioner must make substantial showing of the denial of a federal right for certificate).

Other Circuits:

Jefferson v. Welborn, 222 F.3d 286 (7th Cir. 2000) (granting COA and finding for petitioner on merits of procedural appeal simultaneously, and remanding for reinstatement of petition).

Jones v. Johnson, 134 F.3d 309 (5th Cir. 1998) (holding that, where the district judge conclusively ceded responsibility for determining whether a CPC shall issue to the magistrate judge, the CPC is ineffective to confer jurisdiction on a court of appeals; remanding for proper determination by the district judge).

Federal Statutes:

28 U.S.C. § 2253(c) (2000) (providing COA requirement in § 2254 and § 2255 cases).

Federal Rules:

Fed. R. App. P. 22(b) (requiring COA in § 2254 cases).

Ninth Circuit Rules:

9th Cir. R. 22-1 (addressing certificates of appealability).

6.2.15.1.1 Retroactivity of Certificate of Appealability Requirement

In *Slack v. McDaniel*, 529 U.S. 473 (2000), the Court held that the § 2253 certificate of appealability requirement has retroactive effect to petitions filed before the AEDPA's effective date when the appeal commenced after the effective date. Additionally, the circuit court has jurisdiction to issue initial COA determinations for post-AEDPA appeals from pre-AEDPA petitions already pending at the circuit court, notwithstanding Rule 22-1. *Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000). *See infra* § 6.2.15.1.2.

Supreme Court:

Slack v. McDaniel, 529 U.S. 473 (2000) (holding that when an appeal is commenced after April 24, 1996, the post-AEDPA version of 28 U.S.C. § 2253(c)–requiring a certificate of appealability from the circuit court–applies).

Dickey v. United States, 524 U.S. 947 (1998) (granting certiorari, vacating the Fifth Circuit's order denying a COA on pre-AEDPA § 2255 petition and remanding consideration in light of *Lindh*).

6.2.15.1.2 Ninth Circuit Rule 22-1

Ninth Circuit Rule 22-1 sets forth the required procedures regarding the filing of a certificate of appealability ("COA"). Circuit Rule 22-1(a) provides that the procedures set forth in Federal Rules of Appellate Procedure 4 and 22(b) will apply to an appeal from a judgment of the district court in proceedings under 28 U.S.C. §§ 2254 and 2255. Rule 22-1(a) specifically provides that the court of appeals "will not act on a motion for a COA if the district court has not ruled first."

Pursuant to Rule 22-1(d), if the district court denies a COA as to all issues, the petitioner may file a motion for a COA in the court of appeals within 35 days of the district court's entry of its order of denial of the COA in full or denial of a timely filed post-judgment motion, whichever is later. If the petitioner files no COA motion after the district court denies a COA motion in full, the court of appeals will deem the notice of appeal to constitute a motion for a COA.

Pursuant to Rules 22-1(c), if the district court grants a COA as to any or all issues, the petitioner may brief only those issues certified, or otherwise proceed according to Rule 22-1(e). Rule 22-1(e) provides that alternatively, if a petitioner concludes during the course of preparing the opening brief, that an uncertified issue should be discussed in the brief, the petitioner must first brief all certified issues under the heading, "Certified Issues," and then, in the same brief, discuss any uncertified issues under the heading, "Uncertified Issues." Uncertified issues raised and designated in this manner will be construed as a motion to expand the COA and will be addressed by the merits panel to such extent as it deems appropriate.

A merits panel may expand a COA to include claims specifically rejected by a motions panel as well as claims that were not presented to the motions panel for certification. *Hiivala v. Wood*, 195 F.3d 1098 (9th Cir. 1999) (per curiam), *cert denied*, 529 U.S. 1009 (2000).

Finally, the circuit court has jurisdiction to issue initial COA determinations for post-AEDPA appeals from pre-AEDPA petitions already pending at the circuit court, notwithstanding Rule 22-1. *Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000); *see also Slack v. McDanial*, *supra* § 6.2.15.1, *et seq*.

Ninth Circuit:

Valerio v. Crawford, 306 F.3d 742 (9th Cir. 2002) (en banc) (holding that Circuit Rule 22-1 does not apply, either directly or by analogy, to habeas appeals in which an expanded COA is sought in the court of appeals, and in which the district court's order denying a COA was entered before the effective date of the Rule (January 1, 1999) and that for such cases, procedure approved in *Cruz-Mendoza I*, in which briefing of the uncertified issue or issues in the court of appeals is treated as a request for an expanded COA, is available; holding, therefore, that because Rule 22-1 went into effect after district court partially granted a COA as to a penalty phase issue, but partially denied a COA as to guilt phase issues, the requirement of Rule 22-1 that petitioner file a "separate motion for broader certification" within thirty-five days of the district court's entry of its order denying a COA did not apply to petitioner's request for an expanded COA), *cert. denied*, 538 U.S. 994 (2003).

Mayfield v. Woodford, 270 F.3d 915 (9th Cir. 2001) (en banc) (noting that even though AEDPA's provisions applied to issue whether petitioner was entitled to COA, pre-AEDPA law applied to merits of petition filed in 1995, before AEDPA's effective date of April 24, 1996)

United States v. Martin, 226 F.3d 1042 (9th Cir. 2000) (following *Schell).*

Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000) (treating petitioner's notice of appeal, filed after April 24, 1996 from a pre-AEDPA petition, as an application for a COA; granting COA without discussing basis and deciding merits of appellate claims).

United States v. Kramer, 195 F.3d 1129 (9th Cir. 1999) (declining to expand COA issued by merits panel, citing *Hiivala*).

Hiivala v. Wood, 195 F.3d 1098 (per curiam) (9th Cir. 1999) (reconsidering–as part of merits appeal–but declining to certify claims either specifically rejected by COA motions panel or not presented to motions panel pursuant to § 2253(c) and Circuit Rule 22-1), *cert denied*, 529 U.S. 1009 (2000).

United States v. Cruz-Mendoza, 147 F.3d 1069, 1074 (9th Cir.) (noting the recent adoption of Ninth Circuit Rule 22-1; declining to decide on the application of Rule 22-1 to this pre-rule case because petitioner had not made the § 2253(c)(2) showing regarding the uncertified claim in any event), *as amended*, 163 F.3d 1149 (9th Cir. 1998).

6.2.15.2 Jurisdictional Requirement: Resolution of all Guilt Phase Claims

In *Blazak v. Ricketts*, 971 F.2d 1408 (9th Cir. 1992), the Ninth Circuit held that the district court's order was final and appealable where all guilt phase issues had been adjudicated and relief had been granted on one of the claims, notwithstanding that punishment issues were not addressed.

In the capital habeas appeal of *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1997), *rev'd on other grounds*, 528 U.S. 259 (2000), the district court determined that appellate counsel was ineffective and consequently failed to adjudicate petitioner's guilt phase issues. The Ninth Circuit ruled on the ineffective assistance of appellate counsel issue; however, it also remanded to the district court for consideration of the alleged trial errors. This remand was to prevent unnecessary delay–caused by a state appellate rehearing–that might otherwise be mooted by federal relief on any of the guilt claims.

Ninth Circuit:

Robbins v. Smith, 152 F.3d 1062 (9th Cir. 1997) (applying *Blazak* in holding that a district court must rule on all exhausted guilt claims raised in a habeas petition notwithstanding district relief based on an ineffective assistance of state appellate counsel claim; requiring district court to rule on guilt claims prevents delay caused by state appellate rehearing that may be mooted by district court relief on a guilt claim), *rev'd on other grounds*, 528 U.S. 259 (2000).

Blazak v. Ricketts, 971 F.2d 1408 (9th Cir. 1992) (holding that the district court's order was final and appealable where all guilt phase issues had been adjudicated and relief had been granted on one of the claims, notwithstanding that punishment issues were not addressed).

6.2.15.3 Appellate Standards of Review

When a federal appellate court reviews a district court's disposition of a habeas petition, the appropriate standard of review depends on the issue involved.

6.2.15.3.1 Grant or Denial of Habeas Relief

The Ninth Circuit reviews *de novo* a district court's decision to grant or deny habeas relief. However, in post-AEDPA cases, the appellate court, like the district court, can grant relief on a claim adjudicated on the merits in state court only if the claim withstands 28 U.S.C. § 2254(d) scrutiny. See § 6.3.1, *et seq*.

Ninth Circuit–Pre-AEDPA:

Eslaminia v. White, 136 F.3d 1234, 1236 (9th Cir. 1998) (holding that Ninth Circuit reviews *de novo* the denial of a state prisoner's petition for habeas corpus pursuant to 28 U.S.C. § 2254).

Sanders v. Ratelle, 21 F.3d 1446 (9th Cir. 1994) (holding that appellate courts review grants or denials of habeas corpus relief *de novo*).

Madera v. Risley, 885 F.2d 646, 648 (9th Cir. 1989) (holding that appellate court reviews district court's decision to grant or deny habeas relief *de novo*).

Ninth Circuit–Post-AEDPA:

Tran v. Lindsey [*also referred to as Van Tran v. Lindsey*], 212 F.3d 1143 (9th Cir.) (applying § 2254; opining that under a de novo review standard the state court erred, but affirming the district court denial of relief by holding that state court's decision did not involve an unreasonable application of clearly established federal law), *cert. denied*, 531 U.S. 944 (2000), *disapproved in Lockyer v. Andrade,* 538 U.S. 63, § 6.3.1.

6.2.15.3.2 Factual vs. Legal Findings

In *Amadeo v. Zant*, 486 U.S. 214 (1988), the Supreme Court held that an appellate court reviews a district court's factual findings in a habeas corpus proceeding for clear error and reviews a district court's legal conclusions *de novo*. The Ninth Circuit has held that it reviews a district court's resolutions of mixed questions of law and fact *de novo*.

Supreme Court:

Amadeo v. Zant, 486 U.S. 214 (1988) (holding that federal appellate courts may not set aside a district court's factual findings unless they are clearly erroneous).

Ninth Circuit:

Moran v. McDaniel, 80 F.3d 1261, 1268 (9th Cir. 1996) (holding, in capital case, that state fact findings are reviewed for clear error).

King v. Brown, 8 F.3d 1403 (9th Cir. 1993) (holding that appellate courts review district court's factual findings for clear error).

Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989) (stating that issues of law and mixed legal-factual issues are reviewed *de novo*), *vacated on other grounds*, 500 U.S. 901 (1991).

6.2.15.3.3 Stay of Order Granting Habeas Relief

In *Hilton v. Braunskill*, 481 U.S. 770 (1987), the Supreme Court held that a district court's decision whether to stay an order granting habeas relief is presumed to be correct, but the presumption can be overcome.

Supreme Court:

Hilton v. Braunskill, 481 U.S. 770 (1987) (holding that district court's decision whether to stay an order granting habeas relief is presumed correct; stating that presumption can be overcome).

6.2.15.3.4 Dismissal of Second or Successive Habeas Petition

The AEDPA requires that the circuit court authorize filing of a second or successive petition. Under pre-AEDPA law, the Ninth Circuit reviews a district court's decision regarding dismissal of successive or abusive habeas petitions for abuse of discretion.

Ninth Circuit:

Howard v. Lewis, 905 F.2d 1318 (9th Cir. 1990) (holding that a district court's decision to deny consideration of petition's merits on successive petition basis is reviewed for abuse of discretion).

Federal Statutes:

28 U.S.C. § 2244(b)(3) (2000) (requiring petitioner to motion circuit court for permission to file second or successive petition in district court).

6.2.15.3.5 State Exhaustion

The Ninth Circuit reviews a district court's determination as to whether a petitioner exhausted available state remedies *de novo*.

Ninth Circuit:

Lyons v. Crawford, 247 F.3d 904 (9th Cir. 2001) (applying de novo standard of review to district court's exhaustion based dismissal in post-AEDPA case).

Harris v. Pulley, 885 F.2d 1354 (9th Cir. 1988) (stating that appellate court reviews issue of whether a petitioner exhausted available state remedies *de novo*).

6.2.15.3.6 Discovery

The Ninth Circuit reviews a district court's denial of discovery motions in a habeas corpus proceeding for abuse of discretion.

Supreme Court:

Bracy v. Gramley, 520 U.S. 899 (1997) (holding that petitioner made a sufficient factual showing to establish good cause as required by Habeas Corpus Rule 6(a) for discovery on his claim of actual judicial bias where state trial judge had been convicted of taking bribes from criminal defendants to fix cases).

Ninth Circuit:

McDaniel v. United States Dist. Ct. for the Dist. of Nev. (Jones), 127 F.3d 886 (9th Cir. 1997) (holding that discovery is proper in capital proceedings in which petitioner is pursuing exhausted claims with some factual basis).

Harris v. Vasquez, 949 F.2d 1497 (9th Cir. 1990) (holding that appellate court reviews district court's denial of discovery motions in habeas proceeding for abuse of

discretion), *cert. denied*, 503 U.S. 910 (1992).

6.2.15.3.7 *Batson* Claims

Ninth Circuit:

Tolbert v. Gomez, 190 F.3d 985 (9th Cir. 1999) (reviewing *de novo* district court's dismissal of petitioner's *Batson*-based habeas petition; applying deferential review of state court's ruling on whether a criminal defendant has established a prima facie case of prosecutorial discrimination in the exercise of a peremptory challenge).

6.2.15.4 Writ of Mandamus

Ninth Circuit:

In re Morris, 363 F.3d 891 (9th Cir. 2004) (per curiam) (as to a capital habeas petitioner whose first habeas petition had not yet been decided because there were pending guilt phases issues that were the subject of an evidentiary hearing, holding that mandamus relief requiring district court to permit amendment of habeas petition was not appropriate because the district court had not yet made any definitive ruling as to petitioner's request to amend the habeas petition to include claims based on newly discovered evidence).

Calderon v. United States Dist. Ct. for the Cent. Dist. of Cal. (Kelly V), 163 F.3d 530 (9th Cir. 1998) (en banc) (characterizing mandamus as an "extraordinary" or "drastic" remedy; holding that a writ of mandamus was not properly issued where it prevented consideration of a first habeas petition; stating that there is no reason why a state's Rule 12(b)(6) motion to dismiss on 28 U.S.C. § 2244(d) statute of limitations grounds should be reviewed by mandamus rather than on appeal from a final judgment), *cert. denied*, 526 U.S. 1060 (1999).

6.2.15.5 Writ of Certiorari

Section 2101(d) of Title 28, United States Code, provides time limitations for applications to the U.S. Supreme Court for a writ of certiorari. A justice of the Court may extend the time periods, to a limited extent, "for good cause shown."

Supreme Court:

Penry v. Texas, 515 U.S. 1304 (1995) (ruling on application for extension of time to file certiorari petition and stating that there is only one "good cause" standard, which applies to both capital and non-capital cases).

Madden v. Texas, 498 U.S. 1301 (1991) (stating that withdrawal of appellate counsel does not automatically constitute good cause for extension of time to prepare application for writ of certiorari).

Federal Statutes:

28 U.S.C. § 2101(d) (2000) (providing time limitations for certiorari petitions).

6.2.16 Special Procedures for "Opt-In" States

The AEDPA created Chapter 154 of Title 28 of the United States Code entitled "Special Habeas Corpus Procedures in Capital Cases." Chapter 154 sets forth expedited procedures for § 2254 capital habeas petitions in states which "opt-in" to the chapter by meeting the statute's counsel representation and compensation scheme. *See* § 6.2.16.1, *infra*.

Supreme Court:

Calderon v. Ashmus, 523 U.S. 740 (1998) (holding that class action seeking injunction preventing state of California from asserting compliance with opt-in protocol was a non-justiciable controversy; Chapter 154 compliance would have to be determined by capital petitioner faced with a state "opt in").

6.2.16.1 "Opt-In" Requirements

In 2006, 28 U.S.C. § 2261, was amended by the USA Patriot Improvement and Reauthorization Act (Pub. L. No. 109-177). As amended, § 2261(b) and (c) set forth the requirements for a state to "opt-in" to Chapter 154:

> (b) Counsel – This chapter is applicable if–
> (1) the Attorney General of the United States certifies that a State has

> established a mechanism for providing counsel in postconviction proceedings as provided in section 2265; and
> (2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.
> (c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided [above] must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record–
> (1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;
> (2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or
> (3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

Although § 2261(e) reiterates that the ineffectiveness or incompetence of state or federal habeas counsel is not a ground for relief, *see infra* § 6.3.2.1, the subsection provides that the "limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings."

In 2006 former section 2265 of Title 28 was repealed, and a new section 2265, pertaining to certification and judicial review, was added and provides in part:

> (a) (1) If requested by an appropriate State official, the Attorney General of the United States shall determine–
> (A) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death;
> (B) the date on which the mechanism described in subparagraph (A) was established; and
> (C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).
> (2) The date the mechanism described in paragraph (1)(A) was established

shall be the effective date of the certification under this subsection.

Under 28 U.S.C. § 2265(c) as added in 2006, the Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review the Attorney General's determination regarding certification, as specified in § 2265(a)(1), subject to review by the Supreme Court. The determination by the Attorney General regarding certification is subject to de novo review. Pursuant to § 2265(d), the amendments made by § 2265, including any new time limits for taking action, apply to cases pending on the date of the enactment of the USA Patriot Improvement and Reauthorization Act [March 9, 2006].

As of March 9, 2006, no state has qualified under Chapter 154 as an "opt-in" state under the state's current statutes and rules. However, in *Spears v. Stewart*, 267 F.3d 1026 (9th Cir. 2001), *amended and superseded by,* 283 F.3d 992 (9th Cir.), *cert. denied,* 537 U.S. 977 (2002), *and cert denied*, 537 U.S. 995 (2002), the Ninth Circuit held that Arizona had in place as of July 17, 1998 (the relevant date as to the petitioner), a mechanism for the appointment and compensation of counsel for indigent capital defendants in state post-conviction proceedings that met the requirements of Chapter 154. Nevertheless, the court held that Arizona was not entitled to enforce the expedited procedures of Chapter 154 because it had not complied with the timeliness requirements of its own system as to the petitioner.

Ninth Circuit:

Spears v. Stewart, 267 F.3d 1026 (9th Cir. 2001) (holding that state of Arizona had mechanism for appointment of counsel for indigent capital defendants in state post-conviction proceedings that met requirement of Chapter 154 and therefore qualified for opt-in status as of that date, but that Arizona was not entitled to enforce procedures of Chapter 154 because it did not comply with timeliness requirements of its own system as to petitioner), *amended and superseded by,* 283 F.3d 992 (9th Cir.), *amended and superseded by,* 283 F.3d 992 (9th Cir.), *cert. denied,* 537 U.S. 977 (2002), *and cert denied*, 537 U.S. 995 (2002).

Ashmus v. Woodford, 202 F.3d 1160 (9th Cir. 2000) (holding, by interlocutory appeal, that during all times relevant to state appeal and at least until 1998, California failed to qualify for Chapter 154's expedited procedures; however, not deciding what date

California must have established its mechanism for appointment of counsel for 154 purposes vis a vis petitioner's appeal time frame), *cert. denied*, 531 U.S. 916 (2000).

Ainsworth v. Calderon, 152 F.3d 1223 (9th Cir. 1998) (reaffirming holding that California does not meet the Chapter 154 "opt-in" requirements).

Ortiz v. Stewart, 149 F.3d 923, 931 (9th Cir. 1998) (noting that Chapter 154 did not affect petition because Arizona had not finalized procedures for appointment and compensation of counsel), *cert. denied*, 526 U.S. 1123 (1999).

Ashmus v. Calderon, 123 F.3d 1199 (9th Cir. 1997) (affirming district court's finding–in class action–that state did not meet requirements for state to qualify for AEDPA's limitations on habeas review in death penalty cases), *vacated on other grounds*, 523 U.S. 740 (1998).

Langford v. Day, 110 F.3d 1380 (9th Cir. 1996) (holding that Montana failed to demonstrate compliance with § 2261), *cert. denied*, 522 U.S. 881 (1997) .

District Courts in Ninth Circuit:

Stenson v. Lambert, No. C01-252P (D. West. Wa, May 2, 2001) (unpublished) (denying application of "opt-in" provision; holding state does not have adequate mechanism for the appointment of counsel in PCR proceedings, that state has inadequate standards for determining the qualifications of appointed counsel, and that state does not guarantee payment of reasonable litigation expenses and attorney's fees).

Other Circuits:

Moore v. Reynolds, 153 F.3d 1086 (10th Cir. 1998) (observing that Oklahoma had not satisfied, or even argued that it could satisfy, Chapter 154; determining that the expedited habeas procedures were inapplicable), *cert. denied*, 526 U.S. 1025 (1999).

Cannon v. Johnson, 134 F.3d 683 (5th Cir. 1998) (reiterating that Texas does not meet the "opt-in" requirements set forth in section 2261).

Death Row Prisoners of Pennsylvania v. Ridge, 106 F.3d 35 (3d Cir. 1997) (finding that Pennsylvania does not meet § 2261 "opt-in" requirements).

Bennett v. Angelone, 92 F.3d 1336 (4th Cir. 1996) (holding that prior to July 1, 1992, Virginia had not satisfied the AEDPA's "opt in" requirements and the AEDPA's special capital provisions did not apply to cases decided before that date).

District Courts in Other Circuits:

Hamblin v. Anderson, 947 F. Supp. 1179 (N.D. Ohio 1996) (concluding that Ohio fails to comply with Chapter 154 representation requirements).

Williams v. Cain, 942 F. Supp. 1088 (W.D. La. 1996) (concluding that Louisiana does not comply with Chapter 154 competency requirements).

Hill v. Butterworth, 941 F. Supp. 1129 (N.D. Fla. 1996) (concluding that Florida does not comply with Chapter 154 requirements), *judgment reversed on other grounds*, 147 F.3d 1333 (11th Cir. 1998).

Booth v. Maryland, 940 F. Supp. 849 (D. Md. 1996) (concluding that Maryland does not comply with Chapter 154), *vacated on other grounds*, 112 F.3d 139 (4th Cir. 1997).

Zuern v. Tate, 938 F. Supp. 468 (S.D. Ohio 1996) (concluding that Ohio does not comply with Chapter 154's counsel representation requirements).

Rahman v. Bell, 927 F. Supp. 262 (M.D. Tenn. 1996) (holding that Tennessee has not met requirements for Chapter 154 application).

Federal Statutes:

28 U.S.C. § 2261 (2000), *as amended by* Pub. L. No. 109-177 § 507(a) and (b) (providing requirements for state to "opt in" under chapter 154).

28 U.S.C. § 2265, *as added by* Pub. L. No. 109-177, § 507(c) (providing for certification by Attorney General that state has met "opt-in" requirements).

6.2.16.2 Mandatory Stay of Execution

If a state "opts in" to Chapter 154, and if state post conviction counsel has been appointed pursuant to § 2261(c), then, upon application to any federal court with § 2254 jurisdiction, 28 U.S.C. § 2262(a) directs the federal court to stay the execution.

This stay of execution expires under § 2262(b) if:

> (1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

> (2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or
> (3) a state prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

Federal Statutes:

28 U.S.C. § 2262(a) (2000) (providing automatic stay upon filing of § 2254 application).

28 U.S.C. § 2262(b) (2000) (providing three conditions upon which automatic stay of execution expires).

6.2.16.2.1 No Subsequent Stay Unless Successive Petition Authorized

Once one of the § 2262(b) conditions triggering the expiration of the automatic stay occurs, § 2262(c) provides that no federal court may issue another stay "unless the court of appeals approves the filing of a second or successive application under section 2244(b)." *See supra* § 6.2.3.2.

Federal Statutes:

28 U.S.C. § 2262(c) (2000) (prohibiting subsequent stay of execution after mandatory stay expires unless successive petition is authorized).

6.2.16.3 Filing Deadlines

Pursuant to § 2263, if a state "opts in" to Chapter 154, the filing deadline for § 2254 petitions is 180 days after the final affirmance in state court instead of the one-year deadline provided in § 2244(d) for non-"opt-in" petitions. Section 2263 provides as follows:

> (a) Any application under this chapter for habeas corpus relief

> under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.
> (b) The time requirements established by subsection (a) shall be tolled–
> (1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;
> (2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and
> (3) during an additional period not to exceed 30 days, if–
>
> > (A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and
> > (B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

Federal Statutes:

28 U.S.C. § 2263 (2000) (providing for 180-day filing deadline for § 2254 petitions in "opt-in" states).

6.2.16.4 Amended Petitions

If a state "opts in" to Chapter 154, then any amendment to the habeas corpus application must meet the § 2244(b) requirements for successive petitions. *See supra* § 6.2.3.2.

Federal Statutes:

28 U.S.C. § 2266(b)(3)(B) (2000) (providing amended petition standard in opt-in states).

6.2.16.5 Federal Court Priorities and Deadlines for Adjudication

If a state "opts in" to Chapter 154, several time restrictions apply to federal court adjudication of the habeas petition. First, the adjudication of § 2254 or § 2255 capital cases "shall be given priority by the district court and the court of appeals over all noncapital matters" pursuant to 28 U.S.C. § 2266(a). Second, 28 U.S.C.§ 2266, as amended by Pub. L. No. 109-177 in 2006, requires that:

> (1) the district court's final determination on any capital § 2254 petition must be entered within 450 days after the date on which the application is filed or 60 days after the date on which the case is submitted for decision, whichever is earlier (this deadline may be extended no more than one 30-day period upon written order finding that the ends of justice served by the delay outweigh the public's and petitioner's interest in speedy disposition);
> (2) the district court must give the parties at least 120 days in which to complete all actions (including all pleadings, briefs, and hearing if necessary) prior to case submission;
> (3) the court of appeals' final determination of an appeal from a district court's decision of a capital § 2254 petition must be rendered within 120 days after the date the reply brief is due, or the filing of the answering brief;
> (4) the court of appeals must decide a petition for rehearing or request for rehearing en banc within 30 days of the date the petition or responsive brief is filed, and if a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination no later than 120 days after the date of the order granting the rehearing.

Section 2266(b)(4)(B) and § 2266(c)(4)(B) provide that the state may enforce these time limitations through a petition for writ of mandamus to the court of appeals if petitioning a district court's noncompliance–and the appellate court must act on such petition within thirty days–or to the Supreme Court if petitioning a court of appeals' noncompliance. The failure of a court to meet these deadlines, however, is "not a ground for granting relief from a judgment of conviction or sentence," pursuant to § 2266(b)(4)(A) and § 2266(c)(4)(A). Also, pursuant to § 2266(b)(3)(A) and § 2266(c)(3), the time limitations should not be construed to entitle the applicant to a stay

of execution to litigate any application or appeal if the applicant would not otherwise be entitled to such a stay.

Federal Statutes:

28 U.S.C. § 2266(a) (2000) (requiring that § 2254 and § 2255 cases be given priority over all noncapital cases).

28 U.S.C. § 2266(b) (2000), *as amended by* Pub. L. No. 109-177, § 507(a) (providing time restrictions for federal district court adjudication of § 2254 capital cases).

28 U.S.C. § 2266(c) (2000) (providing time restrictions for court of appeals adjudication of § 2254 capital cases).

6.2.16.6 Exhaustion of State Remedies

If a state "opts in" to Chapter 154, then an alternative standard of review applies for claims that have not been exhausted in state court. *See infra* § 6.3.3. Specifically, § 2264(a) provides as follows:

> [w]henever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is–
>
> (1) the result of State action in violation of the Constitution or laws of the United States;
> (2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or
> (3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

Federal Statutes:

28 U.S.C. § 2264(a) (2000) (providing special opt-in standard of review for

exhaustion).

6.3 Section 2254 Review: Habeas Corpus Review of State Convictions

Federal court jurisdiction to consider habeas corpus petitions filed by state prisoners derives from 28 U.S.C. § 2254, which provides that a federal court can entertain a state prisoner's habeas petition if the petitioner alleges his or her custody is in violation of the Constitution or laws or treaties of the United States. Case law has played a large part in defining the scope of this power. To assert a claim for federal habeas relief, a petitioner must raise the correct type of claim and must have exhausted state remedies on that claim. In 1996, the AEDPA substantially modified federal habeas corpus law. *See infra* § 6.3.1.

Federal Statutes:

28 U.S.C. § 2254 (2000) providing for habeas relief for state court convictions).

28 U.S.C. § 2241(c)(2) (2000) (defining scope of habeas corpus power).

6.3.1 Standard for Granting Petitions

In 1996, the AEDPA created § 2254(d), which sets forth the current standard for granting a federal habeas relief from a state conviction when the claim was adjudicated on the merits in state court. Prior to the AEDPA, federal courts reviewed state decisions *de novo*, as articulated in *Wright v. West*, 505 U.S. 277 (1992), and *Thompson v. Keohane*, 516 U.S. 99 (1995). Section 2254(d) 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–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an

> unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Supreme Court's opinion in *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000), clarified the meaning of "contrary to" and "unreasonable application of" clearly established Federal law, as determined by the Supreme Court in § 2254(d). Although Justice Stevens viewed the new law as a codification of *Teague*, the Court did not adopt his opinion. Justice O'Connor, writing for the Court, rejected the Fourth Circuit's interpretation of § 2254(d) and held that the federal court must objectively determine whether the state court's decision of federal law was erroneous or incorrect. The Supreme Court reiterated the views expressed in *Williams* in *Bell v. Cone*, 535 U.S. 685 (2002), and held that (1) under the "contrary to" clause of § 2254(d)(1), a federal habeas court may issue the writ if the state court applies a rule different from the governing law set forth in Supreme Court cases or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts; and (2) under the "unreasonable application" clause of § 2254(d)(1), the court may grant relief if the state court correctly identifies the governing legal principle from Supreme Court decisions but unreasonably applies it to the facts of the case. The Court held that under the latter clause the application must be objectively unreasonable, which is different from incorrect. *Id.* at 1850.

In a Ninth Circuit opinion subsequent to *Williams*, the court in *Tran v. Lindsey [also referred to as Van Tran v. Lindsey]*, 212 F.3d 1143 (9th Cir.), *cert. denied*, 531 U.S. 944 (2000), adopted a "clear error" test to determine whether a state court decision involved an unreasonable application of federal law. More recently the Supreme Court held in *Lockyer v. Andrade*, 538 U.S. 63 (2003), that "objectively unreasonable" and "clear error" are not the same standards, and that the "gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Id*. at 75.

Supreme Court:

Rice v. Collins, 126 S. Ct. 969 (2006) (holding that on direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error, (2) under AEDPA, however, a federal habeas court must find the state-court conclusion

"an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," and thus (3) a federal habeas court can only grant a habeas petition if it was unreasonable to credit a prosecutor's race-neutral explanations for the *Batson* challenge; also holding that here, where prosecutor struck a young African-American woman and offered as race-neutral explanations for the strike that (1) the juror rolled her eyes in response to a question from the court; (2) that she was young a might be too tolerant of a drug crime; and (3) she was single and lacked ties to the community, federal court improperly substituted its evaluation of the record for that of the state trial court, which, under §2254(d)(2), did not make an unreasonable determination of the facts in light of the evidence presented).

Evans v. Chavis, 126 S. Ct. 846 (2006) (where the Ninth Circuit had treated a decision of the California Supreme Court in denying a state habeas petition without comment or citation as on the merits, the Supreme Court held that if the appearance of the words "on the merits" in a order by the state supreme court denying a petition does not automatically warrant a holding that a filing was timely, the *absence* of those words could not automatically warrant such a holding; concurring in the judgment, Stevens, J. wrote that the Court should endorse the Ninth Circuit presumption that a ruling on the merits, *simpliciter,* means that the state court has concluded that a habeas petition was timely).

Mitchell v. Esparza, 540 U.S. 12 (2003) (holding that Sixth Circuit Court of Appeals exceeded limits imposed on federal habeas review under 28 U.S.C. § 2254(d)(1) in holding that harmless-error review was not available for Eighth Amendment claim that Ohio violated its own sentencing procedures where the indictment charged the petitioner with aggravated murder in the course of committing aggravated robbery, but did not charge him as a "principal offender"; state court's conclusion, in rejecting an ineffective assistance of counsel claim, that defense counsel's conduct was harmless in failing to insist on literal compliance with death penalty statute requirement that death penalty could only be imposed for aggravated murder during commission of aggravated robbery if defendant was named as principal offender in indictment, was not "contrary to" or an "unreasonable application" of clearly established federal law).

Lockyer v. Andrade, 538 U.S. 63 (2003) (rejecting clear error standard of *Tran v. Lindsey [also referred to as Van Tran v. Lindsey]*; holding that "objectively unreasonable" and "clear error" are not the same standards, and that the gloss of clear error "fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness").

Early v. Packer, 537 U.S. 3 (2003) (per curiam) (recognizing that state-court decision is contrary to clearly established Supreme Court precedents if it "applies a rule that

contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent" but that avoiding this pitfall does not require citation of Supreme Court cases nor does it "even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them").

Bell v. Cone, 535 U.S. 685 (2002) (holding that (1) under "contrary to" clause of § 2254(d)(1) federal habeas court may issue writ if the state court applies a rule different from governing law set forth in Supreme Court cases or if it decides case differently than Supreme Court has done on set of materially indistinguishable facts; and (2) under "unreasonable application" clause of § 2254(d)(1) court may grant relief if the state court correctly identifies governing legal principle from Supreme Court decisions but unreasonably applies it to the facts of case; holding that state court correctly identified *Strickland* principles as governing claim of ineffective assistance of counsel and that there was no merit to contention that state court's adjudication was contrary to court's clearly established law).

Penry v. Johnson, 532 U.S. 782 (2001) (finding the clearly established federal law asserted by petitioner (*Estelle v. Smith*, § 4.2) distinguishable and therefore affirming the denial of § 2254(d)(1) relief on claim; however, finding state appellate court's conclusion–that the substance of the jury instructions given at petitioner's second sentencing trial satisfied the Court's mandate in *Penry I*–was objectively unreasonable. *But see* Thomas, J., dissent, arguing state court's determination of jury instruction conforms to *Penry I* and is therefore not objectively unreasonable).

Williams (Terry) v. Taylor, 529 U.S. 362 (2000) (holding that trial counsel's *Strickland* violation was both "contrary to" and an "unreasonable application of" federal law under § 2254(d)(1); holding that § 2254(d)(1)'s "contrary to " and "unreasonable application of " clauses have independent meaning; holding "unreasonable" standard is an objective inquiry and requires more than a federal judge's determination that the state court application of federal law was erroneous or incorrect; defining "contrary to," in the context of a state court's determination of applicable law, as law being contradictory, diametrically different, opposite in character or nature, mutually opposed to clearly established federal law, or, when a state court arrives at a result different from Supreme Court precedent with a materially indistinguishable set of facts).

Angelone v. Bennett, 519 U.S. 959 (1996) (Stevens, J., dissenting) (stating that because congressional reform, limiting federal court authority to entertain successive petitions, increases the importance of first petition review, federal courts should give greater, rather than less, scrutiny to death row inmates' first petitions).

Thompson v. Keohane, 516 U.S. 99 (1995) (holding, under pre-AEDPA law, that state legal, as opposed to factual, findings are reviewed *de novo*).

Wright v. West, 505 U.S. 277, 291 (1992) (stating no correctness presumption for state legal, as opposed to factual, decisions; decisions subject to *de novo* review under pre-AEDPA law).

Ninth Circuit:

Earp v. Ornoski, 431 F.3d 1158 (9th Cir. 2005) (citing *Lockyer v. Andrade,* in holding that a federal court may not independently review the merits of a state court decision without first applying AEDPA standards, and therefore a federal court may not grant an evidentiary hearing without first determining whether the state court's decision was an unreasonable determination of the facts).

Blair v. Woodford, 319 F.3d 1087 (9th Cir. 2003) (ordering submission withdrawn in habeas appeal pending issuance of mandate in petitioner's direct appeal to California Supreme Court where petitioner sought relief on ground that state court's failure to process his appeal for 13 years constituted denial of his due process rights; holding that remedy of finding due process violation and granting unconditional writ of habeas corpus is not appropriate in absence of showing that delay adversely affected petitioner's chances to obtain reversal or vacation of his conviction or his sentence, and he could not now make such a showing because his direct appeal had only recently commenced with the filing of his opening brief).

Fisher v. Roe, 263 F.3d 906 (9th Cir. 2001) (holding that where jury readback took place without knowledge and participation of defendants or their counsel, and defendants' absence could have undermined fairness of proceedings, under AEDPA state court's denial of habeas petition was unreasonable application of clearly established federal constitutional law; holding that defendants' absence from readback was properly characterized as trial error, rather than structural error, and was therefore subject to constitutional harmless error review and could not be deemed harmless under factual circumstances; distinguishing *La Crosse v. Kernan*, below, on basis that in *LaCrosse*, attorney not only was aware of readback procedure proposed by judge, but attorney was consulted by court and agreed to proposed procedure and stipulated that his client need not be present).

Lockhart v. Terhune, 250 F.3d 1223 (2001) (granting relief pursuant to 28 U.S.C. § 2254(d), finding actual conflict of interest and finding state court's application of state law requiring finding of prejudice clearly erroneous; finding petitioner not made aware

of the specific ramifications of his waiver and state court's conclusion to the contrary was unreasonable).

La Crosse v. Kernan, 244 F.3d 702 (9th Cir. 2001) (applying § 2254(d) and denying relief because trial court's ruling–not allowing petitioner to be present at a jury readback–not contrary to Supreme Court law (since Supreme Court has never ruled on issue), notwithstanding circuit law holding that a defendant does have a Sixth Amendment right to be present at readbacks).
Downs v. Hoyt, 232 F.3d 1031 (9th Cir. 2000) (failing to apply Delgado's nondeferential test where post conviction appellate court issued no opinion but post conviction trial court issued letter opinion and findings of fact; analyzing district court's denial of relief under *Williams v. Taylor*), *cert. denied*, 532 U.S. 999 (2001).

Delgado v. Lewis, 223 F.3d 976 (9th Cir. 2000) (holding that, where the state court does not furnish a basis for its reasoning in a decision, § 2254(d) requires independent federal review to determine whether the state's decision was contrary to, or involved an unreasonable application of, clearly established federal law; stating that while independent review is not the equivalent of *de novo* review, review is undertaken through the "objectively reasonable lens ground by *Williams*; applying *Tran v. Lindsey [also referred to as Van Tran v. Lindsey]* and holding that independent review must reveal clear error).

Tran v. Lindsey [also referred to as Van Tran v. Lindsey], 212 F.3d 1143 (9th Cir.) (holding that federal court must first determine whether state court erred before determining whether the error involved an unreasonable application of controlling law within the scope of § 2254(d); holding that federal court must reverse a state court's decision involving an unreasonable application of federal law when independent review results in conclusion that clear error occurred), *cert. denied*, 531 U.S. 944 (2000), *disapproved in Lockyer v. Andrade,* 538 U.S. 63*, above.*

Duhaime v. Ducharme, 200 F.3d 597 (9th Cir. 2000) (declining to apply Ninth Circuit case law–substantially extending U.S. Supreme Court precedent–to post-AEDPA habeas claim).

Furman v. Wood, 190 F.3d 1002 (9th Cir. 1999) (noting that the Ninth Circuit has not to date defined the term "unreasonable application" nor explained the difference between "contrary to" and "unreasonable application of" as used in § 2254(d); stating that the terms reflect the same general requirement that federal courts not disturb state court determinations unless the state has failed to follow Supreme Court law).

Wilson v. Henry, 185 F.3d 986 (9th Cir. 1999) (noting that the Ninth Circuit has not yet

clearly delineated how to conduct a § 2254(d) review).

Houston v. Roe, 177 F.3d 901 (9th Cir. 1999) (determining that the Supreme Court need not have addressed a factually identical case; § 2254(d) requires only that the Supreme Court clearly determine the law).

Davis v. Kramer, 167 F.3d 494 (9th Cir. 1999) (holding that the AEDPA's standard of review provisions "reflect the . . . general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court"), *vacated and remanded on other grounds*, 528 U.S. 1133 (2000).

Canales v. Roe, 151 F.3d 1226 (9th Cir. 1998) (holding that, even assuming there was "clearly established" rule of presumed prejudice from untimely filing of notice of appeal by counsel, the facts would not support application of such a rule and relief was thus precluded under the AEDPA).

Jeffries v. Wood, 114 F.3d 1484 (9th Cir.) (finding state supreme court's decision was based on an unreasonable determination of the facts in light of the evidence presented and its application of the harmless error standard was contrary to "clearly established federal law"; stating that a factual determination is unreasonable if it would not be debatable among reasonable jurists, and that as to more debatable factual determinations, the care exercised by the state court may be important), *cert. denied*, 522 U.S. 1008 (1997).

Jones v. Wood, 114 F.3d 1002, 1013 (9th Cir. 1997) (holding that when a state court has made no findings of fact, the district court's duty to ascertain the sufficiency of the evidence by thorough review of the complete state record is unaffected by the AEDPA).

Moore v. Calderon, 108 F.3d 261 (9th Cir.) (stating that § 2254(d) does not allow reversal of state decision merely because of conflict with circuit law but rather only when it is "contrary to" or an "unreasonable application of" a Supreme Court decision; noting, in *dicta*, that mixed fact/law questions fall under the "unreasonable application" prong of § 2254(d); state's denial of defendant's timely request to represent himself was error regardless of AEDPA's application because denial violated clearly established law as determined by the Supreme Court), *cert. denied*, 521 U.S. 1111 (1997).

Baylor v. Estelle, 94 F.3d 1321 (9th Cir. 1996) (concluding that § 2254(d) did not affect the court's analysis because the relevant law was clearly established by the Supreme

Court, whether or not the AEDPA applied).

District Courts in Ninth Circuit:

Shine v. Cambra, No. C 97-1433, 1999 WL 252475 (N.D. Cal. Apr. 26, 1999) (unpublished) (finding state court's decisions contrary to, or an unreasonable application of, Supreme Court precedent in so far as trial court failed to allow defense counsel to question witness about defendant's statements and failed to strike witness's direct testimony once the trial court decided to uphold witness' assertion of privilege).

Contreras v. Rice, 5 F. Supp. 2d (C.D. Cal. 1998) (noting the state supreme court's failure to cite authority or provide written opinion, applying the Supreme Court's "look through" approach discussed in *Ylst* and looking to state appellate court's opinion to assess the state supreme court's decision and its relation to the application of § 2254(d) to petitioner's case).

Sampson v. Roe, No. C 97-1343, 1998 WL 209159 (N.D. Cal. April 28, 1998) (unpublished) (noting that the Ninth Circuit has not fully defined "unreasonable application" and concluding that the state court's decision cannot be considered so clearly incorrect as to merit relief), *aff'd*, No. 98-16289, 1999 WL 613462 (9th Cir. 1999).

Perez v. Marshall, 946 F. Supp. 1521 (S.D. Cal. 1996) (adopting magistrate's report and recommendation denying constitutional challenges to § 2254(d) based on *Marbury* judicial power, due process, and Article 1 suspension of writ; finding that § 2254(d) changes federal habeas review standard by eliminating *de novo* review of legal and mixed legal-factual claims and replacing it with deferential standard; holding that "clearly established federal law" is law articulated by Supreme Court), *aff'd*, 121 F.3d 716 (9th Cir. 1997).

Other Circuits:

Matteo v. Superintendent, SCI Albion, 171 F.3d 877 (3d Cir. 1999) (en banc) (holding that § 2254(d) mandates a two-part inquiry whereby a federal court first inquires whether the state decision was "contrary to" clearly established U.S. Supreme Court law and, if not, then whether the state judgment rests upon an objectively unreasonable application of U.S. Supreme Court law; finding "contrary to" to mean that Supreme Court precedent compelled an outcome contrary to that reached by the state court; applying § 2254(d) and affirming dismissal), *cert. denied sub nom. Matteo v. Brennan*, 528 U.S. 824 (1999).

Fisher v. Texas, 169 F.3d 295 (5th Cir. 1999) (finding that state court's decision was not "on the merits" for purposes of the AEDPA and, thus, declining to apply presumption of correctness).

Herbert v. Billy, 160 F.3d 1131, 1135 (6th Cir. 1998) (stating that part of reasonableness review under AEDPA "requires federal courts to take into account the state's care in considering the subject").

Cardwell v. Greene, 152 F.3d 331, 339 (4th Cir.) (holding that circuit court could not review a state court's application of "clearly established law" when the court does not give a rationale for its adverse determination; in such a case the federal court must "independently ascertain whether the record reveals a violation"), *cert. denied*, 525 U.S. 1037 (1998).

Liegakos v. Cooke, 106 F.3d 1381 (7th Cir. 1997) (applying new § 2254(d) and concluding that Supreme Court precedent that state transactional immunity statutes violate the compulsory process clause of Sixth Amendment is not "clearly established," so no § 2254(d) violation).

Lockhart v. Johnson, 104 F.3d 54 (5th Cir.) (applying § 2254(d) and finding no violation of "clearly established" Supreme Court precedent nor unreasonable application of law in state's use of physical restraints on disruptive defendant and state's conducting of voir dire outside of defendant's presence after defendant voluntarily waived right to be present), *cert. denied*, 525 U.S. 1123 (1997).

Berryman v. Morton, 100 F.3d 1089 (3d Cir. 1996) (analyzing § 2254(d) and concluding that state court's determination regarding trial counsel's strategy was "clearly an unreasonable application of *Strickland* to the facts," despite assumption that § 2254(d)(2) establishes a more deferential standard to federal review of state factual determinations).

McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996) (pre-AEDPA holding that when a federal court does not defer to state findings, it must provide explicit written justification, setting forth which of the seven section 2254(d) factors exist, or explaining why the state's findings are unsupported by the record pursuant to the eighth factor).

Hogan v. Hanks, 97 F.3d 189 (7th Cir. 1996) (stating that "[b]oth *Teague* and amended § 2254(d)(1) are designed to ensure that state judgements are not affected by legal rules established or materially expanded after the conviction has become final").

Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (stating that § 2254(d) is "retrenchment from former practice, which allowed federal appellate courts to rely on their own jurisprudence in addition to that of the Supreme Court"; extending the *Teague* principle by limiting the sources on which a federal court may rely in addressing the application for a writ; not limiting, however, the federal courts' independent interpretive authority regarding federal questions; a more deferential standard of review of a state court's application of "clearly established law" may be warranted when the state provides a "thoughtfully reasoned decision"), *rev'd on other grounds*, 521 U.S. 320 (1997), *limited by Williams (Terry) v. Taylor*, 529 U.S. 362 (2000).

McCain v. Gramley, 96 F.3d 288 (7th Cir. 1996) (concluding that state court's determination regarding *Batson* claim was not contrary to, or an unreasonable application of, clearly established federal law nor was it based on an unreasonable factual determination in light of the evidence presented).

Evans v. McBride, 94 F.3d 1062 (7th Cir. 1996) (distinguishing between circuit "extensions of" as opposed to "glosses on" Supreme Court law in applying § 2254(d)'s "contrary to clearly established federal law as determined by the Supreme Court" standard).

Federal Statutes:

28 U.S.C. § 2254(d) (2000) (setting standard for granting habeas corpus petitions from state convictions).

See generally:

Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 Harv. L. Rev. 1868 (1997) (analyzing language and judicial interpretation of § 2254 and identifying potential problems with some interpretations).

6.3.1.1 Retroactivity of § 2254(d)

Several courts have addressed the retroactivity of the § 2254(d) standard of review. However, the Supreme Court, in *Lindh v. Murphy*, 521 U.S. 320 (1997), implicitly overruled decisions retroactively applying § 2254(d) to cases pending at the time the AEDPA was enacted. Moreover, in *Moore v. Johnson*, 521 U.S. 1115 (1997), the Supreme Court granted certiorari and remanded for reconsideration in light of *Lindh* the Fifth Circuit's decision in *Moore v. Johnson*, 101 F.3d 1069 (5th Cir. 1996), that §

2254(d) applied to habeas cases pending at the time of the AEDPA's enactment.

Supreme Court:

Lindh v. Murphy, 521 U.S. 320 (1997) (holding that new provisions of Chapter 153 apply only to cases filed after the AEDPA became effective; reversing the Seventh Circuit's determination that the AEDPA applies to cases pending at time of enactment).

Moore v. Johnson, 521 U.S. 1115 (1997) (granting certiorari and remanding for reconsideration in light of *Lindh*, the Fifth Circuit's decision that § 2254(d) retroactively applies to habeas cases).

6.3.2 Restricted Claims

6.3.2.1 No Ineffective Assistance of Habeas Counsel Claims

In *Murray v. Giarratano*, 492 U.S. 1 (1989), the Supreme Court held that the Constitution does not require appointment of counsel for indigents seeking postconviction collateral relief from death sentences. Accordingly, there is no Sixth Amendment claim for ineffective assistance of counsel during habeas proceedings.

In 1996, Congress enacted the AEDPA which specifically codified this rule. The AEDPA added the following subsection to § 2254: "(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." The restriction is similarly stated in § 2261(e) which applies to § 2254 petitions filed under Chapter 154. *See supra* § 6.2.16.

Supreme Court:

Murray v. Giarratano, 492 U.S. 1 (1989) (holding that state is not constitutionally required to provide counsel for indigent death row inmates seeking state postconviction relief).

Federal Statutes:

28 U.S.C. § 2254(i) (2000) (prohibiting ineffective assistance of state or federal

collateral postconviction counsel claims in §2254 cases).

28 U.S.C. § 2261(e) (2000) (prohibiting ineffective assistance of collateral postconviction counsel claims in § 2254 opt-in cases).

6.3.2.2 No State Law Claims

In *Pulley v. Harris*, 465 U.S. 37 (1984), the Supreme Court established that since a federal writ of habeas corpus is proper only where a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States," a federal court may not issue a writ of habeas corpus based on a perceived error of state law. Federal courts can only vindicate federal rights and therefore cannot consider violations or erroneous applications of state law. In *Pulley*, the Court noted that *some* error could potentially be sufficiently egregious that it amounts to a denial of equal protection or due process under the Fourteenth Amendment but rejected Harris' petition as not constituting such an error.

In *Hunt v. Vasquez*, 899 F. 2d 878 (9th Cir. 1990), the Ninth Circuit held that petitioners have no federal right to a particular state law regime and, thus, when a federal habeas court redresses a violation of federal law it cannot order a state to apply a particular state law.

Supreme Court:

Estelle v. McGuire, 502 U.S. 62 (1991) (reversing Ninth Circuit finding that fundamentally unfair trial violated due process; holding instead that admission of challenged evidence and jury instructions did not rise to level of due process violation; "reemphasizing that it is not the province of a federal habeas court to reexamine state court determinations on state law questions").

Lewis v. Jeffers, 497 U.S. 764, 780 (1990) (stating that "federal habeas corpus relief does not lie for errors of state law").

Pulley v. Harris, 465 U.S. 37 (1984) (holding that federal court may not issue writ of habeas corpus based on perceived state law error).

Rose v. Hodges, 423 U.S. 19 (1975) (holding that governor's commutation of

petitioners' death sentences to life imprisonment presented state law question not reviewable by federal habeas corpus).

Ninth Circuit:

Park v. California, 202 F.3d 1146 (9th Cir.) (affirming dismissal of claim based on petitioner's failure to demonstrate a due process violation merely by citing to the Fourteenth Amendment, where issue was improper admission of evidence), *cert. denied*, 531 U.S. 918 (2000).

Vansickel v. White, 166 F.3d 953 (9th Cir. 1999) (holding that a state's denial of statutory peremptory challenges can constitute a federal due process violation cognizable in federal habeas proceedings).

Moran v. Godinez, 57 F.3d 690, 698 (9th Cir. 1994) (holding that the denial or misapplication of state procedures resulting in the deprivation of a substantive right will implicate a federally recognized liberty interest).

Fetterly v. Paskett, 997 F.2d 1295 (9th Cir. 1993) (holding that trial court's failure to comply with state law requiring trial court to weigh each aggravating factor against all of the mitigating factors violated due process and was therefore cognizable in federal habeas proceedings).

Campbell v. Blodgett, 997 F.2d 512 (9th Cir. 1992) (holding petitioner's complaint, alleging state supreme court's failure to "fulfill its statutory mandate" regarding independent proportionality review, not sufficiently egregious to establish due process violation, and thus not cognizable on habeas corpus).

Hunt v. Vasquez, 899 F. 2d 878 (9th Cir. 1990) (holding that habeas petitioners have no federal right to application of a particular state law; upon reinstating petitioner's right to a state court appeal, district court lacked authority to order state court to apply the law that would have been in effect had the appeal been timely).

Knapp v. Cardwell, 667 F.2d 1253, 1260 (9th Cir.) (stating that federal courts do not review a state's interpretation of its death penalty statute unless the interpretation is a subterfuge to avoid federal review of the state's unconstitutional deprivation of right), *cert. denied*, 459 U.S. 1055 (1982).

Bates v. Nelson, 485 F.2d 90, 96 (9th Cir. 1973) (holding that governor's clemency determination is not reviewable in federal habeas proceeding).

6.3.2.3 No Fourth Amendment Claims

A federal court may not consider a § 2254 claim that evidence obtained in violation of the Fourth Amendment should have been excluded at trial where a prisoner had a full opportunity to litigate the claim in state court. In *Stone v. Powell*, 428 U.S. 465 (1976), the Supreme Court ruled that when a state has provided a "full and fair opportunity to litigate" a Fourth Amendment claim, federal habeas review is not available. In *Stone*, the Court reasoned that the exclusionary rule for Fourth Amendment violations is not a personal constitutional right but instead is primarily a judicially created structural remedy designed to safeguard Fourth Amendment rights, generally, through its deterrent effect.

Supreme Court:

Stone v. Powell, 428 U.S. 465 (1976) (holding that where state has provided opportunity for full and fair litigation of Fourth Amendment claims, federal habeas corpus relief is not available for a claim that evidence obtained in unconstitutional search and seizure was introduced at trial).

Ninth Circuit:

Anderson v. Calderon, 232 F.3d 1053 (9th Cir. 2000) (finding Fourth Amendment issue proper habeas claim because petitioner did not have full and fair opportunity to litigate claim in state court (claim was not established until petitioner's appeal was pending cert. in the U.S. Supreme Court and California Supreme Court denied claim raised in a postconviction petition because claim not raised on appeal); also finding 48 hour arraignment rule violated but finding suppression of petitioner's confession to two additional out-of-state murders given after 48 hours expired not inappropriate because confession was voluntary and not harvest of extended prearraignment incarceration; also finding state doctor's examination of petitioner after petitioner held for more than 48 hour was fruit of poisonous tree and was error to admit at trial, but error was harmless), *cert. denied*, 534 U.S. 1036 (2001).

Woolery v. Arave, 8 F.3d 1325 (9th Cir. 1993) (holding that, absent a showing that state denied full and fair opportunity to litigate Fourth Amendment claim, *Stone* rule precludes federal court from enforcing exclusionary rule through habeas corpus even though state failed to raise *Stone* issue).

See generally:

Philip Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After Stone v. Powell*, 82 Colum. L. Rev. 1 (1982) (discussing theoretical justification for a limited federal habeas corpus Fourth Amendment review system; presenting conditions under which such review should occur).

Janet B. Jones, Annotation, *What Constitutes "An Opportunity for Full and Fair Litigation" in State Court Precluding Habeas Corpus Review under 28 U.S.C. § 2254 in Federal Court of State Prisoner's Fourth Amendment Claims*, 75 A.L.R. Fed. 9 (1985) (analyzing federal cases addressing state prisoners' "opportunity for full and fair litigation" of Fourth Amendment claims under *Stone*).

6.3.2.3.1 Limitations on *Stone v. Powell*: Fundamental Rights

The *Stone* restriction on federal habeas jurisdiction does not apply to certain fundamental rights claims that do not share the exclusionary rule's deterrence function. In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court held that *Stone* does not bar habeas consideration of Fourteenth Amendment due process claims that trial evidence was insufficient to support a conviction because that issue is "central to the basic question of guilt or innocence." Similarly, in *Rose v. Mitchell*, 443 U.S. 545 (1979), the Court held that *Stone* does not foreclose habeas review of an equal protection claim of racial discrimination in the selection of a state grand jury foreman because such a claim implicates the integrity of the judicial process and fails to raise *Stone*'s federalism concerns.

In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Court held that *Stone* does not bar Sixth Amendment ineffective assistance of counsel claims even if based on a claim that counsel failed to move to exclude illegally obtained evidence. More recently, in *Withrow v. Williams*, 507 U.S. 680 (1993), the Court also held that the *Stone* restriction does not apply to claims that a conviction rests on statements obtained in violation of *Miranda* because such claims invoke fundamental trial rights, as opposed to exclusionary rule claims, which are "necessarily divorced from the issue of guilt."

Supreme Court:

Withrow v. Williams, 507 U.S. 680 (1993) (holding that *Stone* bar to federal habeas review is not applicable to *Miranda* claims because *Miranda* claims involve fundamental trial rights).

Kimmelman v. Morrison, 477 U.S. 365 (1986) (holding that *Stone* bar does not apply to Sixth Amendment ineffective assistance claims based on incompetent representation with respect to Fourth Amendment issues).

Vasquez v. Hillery, 474 U.S. 254 (1986) (holding that grand jury discrimination claims are not barred by *Stone*).

Rose v. Mitchell, 443 U.S. 545 (1979) (holding *Stone* inapplicable to equal protection claims of racial discrimination in selection of state grand jury foreman).

Jackson v. Virginia, 443 U.S. 307 (1979) (declining to extend *Stone* to bar habeas consideration of due process claim that trial evidence was insufficient to support conviction).

See generally:

Kevin J. O'Brien, Comment, *Federal Habeas Review of Ineffective Assistance Claims: A Conflict Between Strickland and Stone?*, 53 U. Chi. L. Rev. 183 (1986) (analyzing *Stone* in light of *Strickland*).

Irene M. Rosenberg, *Withrow v. Williams: Reconstitutionalizing Miranda*, 30 Hous. L. Rev. 1685 (1993) (analyzing reinterpretation of *Miranda* in *Withrow*).

Yale L. Rosenberg, *The Supreme Court Reinforces Both Federal Habeas Corpus and Miranda*, 29 Crim. L. Bull. 418, 418–19 (1993) (stating that *Withrow* court "broadened the equitable pursuit of federal habeas courts . . . and managed to elevate the much maligned prophylactic *Miranda* rule").

Michael L. Scheier, Note, *Miranda Warnings and Habeas Corpus: The Supreme Court's Erosion of Prisoner's Fifth Amendment Rights in Duchworth v. Eagan*, 59 U. Cin. L. Rev. 261 (1990) (addressing, prior to *Withrow*, whether *Miranda* claims from state court should be collaterally reviewed by federal habeas courts).

6.3.2.4 No Claims of Error in State Postconviction Proceedings

In *Franzen v. Brinkman*, 877 F.2d 26 (9th Cir. 1989), the Ninth Circuit followed other circuits in holding that a federal habeas court may not review a petition alleging errors in the state postconviction review process. In *Dickerson v. Walsh*, 750 F.2d 150 (1st Cir. 1984), however, the First Circuit held to the contrary.

Ninth Circuit:

Franzen v. Brinkman, 877 F.2d 26 (9th Cir. 1989) (holding that a federal habeas court may not review claims of error in state postconviction review proceedings).

Other Circuits:

Millard v. Lynaugh, 810 F.2d 1403, 1410 (5th Cir. 1987) (holding that a federal habeas court may not review claims of error in state postconviction review proceedings).

Kirby v. Dutton, 794 F.2d 245, 247–48 (6th Cir. 1986) (holding that a federal habeas court may not review claims of error in state postconviction review proceedings).

Dickerson v. Walsh, 750 F.2d 150 (1st Cir. 1984) (holding that habeas relief *is* available for claims of error in state postconviction review proceedings).

Mitchell v. Wyrick, 727 F.2d 773, 774 (8th Cir. 1984) (holding that a federal habeas court may not review claims of error in state postconviction review proceedings).

6.3.2.5 No "Freestanding" Actual Innocence Claims

Newly discovered evidence generally does not provide a basis for federal habeas relief unless it relates to the constitutionality of a petitioner's conviction. In *Herrera v. Collins*, 506 U.S. 390 (1993), the Supreme Court held that a claim of actual innocence based on newly discovered evidence does not provide an independent basis for federal habeas relief. The Court held that the purpose of habeas corpus is to correct constitutional errors and not to reweigh questions of fact. Consequently, a "freestanding" claim of actual innocence, unaccompanied by a claim of constitutional error, is not cognizable by a federal habeas court. The Court stated that such claims

should instead be addressed through executive clemency procedures.

The *Herrera* Court noted, however, that a truly persuasive innocence claim in a capital case would render the petitioner's execution unconstitutional but did not describe exactly what type of claim would qualify. More recently, however, the Court explained the various levels of proof required in asserting an actual innocence claim. In *Schlup v. Delo*, 513 U.S. 298 (1995), the Court reemphasized the distinction between a claim of actual innocence *as* the constitutional violation itself (i.e., despite a trial free of constitutional error) and a claim of actual innocence accompanied by constitutional trial error. The Court stated that in the latter instance the conviction is entitled to more respect than one that is the product of an error-free trial. The *Schlup* Court went on to explain that a claim of innocence alone–as in *Herrera*–would require evidence that would "unquestionably establish innocence," but a claim of innocence accompanied by constitutional violation claim requires only sufficient doubt about the petitioner's guilt to justify the conclusion that execution would be a miscarriage of justice.

In *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (en banc), *cert. denied*, 523 U.S. 1133 (1998), the Ninth Circuit emphasized that a petitioner need not prove that he is actually innocent in order to pass through the *Schlup* gateway. The petitioner need only present evidence of innocence that undermines confidence in the outcome of the trial. As the *Carriger* court stated, "the claim is procedural, not substantive."

The Supreme Court has granted certiorari in *House v. Bell*, 125 S. Ct. 2991 (2005) (mem.) with the following as a question presented: "What constitutes a 'truly persuasive showing of actual innocence' pursuant to *Herrera v. Collins* sufficient to warrant freestanding habeas relief?"

Supreme Court:

House v. Bell, 125 S. Ct. 2991 (2005) (mem.) (granting *certiorari* with the following questions presented: "1. Did the majority below err in applying this Court's decision in *Schlup v.Delo* to hold that Petitioner's compelling new evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before the state courts – merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at the original trial? 2. What constitutes a 'truly persuasive showing of actual innocence' pursuant to *Herrera v. Collins* sufficient to warrant freestanding

habeas relief?")

Schlup v. Delo, 513 U.S. 298 (1995) (distinguishing *Herrera* stand-alone actual innocence claim from *Schlup* actual innocence accompanied by constitutional error claim; holding that actual innocence standard in latter case is whether constitutional violation probably resulted in the conviction of one who is "actually innocent;" *Herrera* claim fails without new facts that "unquestionably establish innocence").

Herrera v. Collins, 506 U.S. 390 (1993) (holding that actual innocence claims based on newly discovered evidence do not provide basis for federal habeas relief absent an independent constitutional violation; assuming, without deciding, that truly persuasive actual innocence demonstration in a capital case would render execution of defendant unconstitutional and would warrant federal habeas relief if no state avenue were open for such a claim).

Townsend v. Sain, 372 U.S. 293 (1963) (stating that newly discovered evidence relating to state prisoner's guilt is not a ground for federal habeas relief; such evidence is relevant only if it bears on the constitutionality of petitioner's detention), *overruled in part*, 504 U.S. 1 (1992).

Ninth Circuit:

Majoy v. Roe, 296 F.3d 770 (9th Cir. 2002) (concluding that petitioner in noncapital case, who alleged that his conviction rested on perjured testimony of an accomplice to murders and that there was a confrontation clause violation because the witness' preliminary hearing testimony was introduced when the witness refused to testify at trial, might fall within narrow class of cases implicating fundamental miscarriage of justice; noting that if petitioner passed through *Schlup* gateway, question to be answered was whether that had consequence of overriding AEDPA's statute of limitation, a question yet to be decided by either Ninth Circuit or U.S. Supreme Court; remanding to district court for determination of whether petitioner could pass through actual innocence gateway).

Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (en banc) (emphasizing that a petitioner need not prove that he is actually innocent in order to pass through the *Schlup* gateway; petitioner need only present evidence of innocence that undermines confidence in the outcome of the trial; "the claim is procedural, not substantive"), *cert. denied*, 523 U.S. 1133 (1998).

Coley v. Gonzales, 55 F.3d 1385, 1387 (9th Cir. 1995) (holding, in non-capital case, that *Herrera* precludes relief based solely on petitioner's actual innocence of the

crime).

Swan v. Peterson, 6 F.3d 1373 (9th Cir. 1993) (holding that newly discovered evidence is a ground for federal habeas corpus relief only when it bears on the constitutionality of an applicant's conviction *and* would probably produce an acquittal).

Clark v. Lewis, 1 F.3d 814, 821 (9th Cir. 1993) (implying that, in a capital case, *Herrera* forecloses habeas relief based solely on petitioner's actual innocence of death penalty).

See generally:

Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 Buff. L. Rev. 501 (1996) (arguing that execution of innocent person violates Eighth and Fourteenth Amendments).

Kathleen C. Boyd, Note, *The Paradox of Actual Innocence in Federal Habeas Corpus After Herrera v. Collins*, 72 N.C. L. Rev. 479 (1994) (reviewing *Herrera* and analyzing the resulting confusion surrounding federal habeas innocence claims).

Greg Bylinsky, *Recent Development: Herrera v. Collins: A New Innocence Principle?*, 11 Harv. Blackletter J. 191 (1994) (arguing that *Herrera* majority establishes principle that an actual innocence claim can be basis for avoiding death sentence; criticizing Court's failure to specify showing necessary to establish such right).

James G. Clessuras, *Schlup v. Delo: Actual Innocence as Mere Gatekeeper*, 86 J. Crim. L. & Criminology 1305 (1996) (arguing that *Schlup* should have answered question of whether execution of an innocent person is unconstitutional).

Kris T. Daniel, *Sawyer v. Whitley, The Deadly Game of Procedures in Death Penalty Cases*, 61 UMKC L. Rev. 599 (1993) (analyzing impact of *Sawyer*'s restrictive rule on availability of habeas relief for innocence claims; reviewing impact on Missouri habeas law).

Vernon E. Googe III, *Herrera v. Collins–Federal Habeas Corpus Review and Claims of Actual Innocence*, 27 Ga. L. Rev. 971 (1993) (focusing on *Herrera* and analyzing federal court's dilemma in habeas cases alleging innocence).

Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 Buff. L. Rev. 469 (1996) (arguing that nature of capital cases multiplies likelihood of error and addressing special factors that produce error in capital

cases).

Kelli Hinson, Comment, *Post Conviction Determination of Innocence for Death Row Inmates*, 48 SMU L. Rev. 231 (1994) (critiquing actual innocence claims; detailing and analyzing adequacy of procedures in place for attack on conviction).

Jill Hanson Reinmuth, *When Actual Innocence is Irrelevant: Federal Habeas Relief for State Prisoners After Herrera v. Collins*, 69 Wash. L. Rev. 279 (1994) (analyzing role of innocence in habeas corpus jurisprudence and summarizing *Herrera*).

Robert C. Stacy II, Note, *Schlup v. Delo: The Result of Curbing Unlimited Jurisdiction by Limiting Discretion*, 74 N.C. L. Rev. 897 (1996) (focusing on miscarriage of justice exception to procedural default, and *Schlup* standard, and predicting future problems in application of *Schlup* because of inconsistencies in Supreme Court habeas jurisprudence).

Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. Rev. 303 (1993) (analyzing *Herrera* and Supreme Court's new "innocence-focus" in habeas cases).

J. Thomas Sullivan, *"Reforming" Federal Habeas Corpus: The Cost to Federalism; The Burden to Defense Counsel; And The Loss of Innocence*, 61 UMKC L. Rev. 291 (1992) (arguing that *Herrera* leaves law unclear, retreats from Court's earlier emphasis on innocence, and allows states to preclude judicial review of constitutional violations).

James J. Turocy, *Recent Decision, Schlup v. Delo*, 34 Duq. L. Rev. 373 (1996) (summarizing *Schlup*).

6.3.3 Exhaustion of State Remedies

Traditionally, as a matter of comity, not jurisdiction, a federal court would not consider a habeas corpus petition until the petitioner exhausted available state remedies with respect to each claim. In *Rose v. Lundy*, 455 U.S. 509 (1982), the Supreme Court explained that the exhaustion doctrine is designed to protect the state courts' role in the enforcement of federal law and prevent the disruption of state judicial proceedings. The federal statute providing for habeas relief from state custody, 28 U.S.C. § 2254, provides that such relief is not available unless the applicant "exhausted the remedies available in the courts of the state." The exhaustion requirement is satisfied where the federal claim's substance is "fairly presented" to the highest state court, and that court

disposes of the claim on the merits.

In *Granberry v. Greer*, 481 U.S. 129 (1987), the Supreme Court created an exception to the exhaustion requirement. The Court held that if a state fails to raise exhaustion at the district court level, whether inadvertently or otherwise, the appellate court should determine whether the interests of comity, federalism, and justice are better served by addressing the merits forthwith or by first requiring a series of additional state and district court proceedings. If it is perfectly clear that the petition does not raise even a colorable federal claim, no interest is served by requiring exhaustion. The Supreme Court specifically noted that exhaustion is *not* an absolute bar whenever raised and that the failure to raise it as a defense does not amount to an absolute waiver by the state. Instead, federal courts should take the "middle course" described above in evaluating such situations.

In *Plunkett v. Johnson*, 828 F.2d 954 (2d Cir. 1987), the Second Circuit extended *Granberry* to an exhaustion waiver in district court. In *Ybarra v. Sumner*, 678 F. Supp. 1480 (D. Nev. 1988), the District of Nevada questioned the Second Circuit's approach. The *Ybarra* court reasoned that the application of *Granberry* at the district court level entails different considerations than at the appellate level. For instance, less time is wasted if the district court requires exhaustion.

In 1996, the AEDPA amended § 2254 to specifically allow a federal court to deny an unexhausted habeas corpus petition on the merits. Section 2254(b) provides:

> (b)(1) 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 unless it appears that–
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through

counsel, expressly waives the requirement.

In *Cassett v. Stewart,* 406 F.3d 614 (9th Cir. 2005), *cert. denied,* 2006 WL 386448 (U.S. Feb. 21, 2006), the Ninth Circuit adopted the *Granberry* standard in determining when it is appropriate to deny an unexhausted claim on the merits under 28 U.S.C. § 2254(b)(2) and thus held that a federal court may deny an unexhausted petition on the merits only when it is perfectly clear that the applicant does not raise even a colorable federal claim.

The AEDPA also created 28 U.S.C. § 2264(a), which applies when a state "opts-in" to the special capital chapter by meeting the chapter's requirements. If a state "opts-in," then the alternative review standard of § 2264(a) for unexhausted claims applies. *See supra* § 6.2.16.

Supreme Court:

Coleman v. Thompson, 501 U.S. 722, 731 (1991) (stating long-held rule that petition should be dismissed where petitioner has not exhausted available state remedies).

Castille v. Peoples, 489 U.S. 346, 349 (1989) (stating that petition should be dismissed where state remedies have not been exhausted).

Granberry v. Greer, 481 U.S. 129 (1987) (remanding for further proceedings because, due to state's failure to raise exhaustion defense, court did not determine whether interests of justice would be better served by addressing merits or requiring additional state proceedings before doing so).

Rose v. Lundy, 455 U.S. 509, 518 (1982) (stating that exhaustion doctrine furthers federalism and comity by protecting state courts' role in enforcement of federal law, and by preventing disruption of state judicial proceedings).

Duckworth v. Serrano, 454 U.S. 1 (1981) (per curiam) (reversing ruling that "clear violation of petitioner's rights" entitles petitioner to relief without exhaustion; exhaustion requirement can be ignored "only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief").

Picard v. Connor, 404 U.S. 270 (1971) (holding that petitioner must fairly present

federal claims to state courts before presentation to federal courts).

Ex Parte Royall, 117 U.S. 241, 250-51 (1866) (describing comity nature of exhaustion doctrine).

Ninth Circuit:

Cassett v. Stewart, 406 F.3d 614 (9th Cir. 2005) (holding that a federal court may deny an unexhausted petition on the merits only when it is perfectly clear that the applicant does not raise even a colorable federal claim), *cert. denied,* 2006 WL 386448 (U.S. Feb. 21, 2006).

Brown v. Maass, 11 F.3d 914 (9th Cir. 1993) (applying *Granberry* and remanding case to district court where state failed to assert exhaustion defense; no exceptional circumstances prevented state from raising defense; comity and federalism interests not better served by requiring state supreme court to address claim's merits before federal court).

Taylor v. Kincheloe, 920 F.2d 599, 602 n.1 (9th Cir. 1990) (noting that although a mixed petition normally must be dismissed under *Rose*, reaching merits best serves administration of justice where state failed to raise exhaustion and issues are primarily issues of law).

O'Bremski v. Maass, 915 F.2d 418 (9th Cir. 1990) (holding that where state failed to raise exhaustion, petitioner raised no colorable federal claims, and there were no unresolved factual questions, judicial efficiency requires petition's dismissal without first requiring exhaustion).

Toomey v. Bunnell, 898 F.2d 741, 744 (9th Cir.) (holding that where state failed to raise exhaustion, administration of justice better served by reaching merits), *cert. denied*, 498 U.S. 960 (1990).

Ames v. Endell, 856 F.2d 1441, 1444 (9th Cir. 1988) (setting forth *Granbury* review standard for reviewing unexhausted claims and state waiver).

Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985) (stating that exhaustion requires "fair presentation" to highest state court).

Sherwood v. Tomkins, 716 F.2d 632 (9th Cir. 1983) (holding that, while state appeal is pending, petitioner cannot seek federal habeas review of state's decision regarding appointment of counsel).

Batchelor v. Cupp, 693 F.2d 859 (9th Cir. 1982) (indicating that district and appellate court may raise exhaustion *sua sponte*).

Sweet v. Cupp, 640 F.2d 233 (9th Cir. 1981) (holding that state court must issue ruling on claim's merits prior to federal court consideration).

Harris v. Superior Ct., 500 F.2d 1124, 1126-27 (9th Cir. 1974) (en banc) (stating that exhaustion is a matter of comity, not jurisdiction).

District Courts in Ninth Circuit:

Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz. 1999) (dismissing petitioner's *Ford* claim without prejudice to allow petitioner to assert and exhaust the claim in state court).

Ybarra v. Sumner, 678 F. Supp. 1480 (D. Nev. 1988) (questioning *Granberry*'s application at district level; even if applicable, exhaustion was necessary in instant case because state court had no opportunity to consider a substantial constitutional law question).

Other Circuits:

Nowaczyk v. Warden, New Hampshire State Prison, 299 F.3d 69 (1st Cir. 2002) (holding that district court abused its discretion in dismissing, rather than staying, habeas petition containing only fully exhausted claims because of pendency of state proceedings on another, unexhausted claim; also holding that district court is not required to immediately adjudicate fully exhausted petition in these circumstances, particularly where pending state claim may be outcome determinative, but that compelling reason must be present before dismissal may be used in lieu of stay, given risk that habeas petitioner may run afoul of AEDPA's limitations period if habeas petition is not promptly refiled at conclusion of state proceedings).

Lambert v. Blackwell, 134 F.3d 506 (3d Cir. 1997) (discussing the relationship between the AEDPA and prior Supreme Court precedent regarding exhaustion), *cert. denied*, 532 U.S. 919 (2001).

McWilliams v. State of Colorado, 121 F.3d 573 (10th Cir. 1997) (adopting the view "espoused by every circuit that has considered this issue" that refiling after state exhaustion does not qualify as a second or successive petition).

In re Gasery, 116 F.3d 1051 (5th Cir. 1997) (holding that where petitioner's original petition was dismissed for lack of exhaustion, petitioner need not seek leave from the court of appeals to refile following exhaustion).

Hoxsie v. Kerby, 108 F.3d 1239 (10th Cir.) (noting that § 2254(b)(2), alone, does not determine when a court should dismiss a petition on merits instead of requiring exhaustion; reading statute in conjunction with *Granberry* and concluding that court should dismiss when "convinced petition has no merit" to avoid needless state court litigation), *cert. denied*, 522 U.S. 844 (1997).

Anderson v. Groose, 106 F.3d 242 (8th Cir. 1997) (1997) (holding that "arguable factual commonality" existed between state appellate argument that trial court preclusion of certain testimony prevented effective assistance and argument that trial counsel was ineffective, thus allowing federal court to reach merits).

Hatch v. State of Oklahoma, 92 F.3d 1012 (10th Cir. 1996) (holding that exhaustion is not a prerequisite to appellate court consideration of application for leave to file a second or successive habeas petition but is instead an issue for the district court to consider once leave is granted).

Davis v. Dugger, 829 F.2d 1513 (11th Cir. 1987) (holding that it was error to dismiss habeas petition for lack of exhaustion before the state either set out exhaustion defense or waived it).

Plunkett v. Johnson, 828 F.2d 954 (2d Cir. 1987) (holding that *Granberry* applies to district court proceeding; since petitioner presented no colorable federal claims, district court should have dismissed on basis that exhaustion patently unnecessary).

District Courts in Other Circuits:

Kelly v. Keane, No. 96 Civ. 1742, 1996 WL 640892, at *2 n.1 (S.D.N.Y. Nov. 4, 1996) (declining to deny petition on merits under § 2254(b)(2) notwithstanding failure to exhaust because AEDPA does not apply retroactively to habeas petitions in noncapital cases).

Federal Statutes:

28 U.S.C. § 2254(b) (2000) (setting forth federal court exhaustion requirements and providing for denial of habeas application without exhaustion).

See generally:

Matthew L. Anderson, Note, *Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting*, 79 Minn. L. Rev. 1197 (1995) (proposing new flexible exhaustion doctrine where state court review is discretionary rather than of right).

David B. Franks, *Federal Court Discretion and the Exhaustion Doctrine: Granberry v. Greer*, 26 Crim. L. Bull. 210 (1990) (discussing how *Granberry* refined exhaustion doctrine and "streamlined" habeas corpus review).

Jan Neuenschwander, *Supreme Court Review: Habeas Corpus–Much Ado About Very Little: The Total Exhaustion Rule: Rose v. Lundy*, 73 J. Crim. L. 1641 (1982) (examining the bases of disagreement among *Rose* opinions regarding problem of piecemeal habeas corpus litigation and arguing that Court's solution–total exhaustion rule–fails to solve problem).

6.3.3.1 "Full and Fair Presentation" to State Court

In *Picard v. Connor*, 404 U.S. 270 (1971), the Supreme Court stated that a federal claim is "fairly presented if the petitioner describes the operative facts and legal theories on which he or she bases the claim." A state prisoner ordinarily does not "fairly present" a federal claim to a state court if that court must read beyond a petition, a brief, or similar papers to find material that will alert it to the presence of a federal claim in order to find material, such as a lower court opinion, that does so. *Baldwin v. Reese,* 541 U.S. 27 (2004). A petitioner must fairly present the claim to the state's highest court in order to satisfy the "full presentation" requirement of 28 U.S.C. § 2254. In *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), the Supreme Court held that claims must be presented in the state court of last resort even when review in that court is discretionary.

Supreme Court:

Dye v. Hofbauer, 126 S. Ct. 5 (2005) (per curiam) (holding that the failure of a state appellate court to mention a federal claim does not mean that the claim was not presented to it, and that whether the exhaustion requirement has been satisfied cannot turn upon whether the state court chose to ignore in its opinion a federal constitutional

claim squarely raised in the petitioner's brief).

Baldwin v. Reese, 541 U.S. 27 (2004) (holding that a federal claim is not "fairly presented" to a state court if that court must read beyond a petition, a brief, or similar papers to find material that will alert it to the presence of a federal claim in order to find material, such as a lower court opinion, that does so; rejecting contention that petition nonetheless fairly presented federal ineffective assistance claim because "ineffective" is a term of art in Oregon that refers only to federal law claims since petitioner failed to demonstrate that state law uses "ineffective assistance" as referring only to federal law rather than a similar state law claim).

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) (holding that to satisfy the exhaustion requirement, a state prisoner must present his claims in a petition to the state court of last resort even when review in that court is discretionary).

Duncan v. Henry, 513 U.S. 364 (1995) (reversing the Ninth Circuit and holding there was no fair presentation–and thus no exhaustion–where petitioner failed to raise federal constitutional challenge to evidence in state court; mere similarity of claims is insufficient to exhaust state remedies).

Castille v. Peoples, 489 U.S. 346 (1989) (holding fair presentation requirement not satisfied by first-time presentation of claim to state appellate court under state procedure that permits review "only when there are special and important reasons therefor").

Vasquez v. Hillery, 474 U.S. 254, 257 (1986) (stating that exhaustion requirement is satisfied once federal claim has been "fairly presented" to state's highest court).

Anderson v. Harless, 459 U.S. 4 (1982) (holding that mere presentation of facts necessary to support a federal claim, or presentation of state claim similar to federal claim, is insufficient; to exhaust, petitioner must "fairly present" the "substance" of federal claim).

Smith v. Digmon, 434 U.S. 332, 333 (1978) (per curiam) (holding that when claim is squarely raised in state court, it is exhausted despite state court's failure to mention the claim in its opinion).

Picard v. Connor, 404 U.S. 270 (1971) (holding "fair presentation" requires state court must have opportunity to apply controlling legal principles to the facts bearing upon the claim).

Wilwording v. Swenson, 404 U.S. 249, 249–50 (1971) (per curiam) (noting that, although 28 U.S.C. § 2254(c)'s language could be read to foreclose habeas review by requiring a state prisoner to invoke any possible avenue of state review, the Supreme Court has never interpreted the exhaustion requirement in such a restrictive fashion).

Fay v. Noia, 372 U.S. 391 (1963) (holding that exhaustion doctrine does not include U.S. Supreme Court proceedings).

Brown v. Allen, 344 U.S. 443, 448–49 n.3 (1953) (examining § 2254(c)'s language that petitioner has not exhausted so long as there is a right to raise the claim "by any available state procedure"; holding that once state court rules on claim, request for state collateral relief based on same evidence and issues decided by direct review is not necessary).

Ninth Circuit:

Peterson v. Lampert, 319 F.3d 1153 (9th Cir. 2003) (en banc) (in a noncapital habeas case, rejecting any suggestion in *Lyons v. Crawford* and *Gatlin v. Madding,* both below, that for purposes of exhaustion, counseled and *pro se* filings in state court must be read the same way; holding that petitioner did not fairly present his federal ineffective assistance of counsel claim to the Oregon Supreme Court because on the face of his petition for review in that court, he expressly limited his claim to state constitutional law; also holding that even though petitioner presented federal claim to Oregon Court of Appeals, Oregon Rule of Appellate Procedure 9.20, which allows the Oregon Supreme Court to decide all issues properly presented to the Oregon Court of Appeals was not sufficient to alert the supreme court that petitioner was seeking review of the federal issue where the petition for review did not refer to petitioner's appellate brief and did not refer to federal law, and court of appeals' opinion did not specifically address federal claim; joining the Second, Third, Sixth, Seventh, and Eighth Circuits in holding that for purposes of exhaustion, citation to a state case analyzing federal constitutional issue serves the same purpose as citation to a federal case analyzing such an issue).

Lyons v. Crawford, 247 F.3d 904 (9th Cir. 2000) (declining to apply a more liberal test to determine whether claim exhausted in state court for petitioners who acted *pro se* in their state postconviction proceeding; all petitioners must show an explicit federal basis for their state court claims).

Hiivala v. Wood, 195 F.3d 1098 (9th Cir. 1999) (per curiam) (holding petitioner failed to exhaust federal due process issue in state court because petitioner presented claim in

state court only on state law grounds), *cert. denied*, 529 U.S. 1009 (2000).

Gatlin v. Madding, 189 F.3d 882 (9th Cir. 1999) (affirming district court's finding that *pro se* petitioner did not "fairly present" federal claim to the state supreme court where he failed to explicitly identify the federal legal basis for his claim), *cert. denied*, 52 U.S. 1087 (2000).

Keating v. Hood, 133 F.3d 1240 (9th Cir. 1997) (holding that petitioner did not fairly present, and thus did not exhaust, his federal constitutional claim in state court; dismissing petition).

Reutter v. Crandel, 109 F.3d 575 (9th Cir.) (holding that exhaustion requirement may be met by inclusion of issue in the prayer of the state supreme court petition), *cert. denied*, 522 U.S. 851 (1997).

Johnson v. Zenon, 88 F.3d 828 (9th Cir. 1996) (holding state remedies not exhausted by assertion of evidentiary error in state court that is "essentially the same" as claim raised in federal petition).

Jennison v. Goldsmith, 940 F.2d 1308 (9th Cir. 1991) (holding that defendant must seek discretionary review in state supreme court, as well as direct review in intermediate appellate court, to exhaust state law remedies).

McNeeley v. Arave, 842 F.2d 230 (9th Cir. 1988) (holding that even though petitioner had originally filed in state supreme court, which assigned case to court of appeals, petitioner's failure to return to supreme court for review of appellate court decision constituted failure to exhaust).

Campbell v. Kincheloe, 829 F.2d 1453, 1455 n.1 (9th Cir. 1987) (holding that issues presented to state court by way of a motion for stay are exhausted if the state court ruled on the merits).

Turner v. Compoy, 827 F.2d 526, 528–29 (9th Cir. 1987) (holding that petitioner's failure to choose and proceed per statutorily mandated state court route renders claims unexhausted).

Lindquist v. Gardner, 770 F.2d 876, 878 (9th Cir. 1985) (holding that, except in extraordinary circumstances, adherence to Idaho's Uniform Postconviction Sentencing Act is a required step in a state prisoner's postconviction remedies).

Kellotat v. Cupp, 719 F.2d 1027, 1030 (9th Cir. 1983) (holding that petitioner must

present state court claim through proper procedures in order to satisfy fair opportunity requirement).

Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979) (holding that, to satisfy exhaustion requirement, a claim must be presented to highest state court).

Other Circuits:

Aldridge v. Dugger, 925 F.2d 1320 (11th Cir. 1990) (holding that petitioner presented claim's substance to state courts and thereby fulfilled exhaustion requirement; presentation of additional facts in support of claim in federal court is not precluded).

6.3.3.2 New Evidence in Federal Court

In *Vasquez v. Hillery*, 474 U.S. 254 (1986), the Supreme Court indicated that where new evidence supporting a federal claim fundamentally alters that claim, the claim becomes unexhausted.

Supreme Court:

Vasquez v. Hillery, 474 U.S. 254, 260 (1986) (holding that supplemental evidence supporting unconstitutional grand jury composition claim did not circumvent petitioner's obligation to exhaust where evidence did not fundamentally alter the claim considered by the state courts).

Ninth Circuit:

Nevius v. Sumner, 852 F.2d 463, 470 (9th Cir. 1988) (holding that court cannot consider new, unexhausted evidence that places claim in a significantly different posture).

Aiken v. Spalding, 841 F.2d 881, 883 (9th Cir. 1988) (per curiam) (holding that new evidence in a federal habeas proceeding that "substantially improves" petitioner's claim renders the claim unexhausted; expert's studies using modern sound equipment rendered petitioner's claim, that interrogating officers ignored his requests for an attorney, unexhausted).

Other Circuits:

Miller v. Estelle, 677 F.2d 1080, 1083–84 (5th Cir. 1982) (holding that new factual allegations, cumulative to those presented in state court, do not require exhaustion).

6.3.3.3 State Postcard Denials

When a state denies a habeas claim without citation or comment, known as a "postcard" denial, the decision is deemed to be on the merits for exhaustion purposes if the state has a longstanding practice of exercising original habeas jurisdiction.

Supreme Court:

Ylst v. Nunnemaker, 501 U.S. 797 (1991) (reversing the Ninth Circuit and ruling that where one reasoned state judgment rejects a federal claim, later unexplained orders upholding that judgment or rejecting the claim are presumed to rest upon the same ground).

Ninth Circuit:

Lewis v. Borg, 879 F.2d 697, 698 (9th Cir. 1989) (holding that state supreme court's denial of habeas claim without citation or comment constitutes a decision on the merits).

Tacho v. Martinez, 862 F.2d 1376, 1378–79 (9th Cir. 1988) (holding that when a state appellate court denied habeas petition solely on procedural grounds and state supreme court issued postcard denial, a federal court should not assume the state supreme court ignored procedural rules and passed solely on the merits).

Dickey v. Lewis, 859 F.2d 1365, 1368 (9th Cir. 1988) (holding that where state trial court expressly ruled only on merits in postconviction review, and state supreme court denied petition without explanation, a federal court will presume the state court decision was on the merits).

McQuown v. McCartney, 795 F.2d 807, 808–10 (9th Cir. 1986) (holding that when state appellate court ruled on procedural grounds in postconviction proceeding, federal court will not presume that state supreme court's postcard order upon review is on the merits).

Sweet v. Cupp, 640 F.2d 233, 237 (9th Cir. 1981) (presuming that state supreme court's postcard denial is on procedural grounds where state does not have a longstanding practice of exercising original habeas jurisdiction).

Harris v. Superior Ct., 500 F.2d 1124, 1128–29 (9th Cir. 1974) (en banc) (deeming that state supreme court's postcard habeas denial, lacking comment or citation, is a decision on the merits for exhaustion purposes).

6.3.3.4 Mixed Petitions

In *Rose v. Lundy*, 455 U.S. 509 (1982), the Supreme Court held that a federal court must dismiss entirely a "mixed" petition containing both exhausted and unexhausted claims. However, a petitioner with mixed claims must be given the opportunity to amend the mixed petition to present only exhausted claims. *James v. Giles*, 221 F.3d 1074 (9th Cir. 2000). The required dismissal under *Rose* is without prejudice, so the habeas petitioner may return to federal court after state exhaustion. However, post-AEDPA petitioners still must protect themselves against the statute of limitations. See § 6.3.3.5 *infra* and §§ 6.2.1, 6.2.4 *supra*.

Supreme Court:

Pliler v. Ford, 542 U.S. 225 (2004) (in a noncapital case under the AEDPA in which a *pro se* petitioner had timely filed mixed habeas petitions, the petitions were dismissed without prejudice, petitioner returned to state court to exhaust remaining claims, and the petition was then dismissed in federal court as time-barred, holding that the failure of the district court to have given the petitioner two specific warnings regarding the stay-and-abeyance procedure before dismissing the mixed petitions did not make the dismissal improper; stating that because the dismissals were not improper, the Supreme Court need not address the second question presented, whether respondent's subsequent untimely petitions related back to his "improperly dismissed" initial petitions).

Rose v. Lundy, 455 U.S. 509 (1982) (holding that federal court must dismiss a habeas petition that contains a mix of exhausted and unexhausted claims; providing option of amending petition to delete unexhausted claims rather than suffer dismissal).

Strickland v. Washington, 466 U.S. 668, 684 (1984) (stating that exhaustion rule requiring dismissal of mixed petitions "though to be strictly enforced, is not

jurisdictional").

Ninth Circuit:

James v. Giles, 221 F.3d 1074 (9th Cir. 2000) (finding petitioner has right to delete unexhausted claims from mixed petition in lieu of suffering dismissal).

Matthews v. Evatt, 105 F.3d 907 (9th Cir.) (stating that when petition includes both exhausted and unexhausted claims, district court must dismiss entire petition), *cert. denied* 522 U.S. 833 (1997).

Phillips v. Vasquez, 56 F.3d 1030, 1034–35 (9th Cir. 1995) (recognizing that "[i]n *Rose*, the Supreme Court held that a petition containing both exhausted and unexhausted claims must be dismissed").

District Courts in Other Circuits:

Kethley v. Berge, 14 F. Supp. 2d 1077 (E.D. Wis. 1998) (dismissing mixed petition without prejudice and allowing petitioner to retain original filing date to avoid the AEDPA's statute of limitations).

Williams v. Vaughn, 3 F. Supp. 2d 567 (E.D. Pa.) (holding that, to eliminate any risk of bar from the AEDPA's statute of limitations, amended capital petition filed after the AEPDA's enactment and dismissed without prejudice as mixed would "relate back" to the original pre-AEDPA petition pursuant to Fed. R. Civ. P. 15(c)), *motion denied*, No. Civ. A. 95-7977, 1998 WL 238466 (E.D. Pa. May 8, 1998).

See generally:

Mark J. Ryan, Note, *Rose v. Lundy: The Supreme Court Adopts the Total Exhaustion Rule for Review of Mixed Habeas Corpus Petitions*, 1984 Wis. L. Rev. 859 (1984) (analyzing *Rose* and recommending that federal courts reject the plurality's expanded abuse-of-the-writ standard in order to protect petitioner's interest in swift habeas review).

Gary A. Sultz, Note, *Federal Habeas Corpus: The Exhaustion Doctrine and Mixed Petitions–Rose v. Lundy and Exhaustion Under the Illinois Post Conviction Remedies*, 1983 U. Ill. L. Rev. 515 (1983) (examining implementation of exhaustion doctrine in context of mixed petition case and criticizing *Rose* decision).

6.3.3.5 Holding Petition in Abeyance Pending Exhaustion

In *Neuschafer v. Whitley*, 860 F.2d 1470 (9th Cir. 1988), the Ninth Circuit stated that when a petitioner does not exhaust state remedies before filing a federal habeas petition, the district court may hold the federal petition in abeyance, issue a stay of execution, and allow the petitioner an opportunity to exhaust state remedies.

In *Calderon v. United States Dist. Ct. for the E. Dist. of Cal. (Gordon)*, 107 F.3d 756 (9th Cir. 1997), the Ninth Circuit specified that *Neuschafer* does not apply to "mixed" petitions. However, in *Calderon v. United States Dist. Ct. for the N. Dist. of Cal. (Taylor)*, 134 F.3d 981 (9th Cir.), *cert. denied*, 525 U.S. 920 (1998), the Ninth Circuit held that the district court had authority to allow petitioner to amend his petition to delete unexhausted claims from a mixed petition and then hold the amended, fully exhausted petition in abeyance subject to the further amendment of reincorporating the deleted claims after state litigation.

In *Rhines v. Weber*, 125 S. Ct. 1528 (2005), a noncapital habeas case, the Supreme Court held that the AEDPA does not deprive district courts of the authority to issue stays where a stay would be a proper exercise of discretion. However, the Court held, stay and abeyance of a mixed petition to allow a petitioner to present the unexhausted claims to the state court in the first instance and then to return to federal court for review of the perfected petition is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust the claims first in state court. *Id.* at 1535. The Court added that even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant a stay when the unexhausted claims are plainly meritless. *Id.* The Court said that the district court's discretion in structuring the stay is limited by the timeliness concerns reflected in the AEDPA and a mixed petition should not be stayed indefinitely. *Id.* The Court concluded that if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant a stay at all. *Id.*

If AEDPA's statute of limitations is implicated, petitioners must "relate back" an amended petition to its initial filing date. *See* § 6.2.4 *supra*.

Supreme Court:

Rhines v. Weber, 125 S. Ct. 1528 (2005) (holding in a noncapital habeas case that stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust the claims first in state court; stating that if a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief).

Pliler v. Ford, 542 U. S. 225 (2004) (in a noncapital case under AEDPA in which a *pro se* petitioner had timely filed mixed habeas petitions, the petitions were dismissed without prejudice, petitioner returned to state court to exhaust remaining claims, and the petition was then dismissed in federal court as time-barred, holding that the failure of the district court to have given petitioner the following two specific warnings regarding the stay-and-abeyance procedure before dismissing the mixed petitions did not make the dismissal improper: (1) that the court could consider his stay motions only if he opted to amend the petitions and dismiss unexhausted claims, and (2) that his federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opted to dismiss the petitions "without prejudice" and return to state court to exhaust all of his claims; stating that because the dismissals were not improper, the Supreme Court need not address the second question presented, whether respondent's subsequent untimely petitions related back to his "improperly dismissed" initial petitions).

In re Blodgett, 502 U.S. 236 (1992) (reprimanding the Ninth Circuit for delay in considering petitioner's claim where petition was held in abeyance, and execution stayed, pending exhaustion).

Ninth Circuit:

Jackson v. Roe, 425 F.3d 654 (9th Cir. 2005) (holding that pursuant to *Rhines v. Weber*, a district court has discretion, under limited circumstances, to stay a mixed petition to allow petitioner to present his unexhausted claims to the state court in the first instance and then to return to federal court; noting that these limited circumstances are those in which there was good cause for petitioner's failure to exhaust his claims first in state court, the panel remanded for application of *Rhines;* since it was not considered by the noncapital habeas petitioner or the district court, the panel did not consider the continuing propriety of the three-step stay-and-abeyance procedure approved in *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003)).

Kelly v. Small, 315 F.3d 1063 (9th Cir.) (holding in noncapital case that district court must consider alternative of staying the petition after dismissal of unexhausted claims, in order to permit petitioner to exhaust those claims and then add them by amendment to his stayed petition; also holding that exercise of discretion is particularly appropriate when outright dismissal will render it unlikely or impossible for petitioner to return to federal court within AEDPA's one-year limitation period; directing that if district court stays federal proceedings while petitioner exhausts dismissed claims, district court may require petitioner to file new state petition within 30 days), *cert. denied*, 538 U.S. 1042 (2003).

Calderon v. United States Dist. Ct. for the N. Dist. of Cal. (Taylor), 134 F.3d 981 (9th Cir.) (holding that the district court had authority to allow amendment to delete unexhausted claims from mixed petition and hold the amended, fully exhausted petition in abeyance subject to further amendment reincorporating the deleted claims after state litigation), *cert. denied*, 525 U.S. 920 (1998).

Reutter v. Crandel, 109 F.3d 575 (9th Cir.) (ruling that a mixed petition requires dismissal), *cert. denied*, 522 U.S. 851 (1997).

Calderon v. United States Dist. Ct. for the E. Dist. of Cal. (Gordon), 107 F.3d 756 (9th Cir.) (distinguishing *Neuschafer*, and finding that, under *Rose*, holding petition in abeyance is error where federal habeas petition contains unexhausted claims; dismissal is required), *cert. denied*, 522 U.S. 907 (1997).

Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir. 1997) (holding that district court did not err in dismissing, rather than staying, death row inmate's mixed petition; Supreme Court and circuit precedent compel dismissal; distinguishing *Fetterly* as involving first habeas petition containing only exhausted claims, and distinguishing *Neuschafer* as *dicta*), *cert. denied*, 519 U.S. 1102 (1997).

James v. Borg, 24 F.3d 20, 24 (9th Cir. 1994) (stating that petitioner may strike unexhausted claim and resubmit petition to district court).

Fetterly v. Paskett, 997 F.2d 1295 (9th Cir. 1993) (holding that, in light of petitioner's diligence in discovery of new claim and attempt to raise all claims in a single habeas petition, district court abused its discretion in denying stay of federal proceedings while petitioner exhausted state remedies).

Roman v. Estelle, 917 F.2d 1505 (9th Cir. 1990) (ruling that, where only one claim in habeas petition is exhausted, petitioner should have opportunity to amend petition to include only the exhausted claim).

Ostrosky v. State of Alaska, 913 F.2d 590, n.9 (9th Cir. 1990) (noting that petitioner amended petition to delete unexhausted claim).

Guizar v. Estelle, 843 F.2d 371, 372 (9th Cir. 1988) (stating that petitioners who submit mixed petitions should have option of either resubmitting petitions without unexhausted claims, or exhausting unexhausted claims in state court; court may accept resubmitted petition with only exhausted claims *nunc pro tunc* to date of original filing).

Neuschafer v. Whitley, 860 F.2d 1470, 1472 n.1 (9th Cir. 1988) (suggesting that when a petitioner has not exhausted before filing federal habeas petition, district court may hold federal petition in abeyance, issue a stay of execution, and allow petitioner an opportunity to exhaust).

District Courts in Ninth Circuit:

Ashmus v. Calderon, 977 F. Supp. 987 (N.D. Cal. 1997) (finding that district court could exercise its discretion to hold exhausted petition in abeyance while petitioner exhausted additional claims).

Caro v. Vasquez, 789 F. Supp. 315 (N.D. Cal. 1992) (vacating stay of execution where petitioner failed to timely file state habeas petition in proper court).

Rogers v. Whitley, 701 F. Supp. 757, 759 (D. Nev. 1988) (stating that if petitioner chooses to return to state court, district court will hold petition in abeyance rather than dismiss so that court can enter a stay of execution if necessary).

Other Circuits:

Christy v. Horn, 115 F.3d 201 (3rd Cir. 1997) (disallowing the holding in abeyance of mixed petitions).

Victor v. Hopkins, 90 F.3d 276 (8th Cir. 1996) (holding that district court has no authority to hold mixed petition in abeyance or maintain stay of execution pending exhaustion and that proper procedure is to dismiss the petition and lift the federal stay), *cert. denied*, 519 U.S. 1153 (1997).

Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983) (holding that district court may continue considering exhausted claims at petitioner's request pending petitioner's presentation of unexhausted claims to state court).

Arrango v. Wainwright, 716 F.2d 1353 (11th Cir. 1983) (remanding case, on appeal from habeas denial where defendant was pursuing separate issues in state court, for district court to hold in abeyance until state claims are exhausted and merged with proper federal court claims; on rehearing district court can apply abuse of writ doctrine if it determines that defendant is delaying).

6.3.3.6 Patently Frivolous Claims

In his concurrence in *Rose v. Lundy*, 455 U.S. 509, 525 (1982), Justice Blackmun noted that requiring state exhaustion of patently frivolous claims would not serve the principles of comity underlying the exhaustion doctrine. Following this reasoning, the Ninth Circuit held, in *Clark v. Ricketts*, 958 F.2d 851 (9th Cir.), *cert. denied*, 506 U.S. 838 (1992), that a federal court need not send a petition back to state court to exhaust a patently frivolous claim.

Supreme Court:

Rhines v. Weber, 125 S. Ct. 1528 (2005) (holding in a noncapital habeas case that the district court would abuse its discretion if it were to grant a stay when the unexhausted claims are plainly meritless).

Rose v. Lundy, 455 U.S. 509, 525 (1982) (Blackmun, J., concurring) (noting that requiring exhaustion of patently frivolous claim does not demonstrate respect for state courts).

Ninth Circuit:

Clark v. Ricketts, 958 F.2d 851 (9th Cir.) (holding petitioner need not return to state court to exhaust claims so insubstantial as to be frivolous because serves no comity purpose and would only delay petitioner's return to federal court), *cert. denied*, 506 U.S. 838 (1992).

Gutierrez v. Griggs, 695 F.2d 1195, 1197–98 (9th Cir. 1983) (holding that petitioner's meritless claims, failing to allege deprivation of a federal right, may be dismissed without exhaustion because exhaustion would not serve comity purposes).

6.3.3.7 Waiver of Exhaustion by the State

Since the exhaustion doctrine is not jurisdictional, a state may waive the exhaustion requirement. The Ninth Circuit and other circuits have held that a state's failure to raise exhaustion at the district court level impliedly waives the issue on appeal. However, the AEDPA amended § 2254 to prohibit implied waivers of exhaustion. Section 2254(b)(3) provides: "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."

Supreme Court:

Granberry v. Greer, 481 U.S. 129, 134 (1987) (stating that when the state fails to raise exhaustion, it is "appropriate for the court of appeals to take a fresh look at the issue").

Ninth Circuit:

Paradis v. Arave, 130 F.3d 385 (9th Cir. 1997) (holding that state waived exhaustion by failing to advise the district and circuit courts whether claims were exhausted, and that comity, federalism, and finality are not served by insisting on exhaustion).

Federal Statutes:

28 U.S.C. § 2254(b)(3) (2000) (requiring express waiver of exhaustion requirement by state).

See generally:

Lawrence S. Hirch, Note, *State Waiver of the Exhaustion Requirement in Habeas Corpus Cases*, 52 Geo. Wash. L. Rev. 419 (1984) (reviewing state exhaustion waiver issues).

6.3.3.8 Exceptions to Exhaustion Requirement: No State Remedies, Futility, Delay and Unavailability of State Procedure

Section § 2254(b)(1) of Title 28, United States Code, excuses a petitioner from the exhaustion requirement if there is an absence of available state corrective process or if

it would be ineffective to protect the rights of the applicant. In *Phillips v. Vasquez*, 56 F.3d 1030 (9th Cir. 1995), the Ninth Circuit held that an extraordinary state court delay in making a final sentencing decision renders the state corrective process "ineffective" within the meaning of § 2254(b). Such circumstances entitle the petitioner to bring a habeas petition regarding the constitutionality of the conviction despite the fact that the state has not made a final sentencing decision.

Supreme Court:

O'Sullivan v. Boerckel, 526 U.S.838 (1999) (resolving circuit conflict by stating that state court's discretion to review claims in state petition does not make state procedure unavailable for purposes of establishing exception to exhaustion doctrine).

Duckworth v. Serrano, 454 U.S. 1 (1981) (per curiam) (refusing to recognize exhaustion exception for clear constitutional violation because it would not promote judicial economy).

Ninth Circuit:

Edelbacher v. Calderon, 160 F.3d 582 (9th Cir. 1998) (distinguishing *Phillips* and finding no extraordinary delay where: (1) retrial of petitioner's penalty phase was ongoing, (2) there was no assignment of the necessary capital or non-capital status, (3) there were no unusual circumstances suggesting that "no end was in sight" for state proceedings, and (4) the delay at issue was not attributable to ineffective state process but to the extended proceedings related to the guilt issue; affirming dismissal of petition while state proceedings are pending).

Hamilton v. Calderon, 134 F.3d 938, 939 (9th Cir. 1998) (holding that *Phillips* does not apply absent "extreme delay" by state court).

Phillips v. Vasquez, 56 F.3d 1030 (9th Cir. 1995) (holding that where state's decision on defendant's final sentence is extraordinarily delayed, petitioner may bring federal habeas challenge to conviction; petitioner's right to reasonably prompt conviction review outweighs judicial interest in deference to exhaustion).

Noltie v. Peterson, 9 F.3d 802, 806 (9th Cir. 1993) (criticizing futility doctrine; stating that there are indications that the Supreme Court may make an exception to exhaustion in actual innocence cases).

Beam v. Paskett, 966 F.2d 1563 (9th Cir. 1992) (declining to default petitioner's challenge to state's "utter disregard" for aggravating factor despite petitioner's failure to raise it before state supreme court where state court recently resolved the issue adversely to petitioner), *vacated on other grounds*, 507 U.S. 463 (1993).

Kim v. Villalobos, 799 F.2d 1317, 1321 (9th Cir. 1986) (holding that if state procedural requirements consistently prevent a fairly presented claim from being heard on the merits, exhaustion is excused; state court twice denied petitioner's "fairly presented" claim for lack of particularity).

Sweet v. Cupp, 640 F.2d 233 (9th Cir. 1981) (adopting futility doctrine that petitioner may be excused from exhausting state remedies if highest state court has recently addressed the issue and resolved it adversely to petitioner and there are no intervening U.S. Supreme Court decisions on point or other indications state court would depart from its prior decision).

Other Circuits:

Story v. Kindt, 26 F.3d 402 (3d Cir. 1994) (holding exhaustion requirement excused because of inordinate nine-year delay in state postconviction collateral proceedings).

Deters v. Collins, 985 F.2d 789 (5th Cir. 1993) (declining to apply exhaustion doctrine where state system inordinately and unjustifiably delays review of petitioner's claims thereby infringing on due process rights).

Hollis v. Davis, 912 F.2d 1343 (11th Cir. 1990) (holding that because state court failed to act on inmate's three previous *pro se* petitions and did not appoint a lawyer, further resort to state courts was futile and exhaustion requirement satisfied).

6.3.4 Presumption of Correctness of State Court Fact Findings

6.3.4.1 Findings of Fact

Prior to the AEDPA, 28 U.S.C. § 2254 required federal habeas courts to presume the correctness of state court factual findings–whether trial, appellate, or state postconviction. For the presumption to apply, former § 2254(d) required that a state court of competent jurisdiction make the findings in writing after a hearing on the merits. Former § 2254(d) provided seven enumerated exceptions to the application of the presumption and additionally prohibited application if the factual determination lacked "fair support in the record." In *Sumner v. Mata*, 449 U.S. 539 (1981), the

Supreme Court held that federal habeas courts must explicitly apply § 2254(d) and state in the opinion their reasoning for refusing to apply the presumption to any state court factual findings.

In 1996, Congress enacted the AEDPA which repealed former § 2254(d) and created § 2254(e) with new presumption of correctness language. Section 2254(e)(1) provides as follows:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Supreme Court:

Burden v. Zant, 498 U.S. 433 (1991) (holding that a federal court must presume correctness of a state court's factual findings or state reasons why presumption of correctness is not supported).

Parker v. Dugger, 498 U.S. 308 (1991) (holding that a state appellate court's resolution of an ambiguity in a state trial court statement is a finding of fact entitled to presumption of correctness under former § 2254(d) unless not "fairly supported by the record"; concluding in instant case that state appellate court's finding that state trial court found no evidence of non-statutory mitigating factors was not "fairly supported by the record" and therefore should not be presumed correct).

Marshall v. Lonberger, 459 U.S. 422 (1983) (holding that a federal court may not substitute its own judgment for a state court's determination regarding credibility of witnesses who appeared before state court; concluding that state court's implicit credibility findings provided "fair support in the record" for state court's factual determination).

Sumner v. Mata, 455 U.S. 591 (1982) (holding that, although presumption of correctness does not apply to ultimate resolution of mixed law-fact questions, a federal court must apply statutory presumption to the facts underlying a mixed question or must explain why the presumption is inapplicable).

Sumner v. Mata, 449 U.S. 539 (1981) (holding that a federal habeas court must make

clear that it applied the § 2254(d) presumption of correctness to state court findings and must explain its reasons for applying any statutory exceptions to presumption; holding that presumption of correctness is equally applicable to state appellate court findings of fact; stating that "hearing on the merits" under former § 2254(d) requires only that petitioner and state be parties and that state court make written findings).

Ninth Circuit:

Tolbert v. Gomez, 190 F.3d 985 (9th Cir. 1999) (applying on remand the deferential standard of review as set forth by the en banc court in *Tolbert v. Page*; holding that the pre-AEDPA § 2254(d) "presumption of correctness" applies to state court's determination of whether a criminal defendant established a prima facie case of prosecutorial discrimination in the exercise of peremptory challenges; affirming the state court's judgment of conviction).

Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (en banc) (declining to presume correct the state court's finding that state's star witness's post-trial confession was not credible where the confession was the only time witness was not speaking under a grant of immunity), *cert. denied*, 523 U.S. 1133 (1998).

Gallego v. McDaniel, 124 F.3d 1065, 1069 (9th Cir. 1997) (court must defer to state court factual findings unless based on an unreasonable determination in light of the evidence presented), *cert. denied*, 524 U.S. 917, *and cert. denied*, 524 U.S. 922 (1998).

Jones v. Wood, 114 F.3d 1002 (9th Cir. 1997) (granting less deference to state court decision where state did not make findings of fact).

Langford v. Day, 110 F.3d 1380 (9th Cir. 1996) (finding that state's factual determinations regarding counsel's alleged failure to advise defendant of meritorious pretrial arguments were entitled to presumption of correctness).

Burks v. Borg, 27 F.3d 1424 (9th Cir. 1994) (deferring to state court finding that trial court's ruling on prosecutor bias in exercising peremptory challenges warranted deference where ruling turned on an evaluation of prosecutor's credibility).

Palmer v. Estelle, 985 F.2d 456 (9th Cir.) (stating that, where record is ambiguous, state appellate court's findings of fact are deemed "fairly supported by the record" within the meaning of former § 2254(d)(8)), *cert. denied*, 509 U.S. 928 (1993).

Hawkins v. Risley, 984 F.2d 321 (9th Cir. 1993) (stating that state habeas court's factual findings are presumed correct under former § 2254(d) unless petitioner

establishes that state hearing was inadequate).

Tinsley v. Borg, 895 F.2d 520 (9th Cir. 1990) (holding that former § 2254(d)'s "written findings" requirement does not demand infinite detail and clarity and can be satisfied by findings implicit in state court's actions).

Oxborrow v. Eikenberry, 877 F.2d 1395 (9th Cir. 1989) (holding that state court's reasonable inferences drawn from evidence are presumed correct under former § 2254(d)).

Robtoy v. Kincheloe, 871 F.2d 1478 (9th Cir. 1989) (considering "convincing evidence" standard interchangeable with "clear and convincing evidence" standard in non-habeas case).

Ruff v. Kincheloe, 843 F.2d 1240, 1242 (9th Cir. 1988) (holding that *Chaney* limits *Austad*'s holding–that there is no duty for court to obtain record *sua sponte*–to factual determinations only).

Neuschafer v. McKay, 807 F.2d 839 (9th Cir. 1987) (holding that presumption of correctness applies to state appellate court factual determinations; federal court must defer to state appellate reading of record on appeal just as it must defer to state trial court's factual findings).

Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1986) (holding that, with respect to purely factual issues, district court is under no duty to obtain and review state trial record *sua sponte* because petitioner must overcome presumption of correctness).

Austad v. Risley, 761 F.2d 1348, 1351 (9th Cir.) (en banc) (holding that district court has no duty to obtain record *sua sponte* where petitioner has not claimed an inability to produce record), *cert. denied*, 474 U.S. 856 (1985).

Nelson v. McCarthy, 637 F.2d 1291 (9th Cir. 1980) (considering "convincing evidence" standard same as "clear and convincing evidence" standard in non-habeas case).

Federal Statutes:

28 U.S.C. § 2254(e)(1) (2000) (articulating presumption of correctness standard).

See generally:

Andrew A. Jones, Note, *Keeney v. Tamayo-Reyes and Federal Habeas Corpus*

Evidentiary Hearings: Has the Court Deliberately Bypassed § 2254(d)?, 1994 Wis. L. Rev. 171 (1994) (summarizing and analyzing *Tamayo-Reyes* and focusing on difficulty it poses for enforcement of § 2254(d) presumption of correctness of state factual findings).

John Greene, Note, *Sumner v. Mata: Muddying the Waters of Federal Habeas Court Deference to State Court Findings*, 1983 Wis. L. Rev. 751 (1983) (examining the Supreme Court's reasoning in *Mata* and exploring its possible implications for future federal habeas corpus reviews of state convictions).

6.3.4.2 Questions of Law

State court resolutions of purely legal questions are not entitled to a presumption of correctness under former § 2254(d). Under pre-AEDPA law, a federal habeas corpus court reviewed legal questions *de novo*. The current version of § 2254(d), enacted with the AEDPA in 1996, creates a new standard of review for state legal decisions. *See supra* § 6.3.

Supreme Court:

Townsend v. Sain, 372 U.S. 293 (1963) (holding that federal courts should defer to state court findings of fact made after a full and fair hearing but may not defer to state findings of law; "issues of fact" do not include resolutions of mixed questions of law and fact), *overruled in part*, 504 U.S. 1 (1992).

Ninth Circuit:

Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1986) (holding that former § 2254(d) presumption of correctness applies only to state court factual determinations and does not extend to state decisions regarding purely legal questions or mixed law-fact questions).

Iaea v. Sunn, 800 F.2d 861 (9th Cir. 1986) (stating that federal habeas courts must defer to state court factual findings but not to state determinations of purely legal questions or mixed questions of law and fact).

6.3.4.3 Mixed Questions of Law and Fact

Under former § 2254(d), a state court's resolutions of mixed questions of law and fact

were also not entitled to a presumption of correctness. A federal habeas court would review the state determinations *de novo*. It should be noted that, in *Sumner v. Mata*, 455 U.S. 591 (1982), the Supreme Court held that a state court's determinations of the facts *underlying* a mixed question *are* presumed correct under former § 2254(d). In *Wright v. West*, 505 U.S. 277 (1992), the Supreme Court discussed the appropriate standard for a federal habeas court reviewing state court resolutions of mixed questions. Four justices argued that *de novo* was well established and that there was no reason to change it. Three justices indicated doubt that *de novo* was clearly established and suggested that deferential review might be more appropriate. Ultimately, the seven justices agreed that resolving the standard of review question was not essential to the case's disposition. Two justices did not reach the standard of review issue.

With the enactment of the AEDPA, § 2254(d) was changed to create a new standard of review for state legal decisions. *See supra* § 6.3.1.

Supreme Court:

Thompson v. Keohane, 516 U.S. 99 (1995) (reversing the Ninth Circuit and holding that state court ruling that a suspect was not "in custody" for *Miranda* warning purposes was mixed question of law and fact).

Wright v. West, 505 U.S. 277 (1992) (declining to adopt a deferential standard of review of state court determinations of mixed questions of law and fact).

Sumner v. Mata, 455 U.S. 591 (1982) (noting that state court's mixed question resolutions are not entitled to a presumption of correctness; stating that, in deciding mixed questions, "the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard. But the question of facts that underlie this ultimate conclusion are governed by the statutory presumption").

Cuyler v. Sullivan, 446 U.S. 335 (1980) (stating that state court resolutions of mixed questions are "open to review on collateral attack").

Ninth Circuit:

Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1986) (holding that former § 2254(d) presumption of correctness applies only to state court findings of fact and does not

extend to state court decisions regarding purely legal questions or mixed questions of law and fact, both of which are reviewed *de novo*).

Iaea v. Sunn, 800 F.2d 861 (9th Cir. 1986) (stating that federal habeas courts must defer to state court findings of fact but not to state court resolutions of purely legal questions or mixed questions of law and fact).

6.3.4.3.1 District Court's Duty to Review State Record

Case law interpreting former § 2254(d) established that since a presumption of correctness attaches to state factual findings, the burden of providing the district court with relevant portions of the state record or showing an inability to do so is on the petitioner. In *Chaney v. Lewis*, 801 F.2d 1191 (9th Cir. 1986), the Ninth Circuit held that a district court has no obligation to obtain and review the state court record when disposing of purely factual questions. Claims raising questions of law or mixed questions of law and fact, however, *do* impose on the district court a *sua sponte* duty to obtain and review all relevant portions of the state record.

Ninth Circuit:

Hamilton v. Vasquez, 882 F.2d 1469 (9th Cir. 1989) (remanding to district court for review of state record and determination whether evidentiary hearing is required to analyze whether shackling defendant during trial violated due process–a mixed question of law and fact).

Ruff v. Kincheloe, 843 F.2d 1240, 1243 n.5 (9th Cir. 1988) (holding that district court has duty to review the entire state court record to determine whether a constitutional error is harmless).

Lincoln v. Sunn, 807 F.2d 805, 808 (9th Cir. 1987) (holding that absent specific findings and conclusions, appellate court cannot be sure that the district court conducted independent state record review).

Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1986) (holding that where habeas claim raises mixed questions of law and fact, district court has a *sua sponte* duty to obtain and review relevant portions of state record, unlike questions of fact which impose no such duty).

Reiger v. Christensen, 789 F.2d 1425, 1428 (9th Cir. 1986) (holding that where district court denies petition without evidentiary hearing, record on appeal must show that district court independently reviewed all relevant portions of petitioner's claims).

Rhinehart v. Gunn, 598 F.2d 557, 558 (9th Cir. 1979) (holding that appellate court cannot affirm a district court's dismissal of petition unless record shows that district court reviewed all relevant portions of state record).

6.3.4.4 Classification of Issues

6.3.4.4.1 Generally

Supreme Court:

Miller v. Fenton, 474 U.S. 104 (1985) (stating that an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question; discussing the considerations involved in labeling an issue "factual," "legal," or "mixed").

6.3.4.4.2 Jury Determinations

In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Supreme Court held that determinations as to individual juror bias, *see supra* § 2.6.2, in both trial and capital sentencing juries, are factual questions entitled to the presumption of correctness. The Ninth Circuit additionally held, in *Greenawalt v. Ricketts*, 943 F.2d 1020 (9th Cir. 1991), that the presumption applies to determinations as to the entire jury's impartiality.

However, in *Marino v. Vasquez*, 812 F.2d 499 (9th Cir. 1987), the Ninth Circuit held that while jury misconduct is a factual inquiry, the determination as to whether the misconduct was prejudicial is a mixed question of law and fact.

Supreme Court:

Greene v. Georgia, 519 U.S. 145 (1996) (holding that *Witt* standard, whereby federal courts accord presumption of correctness to state court's juror bias findings, does not control as standard for state appellate court review of trial court's jury selection rulings).

Wainwright v. Witt, 469 U.S. 412 (1985) (holding that state court's decision to excuse capital sentencing juror for cause under *Witherspoon* is a finding of fact subject to the presumption of correctness under § 2254(d)).

Patton v. Yount, 467 U.S. 1025 (1984) (finding that impartiality of individual jurors is a question of fact).

Rushen v. Spain, 464 U.S. 114 (1983) (holding that substance and effect of *ex parte* communication between judge and juror, on juror's impartiality is fact question; ultimate question whether error was harmless is question of law; state court's failure to contemporaneously record finding does not deprive it of "fair support in the record").

Ninth Circuit:

Dyer v. Calderon, 151 F.3d 970 (9th Cir.) (determining that state court's finding that juror was impartial was not entitled to presumption of correctness), *cert. denied*, 535 U.S. 1033 (1998).

Greenawalt v. Ricketts, 943 F.2d 1020 (9th Cir. 1991) (holding that state court's determination that the jury was impartial is a finding of historical fact treated as presumptively correct).

Tinsley v. Borg, 895 F.2d 520 (9th Cir. 1990) (affording presumption of correctness to state court's finding that no juror misconduct occurred).

Marino v. Vasquez, 812 F.2d 499 (9th Cir. 1987) (holding that state court conclusion that juror's misconduct was not prejudicial is mixed question of law and fact not entitled to presumption).

Austad v. Risley, 761 F.2d 1348 (9th Cir.) (en banc) (holding that determination of juror's bias is factual and entitled to presumption of correctness), *cert. denied*, 474 U.S. 856 (1985).

See generally:

Elise E. Walthall, *Constitutional Law–The Practical and Procedural Implications of Jury Misconduct in the Third Circuit*, 39 Vill. L. Rev. 1005 (1994) (discussing common factors in jury misconduct cases and addressing Third Circuit's treatment of such cases).

6.3.4.4.3 Pretrial Publicity

The question of whether pretrial publicity prejudiced the jury is a factual question accorded the presumption of correctness.

Ninth Circuit:

Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993) (stating that question of jury bias due to pretrial publicity is a factual determination entitled to presumption of correctness).

6.3.4.4.4 Competence of Defendant

State court determinations regarding a defendant's competence to stand trial and to waive rights are accorded the former § 2254(d) presumption of correctness. However, in *Miller v. Stewart*, 231 F.3d 1248 (9th Cir. 2000), the court declined to defer to a state court's factual findings of competency that were issued two years prior.

Supreme Court:

Demosthenes v. Baal, 495 U.S. 731 (1990) (stating that state court's determination regarding defendant's competency is entitled to presumption of correctness).

Maggio v. Fulford, 462 U.S. 112 (1983) (applying presumption of correctness to state court competency determination).

Ninth Circuit:

Miller v. Stewart, 231 F.3d 1248 (9th Cir.) (declining to defer to state court determination of defendant's *Faretta* right to self-representation to determine, two years later, whether federal habeas petitioner is competent to forgo federal appeals and "volunteer" to be executed), *stay vacated sub nom Stewart v. Miller ex rel. Jones*, 531 U.S. 986 (2000).

Brewer v. Lewis, 989 F.2d 1021 (9th Cir. 1993) (holding that state court's conclusion regarding defendant's competence is entitled to presumption of correctness if "fairly supported by the record").

Evans v. Raines, 800 F.2d 884 (9th Cir. 1986) (holding that state court's determinations of defendant's competency to stand trial and waive counsel are entitled to presumption of correctness, although they may be mixed questions of law and fact).

Austad v. Risley, 761 F.2d 1348 (9th Cir.) (en banc) (holding that issue of fitness to stand trial is factual determination accorded presumption of correctness), *cert. denied*, 474 U.S. 856 (1985).

6.3.4.4.5 Right to Counsel: Ineffective Assistance, Conflict of Interest, and Request for Counsel

Conflict of interest and counsel competence issues are mixed questions of law and fact and thus do not come within the presumption of correctness afforded state court findings of fact. Whether defendant's statements constitute a request for counsel, however, is a legal question.

Supreme Court:

Strickland v. Washington, 466 U.S. 668 (1984) (holding that both performance and prejudice components of ineffectiveness inquiry are mixed questions of law and fact).

Cuyler v. Sullivan, 446 U.S. 335 (1980) (concluding that whether counsel undertook multiple representation is mixed question of law and fact).

Ninth Circuit:

Robinson v. Borg, 918 F.2d 1387 (9th Cir. 1990) (holding that while state court's determination as to what was said during an interrogation is a factual finding entitled to presumption of correctness, whether defendant's words constituted a request for counsel is a legal determination subject to *de novo* review).

Adamson v. Ricketts, 758 F.2d 441 (9th Cir. 1985) (holding that whether counsel's error was harmless is mixed question), *rev'd on other grounds*, 789 F.2d 722 (9th Cir. 1986) (en banc), *and rev'd on other grounds*, 483 U.S. 1 (1987).

6.3.4.4.6 Witness Issues

Whether a witness testified under a grant of immunity is a fact question entitled to the presumption of correctness. Questions as to a witness' constitutional unavailability, however, are not entitled to the presumption.

Supreme Court:

Burden v. Zant, 498 U.S. 433 (1991) (holding that state court finding that witness testified under grant of immunity is entitled to presumption of correctness).

Ninth Circuit:

Acosta-Huerta v. Estelle, 7 F.3d 139 (9th Cir. 1992) (stating that state court's determination that witness is constitutionally unavailable is subject to *de novo* review by federal habeas court).

6.3.4.4.7 Voluntariness of Confessions, Pleas and Waivers

The voluntariness of a defendant's confession, plea, or waiver of rights is a legal question. The Ninth Circuit held, however, that a state court's decision whether a waiver was knowing and intelligent is a factual question entitled to a presumption of correctness.

Supreme Court:

Arizona v. Fulminante, 499 U.S. 279 (1991) (holding that voluntariness of defendant's confession is a legal question requiring independent federal court determination).

Ninth Circuit:

Collazo v. Estelle, 940 F.2d 411 (9th Cir. 1991) (en banc) (holding that voluntariness of confession and determination of whether police coerced confession are reviewed *de novo*; voluntariness of *Miranda* waiver is reviewed *de novo*, while determination of whether *Miranda* waiver was knowing and intelligent is entitled to presumption of correctness).

Iaea v. Sunn, 800 F.2d 861 (9th Cir. 1986) (holding that voluntariness of guilty plea is question of law).

6.3.4.4.8 Preclusive Effect of Verdict

The preclusive effect of a jury verdict is a legal question.

Supreme Court:

Schiro v. Farley, 510 U.S. 222 (1994) (holding that the preclusive effect of a jury verdict is a question of federal law subject to *de novo* habeas review).

6.3.4.4.9 Harmless Error

Whether a constitutional error is harmless is a legal question, but the underlying factual determinations are accorded the presumption of correctness.

Ninth Circuit:

Lawson v. Borg, 60 F.3d 608, 612–13 (9th Cir. 1995) (determining that state's harmless error conclusion was not a finding of fact entitled to presumption of correctness).

Dickson v. Sullivan, 849 F.2d 403 (9th Cir. 1988) (holding that state court's harmless error determination was a mixed question of law and fact subject to *de novo* review).

McKenzie v. Risley, 842 F.2d 1525 (9th Cir.) (en banc) (holding that the ultimate determination of whether a constitutional error was harmless is subject to *de novo* review, while underlying state court findings of fact are entitled to presumption of correctness), *cert. denied*, 488 U.S. 901 (1988).

6.3.4.4.10 Custody for *Miranda* Purposes

In *Thompson v. Keohane*, 516 U.S. 99 (1995), the Supreme Court held that whether a defendant is in custody for *Miranda* purposes is a mixed question of law and fact not entitled to a presumption of correctness. The decision reversed the Ninth Circuit and resolved a circuit split regarding that issue.

Supreme Court:

Thompson v. Keohane, 516 U.S. 99 (1995) (holding that state court rulings that a suspect was not "in custody" for *Miranda* warning purposes were mixed questions of law and fact).

6.3.4.4.11 Pretrial Identification Procedures

The constitutionality of pretrial identification procedures is a mixed question of law and fact.

Supreme Court:

Sumner v. Mata, 455 U.S. 591 (1982) (holding that constitutionality of pretrial identification procedures is mixed question).

6.3.4.4.12 Existence of Mitigating Circumstances

The Eleventh Circuit held that a federal habeas court's review of a state court factual finding regarding the existence of mitigating circumstances is entitled to the presumption of correctness.

Other Circuits:

Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986) (stating that federal habeas corpus court's review of a state court factual finding concerning the existence of mitigating circumstances is constrained by 28 U.S.C. § 2254(d)).

6.3.4.4.13 Shackling Defendant

The Ninth Circuit held that the propriety of shackling a defendant during trial is a mixed question of law and fact.

Ninth Circuit:

Hamilton v. Vasquez, 882 F.2d 1469 (9th Cir. 1989) (holding that whether shackling defendant during trial violated due process was mixed question "requiring the

application of legal principles to the historical facts" and requiring trial court to review state record *sua sponte*), *denial of habeas corpus aff'd in part and rev'd in part on other grounds*, 17 F.3d 1149 (9th Cir. 1994).

6.3.4.4.14 Plea Agreements

Whether a modified sentence was adequate specific performance of a broken plea agreement is a mixed question of law and fact.

Ninth Circuit:

Pierre v. Thompson, 666 F.2d 424 (9th Cir. 1982) (holding that whether a modified sentence constituted adequate specific performance of a broken plea agreement is a mixed question subject to independent determination by federal court).

6.3.5 Review Where State Court Did Not Reach Merits of Properly Raised Issue

Where a state court has not reached the merits of a properly raised issue, there is no state court decision on which to accord deference. Therefore, the issue will be reviewed de novo by the federal habeas court.

Ninth Circuit:

Pirtle v. Morgan, 313 F.3d 1160 (9th Cir. 2002) (agreeing with holdings of Third and Fifth Circuits that when it is clear that a state court has not reached the merits of a properly raised issue, the federal habeas court must review it de novo; recognizing, nevertheless, that factual determinations by the state court are presumed correct and can be rebutted only by clear and convincing evidence), *cert. denied*, 539 U.S. 916 (2003).

6.4 Section 2255 Review: Habeas Corpus Review of Federal Convictions

For habeas relief from a federal conviction, a federal prisoner must make a motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255. The procedural rules governing § 2255 motions differ in some respects from those governing habeas corpus petitions under §§ 2241-2254.

A federal district court has jurisdiction to entertain a § 2255 motion only if

the movant is in custody under federal court sentence. Motions must be filed in the district court in which the prisoner was sentenced. Section 2255 provides four grounds justifying relief for a federal prisoner who challenges the imposition or length of federal detention: (1) "that the sentence was imposed in violation of the Constitution or laws of the United States," (2) "that the court was without jurisdiction to impose such sentence," (3) "that the sentence was in excess of the maximum authorized by law," or (4) that the sentence is "otherwise subject to collateral attack."

In 1996, the AEDPA amended § 2255 to include a filing deadline and restrictions on filing successive petitions. *See supra* §§ 6.2.1, 6.2.2. In *United States v. Valdez*, 195 F.3d 544 (9th Cir. 1999), the Ninth Circuit held that § 2255 is not limited to constitutional relief, but includes statutory relief as well. The *Valdez* court also held that the one year statute of limitation for a § 2255(3) claim begins to run on the date the Supreme Court determines retroactivity, not on the date the Court initially recognizes the asserted right.

Supreme Court:

Clay v. United States, 537 U.S. 522 (2003) (holding in noncapital case that when a defendant in a federal prosecution takes an unsuccessful direct appeal from a judgment of conviction, but does not petition for a writ of certiorari from the Supreme Court, for purpose of starting the clock on § 2255's one-year limitation period, the judgment becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction).

Bousley v. United States, 523 U.S. 614 (1998) (accepting district court's treatment of pre-AEDPA petition filed pursuant to § 2241 as a § 2255 motion).

Kaufman v. United States, 394 U.S. 217, 221 (1969) (clarifying that § 2255 revised procedure by which federal prisoners seek relief but did not restrict scope of habeas corpus writ).

Ninth Circuit:

Matus-Leva v. United States, 287 F.3d 758 (9th Cir. 2002) (holding in noncapital case that petitioner may not resort to *coram nobis* because a petition under section 2255 is time barred due to the petitioner's failure to meet the AEDPA's gatekeeping requirements), *cert. denied*, 537 U.S. 1022 (2002).

United States v. Seesing, 234 F.3d 456 (9th Cir. 2000) (stating that when a federal prisoner files a *pro se* request of the court, the court cannot recharacterize the request as a § 2255 motion without giving the prisoner either the option to consent or the option to withdraw the motion so that the prisoner does not lose the right to file a comprehensive first motion).

United States v. Martin, 226 F.3d 1042 (9th Cir. 2000) (holding that district court has jurisdiction to reconsider order granting § 2255 motion when court initially ordered a new sentencing hearing which had not occurred; holding Fed. R. Civ. P. 59(e)'s 10 day time limit–governing motions to alter or amend judgments–does not divest district court of jurisdiction to reconsider because order initially granting petitioner's motion was not a final order), *cert. denied*, 532 U.S. 1002 (2001).

United States v. Garcia, 210 F.3d 1058 (9th Cir. 2000) (holding that the one year limitation period– for a federal prisoner who does not file a certiorari petition to the Supreme Court–begins to run when the time for filing the petition (90 days) expires).

United States v. Colvin, 204 F.3d 1221 (9th Cir. 2000) (holding that a judgment becomes final for a federal prisoner who was resentenced after appeal–triggering the one year filing deadline under § 2255–when the time passes for appealing from the district court's entry of judgment).

United States v. Valdez, 195 F.3d 544 (9th Cir. 1999) (holding that the "right" initially recognized under §2255(3) need not be a constitutional right; holding that one year statute of limitation for § 2255(3) claim begins to run on the date retroactivity is determined, not on date that right initially recognized).

United States v. Pirro, 104 F.3d 297, 297 (9th Cir. 1997) (holding that a federal habeas petitioner authorized to seek relief under § 2255 may not petition for habeas relief pursuant to § 2241 unless it appears that the § 2255 motion is inadequate or ineffective to test the legality of petitioner's detention).

Tripati v. Herman, 843 F.2d 1160, 1162 (9th Cir. 1988) (stating that the authority of federal courts under § 2241 is limited by § 2255).

Federal Statutes:

28 U.S.C. § 2255 (2000) (providing mechanism for habeas relief from federal conviction).

28 U.S.C. § 2241 (2000) (providing for writ of habeas corpus).

See generally:

Matthew S. O'Connell, *Habeas Relief for Federal Prisoners*, 84 Geo. L.J. 1451 (1996) (summarizing procedural rules for § 2255 motions).

6.4.1 No Fourth Amendment Claims

In *Stone v. Powell*, 428 U.S. 465 (1976), the Supreme Court held that when a state prisoner has a full and fair opportunity to litigate Fourth Amendment claims, a federal court will not grant a § 2254 petition based on those claims. *See supra* § 6.3.2.3. The Ninth and Tenth Circuits have extended the *Stone* holding to federal prisoners petitioning for relief under § 2255. Other circuits have declined to do so.

Supreme Court:

Stone v. Powell, 428 U.S. 465 (1976) (holding that where state has provided an opportunity for full and fair litigation of Fourth Amendment claims, federal habeas corpus relief is not available for Fourth Amendment claims).

Ninth Circuit:

United States v. Hearst, 638 F.2d 1190, 1196 (9th Cir. 1980) (holding prisoner's Fourth Amendment claim not cognizable under § 2255 when federal prisoner had full and fair opportunity to litigate claim at trial and on direct appeal).

Other Circuits:

United States v. Cook, 997 F.2d 1312 (10th Cir. 1993) (holding that invalid search warrant claim is not cognizable under § 2255).

Campino v. United States, 968 F.2d 187, 189 (2d Cir. 1992) (rejecting Fourth Amendment claim under § 2255 for failure to raise on direct appeal or show cause and prejudice).

Matta-Ballesteros v. Henman, 896 F. 2d 255, 262 n.8 (7th Cir.) (limiting *Stone* to

Fourth Amendment claims under § 2254), *cert. denied*, 498 U.S. 878 (1990).

6.4.2 Exhaustion and Procedural Bar

Section 2255 does not contain a provision requiring a prisoner to exhaust other available remedies. Nevertheless, a movant must usually complete a direct appeal as a prerequisite to filing a § 2255 motion. In limited circumstances, courts do not enforce this requirement. Failure to raise a claim at trial or on direct appeal generally results in a waiver of the claim, necessitating a showing of cause and prejudice or miscarriage of justice to obtain collateral review of such claims. *See supra* § 6.2.5.

Supreme Court:

Massaro v. United States, 538 U.S. 500 (2003) (holding in noncapital case that failure to raise ineffective assistance of counsel claim on direct appeal does not bar claim from being brought in a later, appropriate proceeding under § 2255).

United States v. Frady, 456 U.S. 152, 162–66 (1982) (stating that a claim is waived unless presented at trial or direct appeal; holding that to obtain habeas review of a waived claim, a federal prisoner must show cause for the failure to object at trial and actual prejudice resulting from the alleged error).

Sunal v. Large, 332 U.S. 174, 179, 181 (1947) (stating that federal prisoner may obtain habeas corpus relief without exhausting direct appeals only in exceptional circumstances when an error is flagrant and no other remedy is available).

Ninth Circuit:

United States v. Montgomery, 998 F.2d 1468, 1472 (9th Cir. 1993) (consolidating direct appeal and appeal of § 2255 motion when both appeals contained same issue).

United States v. Deeb, 944 F. 2d 545 (9th Cir. 1991) (holding that a prisoner may not file a habeas motion when direct appeal is pending).

6.4.3 Successive Petitions

Ninth Circuit:

Moore v. Reno, 185 F.3d 1054 (9th Cir. 1999) (per curiam) (extending *Greenawalt v. Stewart*, 105 F.3d 1287, 1287–88 (9th Cir.)–which holds that state prisoner may not avoid the limitations imposed on successive petitions by styling his petition as one pursuant to § 2241 rather than § 2254–and holding that dismissal of a successive § 2255 motion does not render federal habeas relief an ineffective or inadequate remedy so as to allow petitioner to bring claim under § 2241), *cert. denied,* 528 U.S. 1178 (2000).

United States v. Lorentsen, 106 F.3d 278 (9th Cir. 1997) (denying to certify post-AEDPA successive § 2255 motion but suggesting without deciding that a petitioner could use § 2241 to make a newly available *Bailey* claim).

Other Circuits:

Charles v. Chandler, 180 F.3d 753 (6th Cir. 1999) (distinguishing *Davenport*, *Triestman* and *Dorsainvil*, but avoiding the issue of whether § 2241 is available for a successive motion otherwise barred under § 2255).

United States v. Barrett, 178 F.3d 34 (1st Cir. 1999) (holding that § 2241 habeas relief remains available for federal prisoners in limited circumstances).

Wofford v. Scott, 177 F.3d 1236 (11th Cir. 1999) (declining to allow § 2241 petition to escape procedural bar under § 2255).

In re Davenport, 147 F.3d 605, 608 (7th Cir. 1998) (holding that a § 2255 motion does not become inadequate or ineffective so as to permit the use of § 2241 merely because a prisoner cannot meet the AEDPA's successive petition requirements).

Triestman v. United States, 124 F.3d 361 (2d Cir. 1997) (holding that the AEDPA bars successive § 2255 motions under the guise of § 2241; holding, however, that where the underlying claim was actual innocence a prisoner could bring a successive § 2241 petition despite the fact that prisoner could not, for whatever reason, bring a successive § 2255 motion).

In re Dorsainvil, 119 F.3d 245 (3d Cir. 1997) (stating that inadequacy or ineffectiveness is not established by mere inability to meet the AEDPA's gatekeeping

requirements; holding that § 2241 relief is available to federal prisoner in the unusual circumstance where application of the AEDPA's successive filing restrictions would result in a "complete miscarriage of justice").

In re Vial, 115 F.3d 1192, 1194 n.5 (4th Cir. 1997) (en banc) (same).

District Courts in Other Circuits:

Wilson v. United States, 969 F. Supp. 1054 (E.D. Mich. 1997) (holding that *pro se* letter requesting that federal sentence run concurrently with related state sentence was properly considered a first petition, making petitioner's subsequent petition attacking the underlying sentence a second petition barred by the AEDPA absent appellate court authorization).