

1995

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Recommended Citation

Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part One)*, 29 U. Rich. L. Rev. 1327 (1995).

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PROCEDURAL LABYRINTHS AND THE INJUSTICE OF DEATH: A CRITIQUE OF DEATH PENALTY HABEAS CORPUS (PART ONE)*

Alan W. Clarke**

I. INTRODUCTION

Habeas corpus was once a broad writ of liberty: it served to give meaning to expanding notions of due process, it forced state judicial systems to obey constitutional commands, and it made effective modern conceptions of fundamental fairness. Although a simple implement of humble origin, U.S. habeas corpus became inextricably interwoven with the substantive rights it enforced. Without a practical remedy, cutting across state boundaries and affording uniform access, the substantive rights themselves lose meaning. A right without remedy is a right without meaning. Thus, habeas corpus became an important part of the substantive rights that it enforced.

Once an important human rights remedy, habeas corpus has been virtually obliterated by the Rehnquist Court's assault on the Warren Court's expansion of individual liberty. The Warren Court used a broad habeas remedy to enforce broadened individual rights, and Congress tacitly agreed by enacting habeas corpus statutes that were congenial to this effort. The succeeding Burger Court modestly trimmed these rights without doing violence to the habeas corpus remedy. The Rehnquist Court

* The following is Part One of a two-part article that critiques death penalty habeas corpus. Part One includes discussions on the ineffective assistance of counsel and the federal habeas corpus exhaustion requirement. Part Two of this article which will be published in a forthcoming issue of the *University of Richmond Law Review*, discusses issues related to retroactivity in habeas corpus proceedings and procedural default. Part Two concludes with a discussion of the "deregulation of death."

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that followed largely avoided direct confrontation with substantive Warren Court precedents. Instead, it eviscerated the procedural remedy of habeas corpus by reversing earlier expansive habeas precedents, and by circumventing Congressional will in its statutory habeas corpus regime. It accomplished this by erecting a variety of procedural barriers that, taken collectively, have severely eroded the Great Writ, and, if carried further, will judicially repeal Congress' entire habeas regime. The most important of the many procedural barriers to habeas relief erected by the Rehnquist Court are set out briefly here and are examined at length in the body of this paper.

1. The strict enforcement of state procedural default rules in federal habeas corpus prevents federal habeas oversight of issues not preserved under state pleading and practice rules. The procedural default doctrine is mechanically and sweepingly applied regardless of the merit or importance of the claim or of the harshness of the result. The doctrine's narrow exceptions provide only ephemeral hope, rarely affording relief.

2. Stringent and grudging rules governing ineffective assistance of counsel claims reward states for appointing less qualified lawyers even in serious criminal matters—including capital murder. This ensures that the best constitutional claims and the best arguments will be missed at trial and, therefore, will be barred by the doctrine of procedural default.

3. Strict enforcement of the exhaustion doctrine requires all claims to be presented in the state court before they can be heard in federal habeas corpus. This forces unnecessary duplication of effort, obstructs merits consideration of claims, and allows state courts to find or create yet more procedural defaults.

4. The Supreme Court's judicial creation of a strict retroactivity rule bars application of any "new rule" to a case that was final (and therefore only addressable by habeas corpus) at the time of the announcement of the new rule. This stringent nonretroactivity rule has been interpreted in such a way that it prevents consideration on the merits of most legal issues on habeas corpus.

Thus, if procedural default fails to prevent access to federal habeas corpus, then the nonretroactivity rules will prevent this

access. The only thing that is certain is that the vast majority of habeas corpus petitions will fail, not on the merits, but because of procedural barriers. Grudging rules for the evaluation of the effective assistance of counsel close the noose, guaranteeing that few, if any, substantive claims will be redressed. The doctrine of exhaustion has become the wild card, literally exhausting non-death row prisoners, while eliminating many death row prisoner claims.

These procedural barriers derive from four factors that drive the Rehnquist Court's jurisprudence. Three of these four factors, summarized below, will receive detailed treatment in the sections that follow.¹

The first characteristic of the Rehnquist Court's jurisprudence is its inconsistency; its sole consistency appears in its disposition to favor the government and rule against the individual. The inconsistency and result orientation of Rehnquist Court habeas jurisprudence can be distinctly seen in its retroactivity cases. This new judicially created body of law is riddled with internal contradictions and is applied only one way—against criminal defendants. Governmental petitioners may freely continue to invoke favorable new rules on habeas corpus. Furthermore, stringent application of the nonretroactivity doctrine fails to further legitimate state interests; it insures only that state criminal convictions, regardless of the merits or justice of the claims, will not be reversed in federal habeas corpus proceed-

1. The fourth factor, not discussed in this article, stems from a distorted view of the history of habeas corpus that sees the Warren Court's habeas decisions as based upon little or no direct precedent and therefore subject to little respect under the doctrine of stare decisis. This history is informed by the analysis of Paul Bator, who viewed habeas corpus as limited to narrowly defined jurisdictional issues until a slight stretching of the jurisdiction concepts occurred in the late nineteenth century. Paul M. Bator, *Finality in Criminal Law and Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). The counterpoint to Bator's habeas history has been the analysis of Justice Brennan, which has received support from Gary Peller. See Gary Peller, *In Defense of Federal Habeas Corpus Relegation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982). Under this competing analysis habeas corpus has remained remarkably constant since *Bushel's Case* was tried in London in 1670. See 84 Eng. Rep. 1123 (1670). Although a historical treatment of habeas corpus would require an explication of these different perspectives, for purposes of his article it is important to understand that this debate has often been bitter and lively. See James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 2041-55 (1992) (discussion entitled "Two Theses and Two Tests of the Historical Scope of Habeas Corpus Review in the United States").

ings. The rule serves primarily to frustrate habeas petitioners, including death row inmates. It is supposed to reward state reliance on law in existence at the time that the state considers a criminal case. But the rule has been so rigorously construed that it rewards state courts for crabbed and unfaithful application of Supreme Court precedents. Under this rule, a state court can adopt the narrowest possible interpretation of constitutional law, confident that a federal habeas court cannot reverse the decision lest it create new law on habeas corpus. Only outright illogical defiance of Supreme Court precedent remains within the purview of the federal habeas court.

Political ideology is the second factor driving the Rehnquist Court's jurisprudence. This Court embraces a legal process that is profoundly motivated by politics. The Rehnquist Court's politically conservative ideology locks it into decisions that eschew empirical evidence and value finality and efficiency over justice. The Rehnquist Court's political agenda is apparent throughout its jurisprudence in the adoption of mechanical formulations that are empirically unsupported. This can be seen in the procedural default area where the Court's reasons for the rule—the finality of state criminal judgments and the concomitant efficiency that is supposed to follow—fails to obtain in actual practice. As will be argued below, the evisceration of habeas corpus is motivated by an institutional view of the federal courts that exaggerates the state criminal courts' interest in finality over the citizen's expectations that the court system operate impartially and fairly in accordance with constitutional norms. There are convincing institutional reasons for retaining federal court oversight of state criminal proceedings. One does not have to maintain that the state judiciaries are inferior to appreciate that federal constitutional rules will not be evenly enforced by a balkanized state judiciary; only the federal judiciary, acting as a backstop in the more important cases, can ensure uniform treatment of constitutional norms.

The third factor driving this jurisprudence manifests itself in the Court's clear frustration with the slow pace of executions in this country. The Court seeks to streamline the legal process, preparing the way for increased executions regardless of the increased risk of executing persons who are unjustly on death row. Revelations of innocent persons on death row, and other

injustices in the process (including cases such as that of Walter McMillan in Alabama who was sent to death row on the basis of fraudulent evidence ponied up by the police)² fail to shake the Rehnquist Court's confidence. It remains a court profoundly wedded to the notion that the system supplies too much justice; that the judicial system inefficiently reviews too long and too hard the cases of persons who are, in any event, guilty. This is a stridently utilitarian view that stands willing to execute a few who are innocent, and others who have unjustly received the death penalty, in order to ensure that all who are truly guilty and morally culpable are punished. Such a position seriously undervalues the injustice of executing the innocent and those who otherwise lack the requisite degree of culpability. It plays on the fact that the numbers of persons whose death sentences were unjustly imposed is unverifiable. This allows the lack of hard evidence to stand as proof that unjust executions are not much of a problem. It casts the burden of proving systemic injustice on those who seek to argue the point, while stripping from them the one effective tool—habeas corpus—with which to construct the argument.

This article demonstrates that procedural barriers have gutted the Great Writ, and that the reasons given by the Rehnquist Court for these barriers are flawed. It focuses primarily on death penalty cases and the argument for reform of habeas corpus in the capital punishment arena. It holds that death is qualitatively different from any other punishment. Thus, even if the Rehnquist Court's restrictions have arguable merit in the non-death penalty arena, they should have no application where life itself is at stake. Society has chosen to use the ultimate sanction in some cases. If that judgment is to prevail, the judicial system should ensure that sufficient safeguards are in place to assure that only those few that truly meet the criteria can be executed. It will be shown that, as presently administered, the death penalty is arbitrarily and capriciously imposed. As a direct result of the Rehnquist Court's procedural barriers, the federal habeas corpus system fails to remedy these injustices.

2. *Innocence and Execution*, WASH. POST, Apr. 17, 1993, at A22.

Part II develops the ineffective assistance of counsel issue. Concentration on death penalty habeas corpus jurisprudence permits a narrow focus in this burgeoning and unwieldy area of the law. The history of the right to counsel under the Due Process Clause, and later the Sixth Amendment, is traced, and the early conceptions of the effective assistance of counsel are adumbrated. Then, the present state of the law and the unduly restrictive notions of the effective assistance of counsel that have led to unjust executions are critiqued. Finally, proposals for reform are made. Because many different types of issues appear in the ineffective assistance of counsel area of habeas law, this issue serves as a valuable backdrop for discussion of several remaining issues.

Part III turns to the doctrine of exhaustion of remedies in federal habeas corpus. This doctrine plays an important role in the historical debate through the misinterpretation of *Ex parte Royall*.³ The issue remains important, particularly in death penalty habeas corpus, because of the way the doctrine can force the loss of claims.

Part IV, which, along with parts V and VI, will be published in a forthcoming issue of the *University of Richmond Law Review*, deals with the new (1989) judicially created doctrine of nonretroactivity. This doctrine precludes the utilization of new rules of constitutional law in cases that were final at the time of pronouncement of the new rule. Particular attention is given to the inconsistency of precedent in this area, and the doctrine's potential to end habeas corpus.

Part V is divided into three sections. The first develops the doctrine of procedural default, showing how the Supreme Court has used the bar of procedural default in capital cases. The second section criticizes the injustice perpetrated by strict application of procedural default rules. The third provides a comparative empirical analysis of the procedural default rule in capital cases in Virginia and Kentucky. This demonstrates that the purported reasons for federal deference to state procedural default rules cannot be supported on empirical grounds and further, are erroneous.

3. 117 U.S. 241 (1886).

The concluding part VI finds that the present system of justice, as applied in death penalty cases, is unjust. Procrustean procedural rules have shackled habeas corpus. Loss of this important remedy restricts substantive human rights. These substantive rights are essential to the fair administration of the death penalty. The study concludes by examining and critiquing several reform proposals. It recommends that habeas corpus return, at least in death penalty cases, approximately to the position that it held in *Fay v. Noia*⁴ and *Townsend v. Sain*,⁵ before the narrow procedural hurdles were instituted by the Supreme Court. It also supports the American Bar Association proposals for reform which suggest ways to streamline the system while eliminating the unnecessary barriers erected by the Rehnquist Court.

II. INEFFECTIVE ASSISTANCE OF COUNSEL: THE DEATH PENALTY PERSPECTIVE

A. Introduction

Ineffective representation in capital cases remains a persistent and systemic problem.⁶ It is in the death penalty context that the shortcomings of the present system come most poignantly into focus when someone who is arguably innocent is ineptly defended and then sentenced to death. The specter of an innocent at the gallows can haunt the judicial system and vividly capture the public's short-lived attention. In the context of capital litigation, I will consider the constitutional right to counsel, the changing notions of the requirement that an accused have the effective assistance of counsel, the case for reform, and the reforms necessary for a more just system.

Early state cases, applying state law, generally refused to upset a verdict, even in capital cases, where the claim centered

4. 372 U.S. 391 (1963).

5. 372 U.S. 293 (1963).

6. See *infra* part II.G and accompanying notes; Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. SOC. CHANGE 59, 73 (1986) ("[W]hile we do not know the incidence of trial attorney incompetence, impressionistic information indicates it may be a serious systemic problem.").

on the defense lawyer's lack of competence.⁷ The Supreme Court's nascent right-to-counsel cases⁸ suggested a right to effective assistance of counsel, and the lower federal courts⁹ undertook the burden of defining the standards by which counsel's actions were governed. Ultimately, in 1984, the Supreme Court announced the current governing standard in a landmark decision, *Strickland v. Washington*.¹⁰ This decision has generated much criticism¹¹ and some support.¹² An understanding of these historical developments is necessary to an

7. See *infra* part II.C.

8. See *infra* part II.B.

9. The federal court system operated independently of, and without much effect on, the states' criminal justice systems for most of U.S. history. Two factors brought the federal system into preeminence: (1) the incorporation of the first eight amendments of the U.S. Constitution into the Fourteenth Amendment, see *infra* note 18, which made these guarantees of liberty applicable to the states; and (2) the expansion of the writ of habeas corpus to address constitutional error, see *supra* note 1. Thus, (ignoring many possible intervening steps) a capital case typically takes nine discrete steps which divide into three stages: stage one: (1) trial, (2) state appellate process, and (3) discretionary petition for certiorari to the Supreme Court; stage two: (4) state postconviction process (usually state habeas corpus), (5) state appellate process, and (6) second discretionary petition for certiorari to the Supreme Court; stage three: (7) federal habeas corpus at the U.S. District Court, (8) appeal to the U.S. Circuit Court of Appeals, and finally, (9) a discretionary petition for certiorari to the Supreme Court. To this are added numerous other steps such as "successors", Rule 60(b) motions, motions to rehear, Rule 59(e) motions, and the like, all of which are common, but beyond the scope of this paper, and are mentioned solely to give some sense of the complexity of this area of the law. Ineffective assistance of counsel claims are generally not resolvable solely by reference to the trial record, because many of counsel's actions and decisions will not appear in the record.

10. 466 U.S. 668, *reh'g denied*, 467 U.S. 1267 (1984).

11. See, e.g., Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. SOC. CHANGE (1990-91); Goodpaster, *supra* note 6; Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to the Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986).

12. Joseph Grano, *Response*, 14 N.Y.U. REV. L. & SOC. CHANGE 97 (1986). Professor Grano's *Response* was the product of his participation in a colloquium printed in the New York University Review of Law and Social Change. Colloquium, *Effective Assistance of Counsel For The Indigent Criminal Defendant: Has The Promise Been Fulfilled?* 14 N.Y.U. REV. L. SOC. CHANGE 1 (1986). Professor Grano wrote in response to Professor Goodpaster's article. See Goodpaster, *supra* note 6. A review of the literature after *Strickland* reveals many articles critical of *Strickland*, but very few, like Professor Grano's *Response*, have been supportive. Nonetheless, the rule in *Strickland* appears to be thoroughly entrenched in U.S. jurisprudence. See, e.g., *Burger v. Kemp*, 483 U.S. 776 (1987); *Darden v. Wainwright*, 477 U.S. 168, *reh'g denied* 478 U.S. 1036 (1986); *Smith v. Murray*, 477 U.S. 527 (1986).

understanding of the complexity and injustice of the present system.

B. *The Development of the Constitutional Right to Counsel*

The Sixth Amendment to the United States Constitution provides in part that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.”¹³ Given the peculiar complexities of death penalty jurisprudence,¹⁴ and the difficulties inherent in defending oneself from any serious criminal charge, access to capable counsel can be the most critical right of all. Access to competent counsel can mean the difference between life and death. As the Supreme Court put it in 1986, “[w]ithout counsel the right to a fair trial itself would be of little consequence, . . . for it is through counsel that the accused secures his other rights.”¹⁵ Yet until 1932,¹⁶ an indigent defendant facing the death penal-

13. U.S. CONST. amend. VI. The first ten amendments to the U.S. Constitution were proposed to the legislatures of the states by the first Congress in 1789, and were ratified on December 15, 1791. The First Congress also provided for a federal court system by the Judiciary Act of 1789, which, among other things, provided for the writ of habeas corpus. Act of Sept. 24, 1789, ch. 20, sec. 14, 1 Stat. 73, 81-82 (1789).

14. The reasons for this complexity are discussed *infra* part II.H. That capital proceedings are exceedingly complex is beyond cavil, and has been well documented. U.S. Circuit Judge Godbold (now Director of the Federal Judicial Center) has written: “Taking a habeas death case is not something most lawyers want to do. In the first place, it’s hard. It is the most complex area of the law I deal with.” Abner J. Mikva and John C. Godbold, “*You Don’t Have To Be a Bleeding Heart*,” *Representing Death Row: A Dialogue Between Judge Abner J. Mikva and Judge John C. Godbold*, HUM. RIGHTS, Winter 1987 at 22, 24. While Judge Godbold was referring to capital cases at the habeas corpus collateral-review level, his comments seem equally applicable to both the trial and direct appeal since the substantive law is the same. Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 303 (1983). Bruce Green states the following:

[C]apital cases are far more complex than noncapital criminal cases, so that the level of skill required to provide a competent defense in a death penalty case is higher. And at the sentencing stage, when the quality of lawyering does make a difference, the difference is more than a matter of degree. It is a difference between a sentence of imprisonment and a sentence of death.

Green, *supra* note 11, at 434-35.

15. *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986) (citations omitted); see also, *United States v. Cronin*, 466 U.S. 648, 653 (1984) (“Without counsel, the right to a trial itself would be ‘of little avail.’”).

16. *Powell v. Alabama*, 287 U.S. 45 (1932).

ty had little access to an attorney, and no constitutional right to one under federal law at state expense. In 1938, *Johnson v. Zerbst*¹⁷ expanded the right to counsel to federal crimes involving incarceration. Only in 1963 did the right to court-appointed counsel expand to all felonies,¹⁸ and not until 1972 was the right to counsel extended to misdemeanors involving incarceration.¹⁹

The adequacy of counsel's performance was only peripherally involved in the first right-to-counsel case, *Powell v. Alabama*.²⁰ Seven black youths were charged with rape in the rural south at the height of the Jim Crow era. The trial judge appointed the entire county bar to represent the defendants, with the result that no attorney had any responsibility to prepare the case. The trial court formally appointed counsel for the defendants only minutes before trial. The accuseds' situation was dire:

The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.²¹

It is hard to imagine circumstances more patently unfair. The majority had little difficulty in finding the functional equivalent of no counsel at all, and a corresponding need for counsel. The functional lack of counsel resulted in a violation of the Due Process Clause of the Fourteenth Amendment:

17. 304 U.S. 458 (1938).

18. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Although the Fourteenth Amendment to the U.S. Constitution (which prohibits the denial of "life, liberty, or property, without due process of law" by the states) was enacted in 1867, it was not until the twentieth century that the Supreme Court began to make the specific guarantees of the Bill of Rights applicable to the states through the Fourteenth Amendment. See *Duncan v. Louisiana*, 391 U.S. 145, *reh'g denied* 392 U.S. 947 (1968) (providing for a concise history of the incorporation of the first eight amendments to the constitution into the due process clause of the Fourteenth Amendment). This effectively required the several states to abide by the more important proscriptions of the Bill of Rights.

19. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

20. 287 U.S. 45 (1932).

21. *Id.* at 57-58.

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.²²

The Court went on to hypothesize the situation of a "deaf and dumb, illiterate and feeble minded" capital defendant who could not employ counsel with the "whole power of the state arrayed against him" and concluded that this would clearly be a "gross violation of the guarantee of due process of law."²³

The right to counsel, which now seems so basic to the fair disposition of any serious criminal case, began modestly as a response to what (had it been carried out) would have been a gross human rights violation. Few people today have any difficulty seeing the injustice that *Powell* corrected. Yet, the Attorney General of Alabama argued strenuously in *Powell*: (1) that these young black men had had the services of counsel; (2) that due process had been complied with; and (3) that, "it is imperative that this Court under our system of government see that the States be not restricted in their method of administering justice."²⁴ Furthermore, Justice Butler, joined by Justice McReynolds in dissent, asserted that "[t]he record wholly fails to reveal that petitioners have been deprived of any right guaranteed by the Federal Constitution, and I am of opinion that the judgment should be affirmed."²⁵ Although *Powell* did not posit an inflexible rule requiring counsel, even for all capital cases, it soon came to be read as requiring such.²⁶ The Su-

22. *Id.* at 68-69.

23. *Id.* at 72-73 (citations omitted).

24. *Id.* at 47-48.

25. *Id.* at 77 (Butler, J., dissenting).

26. See, e.g., *Bute v. Illinois*, 333 U.S. 640 (1948):

On the other hand, this Court repeatedly has held that failure to appoint counsel to assist a defendant or to give a fair opportunity to the defendant's counsel to assist him in his defense where charged with a capital crime is a violation of due process of law under the Fourteenth

preme Court, despite opportunities to so do,²⁷ did not fully incorporate the Sixth Amendment into the Fourteenth Amendment until 1963 in *Gideon v. Wainwright*.²⁸

The next question that the courts confronted was the meaning of "effective assistance of counsel." The Court in *Powell* had criticized the pro forma appearance of counsel that was less than "zealous and active."²⁹ Ten years later the Supreme Court reversed a conviction on direct appeal holding that the defendant had been denied the effective assistance of counsel where his court appointed lawyer had a conflict of interest.³⁰ Thus, the Court intimated that the right to counsel includes some measure of effective assistance of counsel.

If the right to the effective assistance of counsel were to have meaning, then counsel in a given case would have to act in conformity with some minimum level of attainment in order for this new right to mean anything to the person charged with a crime. The Supreme Court did not address the question of the standard of reviewing a lawyer's effectiveness under the Sixth Amendment until 1970.³¹ While *Glasser v. United States* implied an undefined standard of effectiveness,³² the Court did not fully develop the standard of review until *Strickland v. Washington*.³³

Amendment.

Id. at 676.

27. *Betts v. Brady*, 316 U.S. 455 (1942):

The Sixth Amendment of the national Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may . . . operate . . . to deprive a litigant of due process of law in violation of the Fourteenth.

Id. at 461-62.

28. 372 U.S. 335 (1963).

29. 287 U.S. at 58.

30. *Glasser v. United States*, 315 U.S. 60 (1942).

31. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

32. 315 U.S. 60, 76 (1942); see also *Reese v. Georgia*, 350 U.S. 85, 90 (1955) ("The effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the Union may disregard.")

33. 466 U.S. 668 (1984).

C. From "Farce and Mockery" to "Reasonably Effective Assistance of Counsel"

Even before *Powell* some states required the appointment of counsel in capital cases.³⁴ Indeed, the petitioners in *Powell* had been entitled to counsel under the Alabama Constitution,³⁵ and it had been argued that the defendants had in fact received the services of counsel. Early state cases, operating under state law, generally refused relief, regardless of how execrable counsel's performance,³⁶ even in capital cases.³⁷ Thus, in *O'Brien v. Commonwealth*³⁸ the Supreme Court of Kentucky refused relief to a condemned prisoner where his lawyer was allegedly drunk during the trial. Courts almost never viewed allegations of incompetency of counsel as "ground[s] for a new trial."³⁹

The general rule, was "that negligence, unskillfulness, or incompetency of counsel [was] imputed to the client and the client [was] bound thereby."⁴⁰ The condemned was bound, even though the penalty of death "may [have been] too severe" (and the Kentucky Supreme Court, speaking in 1922, feared it was)⁴¹ because any excessiveness "of the penalty imposed by the jury addresses itself to the clemency power of the Governor."⁴² At least, unlike today, in the first half of this century the clemency power was exercised with some frequency.⁴³

34. See Green, *supra* note 11, at 438 n.15.

35. *Powell v. Alabama*, 287 U.S. 45, 48 (1932).

36. See, e.g., *Fambles v. State*, 25 S.E. 365 (Ga. 1895); *State v. Benge*, 17 N.W. 100 (Iowa 1883).

37. *Sayre v. Commonwealth*, 238 S.W. 737 (Ky. 1922).

38. 74 S.W. 666 (Ky. 1903).

39. *Benge*, 17 N.W. at 102.

40. *Sayre*, 238 S.W. at 739.

41. *Id.* at 740.

42. *Id.*

43. Hugo Adam Bedau, *The Decline of Executive Clemency In Capital Cases*, 18 N.Y.U. REV. L. SOC. CHANGE 255 (1990-91). Professor Bedau traces the number of commutations of death sentenced prisoners and points out that some years ago "about one out of every four or five death row prisoners had his sentence commuted to life in prison [whereas now] the frequency has dwindled to barely one in forty, a reduction by at least a factor of ten." *Id.* at 266 (footnote omitted). Bedau concludes that "the prospect is not cheering, at least not for those who oppose the death penalty. . . ." *Id.* at 272. This decline in the frequency of clemency commutations (often from death to life imprisonment) has been noted by other scholars. See Paul Whitlock

The Missouri Supreme Court succinctly stated the nearly universal rule, and its basis, in 1897, when it disallowed relief for the poor performance of a criminal defendant's trial counsel:

The neglect of an attorney is the neglect of his client, in respect to the court and his adversary. The decisions are too numerous to cite, but their uniform tenor is to the effect that neither ignorance, blunders, nor misapprehension of counsel, not occasioned by his adversary, is ground for setting aside a judgment or awarding a new trial To permit clients to seek relief against their adversaries upon the alleged negligence or blunders of their own attorneys would open the door to collusions, and would lead to endless confusion in the administration of justice.⁴⁴

The result was to leave a client with only a civil remedy for malpractice against the attorney, cold comfort to the convict where "the sentence of law will be carried into execution."⁴⁵

Before *Powell*, even in the worst cases of gross incompetency, relief was grudging and rare. Capital defendants with demonstrably substandard lawyers were left with executive clemency as the sole avenue for relief. The Supreme Court began the process of change by dicta in a death penalty case that denied

Cobb Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 393-94 (1989); Joseph B. Schimmel, *Commutation of the Death Sentence: Florida Steps Back From Justice and Mercy*, 20 FLA. ST. U.L. REV. 253 (1992). The most comprehensive analysis of clemency decisions since the 1976 reinstatement of the death penalty tracked all recent exercises of executive clemency and found that the majority of those few death row inmates that do receive clemency received it as a result of judicial expediency. These cases had been reversed by a court at some level, often because of constitutional error, and in order to avoid the expense of retrial, the sentences were commuted to life imprisonment, thus mooted any sentencing phase error. Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency In Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 293-97 (1993). When these cases are factored out (along with the swan song mass commutations by outgoing Utah Governor, Toney Anaya) humanitarian commutations have become "unavailable in practice". Bedau, *supra*, at 266. Careful studies have shown that historically "the race of both defendants and victims influenced decisions to grant clemency." Margaret Vandiver, *The Quality of Mercy: Race and Clemency In Florida Death Penalty Cases, 1924-1966*, 27 U. RICH. L. REV. 315, 343 (1993). The present political climate appears to be a factor in the clemency process. Bruce Ledewitz & Scott Staples, *The Role of Executive Clemency In Modern Death Penalty Cases*, 27 U. RICH. L. REV. 227, 238 (1993).

44. *State v. Dreher*, 38 S.W. 567, 570 (Mo. 1897) (citations omitted).

45. *Id.* at 571.

relief, despite the fact that counsel had only three days from appointment to trial to prepare and had intervening trials:

But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.⁴⁶

This case, along with *Glasser*,⁴⁷ plainly implied a right to more than mere appointment of counsel. It implied at least some undefined right to effective assistance of counsel. The lower federal courts quickly recognized the tension between the indigent defendant's right to effective representation and the time-honored limits on the federal court's habeas jurisdiction. Federal habeas courts had heretofore not ordinarily reached these types of issues which had previously been considered nonconstitutional trial issues.⁴⁸ In one of the earliest post-*Powell* cases to confront the issue of counsel's ineffectiveness, *Diggs v. Welch*, a federal appeals court pointed out that while "[t]here must be 'effective' representation . . . if that word be construed in a broad and literal sense it would follow that on habeas corpus the court would have to review the entire trial and consider all the alleged mistakes. . . ."⁴⁹ The *Diggs* court denied relief and intimated that the only circumstances warranting habeas relief from inept defense counsel would be those that "shocked the conscience of the court and made the proceedings a farce and a mockery of justice."⁵⁰

While the Supreme Court continued to duck the issue,⁵¹ low-

46. *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (footnote omitted).

47. *Glasser v. United States*, 315 U.S. 60 (1942).

48. *Fay v. Noia*, 372 U.S. 391 (1963), which was overruled by a series of cases beginning with *Wainwright v. Sykes*, 433 U.S. 72 (1977), and culminating with *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), contains a useful history of the writ of habeas corpus.

49. *Diggs v. Welch*, 148 F.2d 667, 669 (D.C. Cir.) (footnote omitted), *cert. denied*, 325 U.S. 889 (1945).

50. *Id.* at 670.

51. See David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 21 (1973); see also, *Trapnell v. United States*, 725 F.2d. 149, 151 (1983) ("By 1962,

er courts struggled to give definition to this right. Most settled on the "mockery of justice" test which compelled relief for attorney incompetence only when counsel's performance was so poor that it "shocks the conscience of the court."⁵² The "mockery of justice" standard resolved the problem of whether a lawyer for a criminal defendant fell below the constitutional standard by sweeping the problem under a rug. Very few claims of shoddy performance could fail to meet this undemanding standard.⁵³

Trial and intermediate appellate courts feared a standard of review that would have required that indigent defendants be afforded reasonably effective assistance of counsel. Their reluctance in formulating a standard of review that would allow any appreciable number of cases to be seriously considered appears to have been grounded in pragmatism. Criminal defense for indigents has never been a high priority, and the quality of lawyering in these cases has been criticized by a former Chief Justice of the Supreme Court, as well as by two well respected federal appeals court judges.⁵⁴ If the courts took seriously the requirement of affording effective assistance of counsel, the appellate courts would be reversing half of all criminal convictions.⁵⁵ The courts would then be inundated with appeals and retrials.

The "farce and mockery" or "mockery of justice" standard generated a firestorm of scholarly criticism.⁵⁶ Finally, Chief

nine of the eleven circuits were applying the *Diggs* 'farce and mockery' standard. The two remaining circuits adopted the 'farce and mockery' standard in 1965 and 1970, respectively.") (citations omitted).

52. Bazelon, *supra* note 51, at 28 n.76.

53. *United States ex rel. Hall v. Ragen*, 60 F. Supp. 820 (N.D. Ill. 1945) (holding that a doctor who was licensed to practice law, but who was later disbarred, acted competently).

54. Bazelon, *supra* note 51; Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 230-31 (1973); Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569 (1975).

55. Bazelon, *supra* note 51, at 22-23.

56. See, e.g., Bazelon, *supra* note 51; Joel J. Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973); Kaufman, *supra* note 54; Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531 (1963); Note, *Effective Assistance of Counsel For the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965); Comment, *Effective Representation—An Evasive Substantive Notion Masquerading As Procedure*, 39 WASH. L. REV. 819 (1964); Note, *Incompetent Counsel As Ground For New Trial In Criminal Cases*, 47 COLUM. L. REV. 115 (1947).

Judge David Bazelon, of the D.C. Circuit, took direct aim at the courts for "papering over the problem."⁵⁷ Charging that the 'mockery' test required such a minimal level of performance from counsel to be itself a "mockery of the Sixth Amendment,"⁵⁸ he concluded that it was a pretense of justice to provide "an indigent defendant with a lawyer, no matter how inexperienced, incompetent or indifferent."⁵⁹

Although change soon came, the change was grudging and inadequate.⁶⁰ Regrettably, increasing numbers of people are being executed because of the incompetence of their lawyers.⁶¹

Even before Judge Bazelon's often quoted broadsides, a few cracks had appeared in "farce and mockery's" uniform wall. The Fifth⁶² and Third Circuits,⁶³ as well as at least one state court,⁶⁴ had adopted variants of the "reasonably effective assistance" standard for evaluating counsel's performance under the Sixth Amendment. What began as a trickle became a flood throughout the mid and late 1970s as most state courts⁶⁵ and all federal courts⁶⁶ adopted some form of the "reasonably effective assistance" standard.

57. Bazelon, *supra* note 51, at 20.

58. *Id.* at 28.

59. *Id.* at 4 (citation omitted).

60. Although some might argue that conditions have improved somewhat, relief is still rarely granted despite egregious examples of incompetence. *See infra* part II.G.

61. *See, e.g.,* Berger, *supra* note 11; Goodpaster, *supra* note 6; Goodpaster, *supra* note 14; Green, *supra* note 11; Klein, *supra* note 11; Robbins, *Toward a More Just and Effective System of Review In State Death Penalty Cases*, 40 AM. U. L. REV. 1 (1990); Welsh S. White, *Effective Assistance of Counsel In Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 332 ("[E]mpirical evidence indicates that at least in some jurisdictions the quality of representation in capital cases has not improved and in fact may be deteriorating.").

62. *Caraway v. Beto*, 421 F.2d 636, 637 (5th Cir. 1970).

63. *Moore v United States*, 432 F.2d 730, 737 (3d Cir. 1970) ("This standard also makes it clear that the ultimate issue is not whether a defendant was prejudiced by his counsel's act or omission, but whether counsel's performance was at the level of normal competency.").

64. *State v. McCarthy*, 298 A.2d 740, 742 (1972) ("The issue before us is whether defendant's counsel possessed the skill to bring them 'within the range of competence required of attorneys representing defendants in criminal cases.'") (citations omitted).

65. *See generally*, Gregory G. Sarno, Annotation, *Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client*, 2 A.L.R. 4th 27 (1980).

66. *Strickland v. Washington*, 466 U.S. 668, 683 (1984).

One reason for this, in addition to the wide scholarly criticism of the "farce and mockery standard,"⁶⁷ revolved around the changing notion of the basis for the right to counsel. It will be recalled that *Powell*⁶⁸ found a due process right to counsel predicated on the more general due process or fair trial concerns of the Fourteenth Amendment. Once the Sixth Amendment was incorporated into the Fourteenth by *Gideon*,⁶⁹ courts began to see the right to the effective assistance of counsel as fundamental. The reasoning of the California Supreme Court in *People v. Pope* was typical:

The reasons set forth by these courts and commentators for replacing the "farce or sham" standard are compelling. The standard originated in decisions which held that the right to competent representation derived solely from the due process clause of the Constitution and not from the provision guaranteeing the right to the assistance of counsel. This view has been thoroughly discredited, for courts now recognize that the right to competent representation at trial is grounded in the constitutional right to the assistance of counsel. Accordingly, constitutionally adequate assistance . . . must be determined by a standard bottomed on the Sixth Amendment.⁷⁰

But what would that standard be?

67. See *supra* note 58.

68. *Powell v. Alabama*, 287 U.S. 45 (1932).

69. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

70. *People v. Pope*, 590 P.2d 859, 864 (Cal. 1979) (citations omitted). *Contra Moore v. United States*, 432 F.2d 730, 737 (3d Cir. 1970) (implying that the same standard would apply regardless of which amendment is relied upon and holding the standard to be one of "normal competency" of counsel).

D. *Strickland v. Washington: More Farce and Mockery*

1. The "Reasonably Competent Counsel" Standard

a. The Standard of "Any Lawyer"

In 1984, *Strickland v. Washington*⁷¹ decided the matter. The standard for effective assistance of counsel was that of reasonably competent counsel. *Strickland* provides a two pronged test for relief from ineffective assistance of counsel: (1) counsel's performance must fall below that of the hypothetical "reasonably competent counsel"; and (2) prejudice must have resulted to the defense because of counsel's deficient performance. But would the new test make any difference for capital defendants? By the time David Leroy Washington's death sentence reached the Supreme Court,⁷² there was little support for the "farce and mockery" standard and an overwhelming progressive tide in favor of the "reasonably effective assistance" standard.⁷³ Yet even the dissent of Justice Marshall intimated that the majority opinion so stringently cast the new standard that there was little expectation that the new articulation would make any practical difference.⁷⁴ At the time, it was noted that the new standard represented little departure from "farce and mockery."⁷⁵ Despite persistent indications of substandard perfor-

71. 466 U.S. 668 (1984).

72. David Washington "confessed and pleaded guilty to three brutal murders and to a lengthy series of associated crimes of violence. . . ." *Washington v. Strickland*, 673 F.2d 879, 882 (5th Cir. Unit B 1982). Unit B of the former Fifth Circuit Court of Appeals "determined to have this case reheard en banc," *Washington v. Strickland*, 679 F.2d 23 (5th Cir. Unit B) 1982), and, as a result of the reorganization of the old Fifth Circuit dividing that court into two circuits (Pub. L. No. 96-452 (codified at 28 U.S.C. 41 (1993))), the newly formed Eleventh Circuit heard the case en banc. *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B 1982). That court determined "that a habeas petitioner must show that his counsel's ineffectiveness caused 'actual and substantial disadvantage' to the conduct of his case." *Id.* at 1250. The court then remanded the case for further fact-finding under the court's newly announced standard. The Supreme Court granted certiorari and reversed the court of appeals. *Strickland v. Washington*, 466 U.S. 668 (1984).

73. *Strickland*, 466 U.S. at 683-84.

74. *Id.* at 714 (Marshall, J., dissenting).

75. William J. Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181-82 (1984).

mance by attorneys in capital cases,⁷⁶ commentators documented the paucity of successful challenges to death sentences.⁷⁷ Although studies have revealed a few reversals under the new standard,⁷⁸ far too many persons are on death row because of incompetent counsel.⁷⁹

Strickland remains a difficult case to grasp because it speaks with two voices.⁸⁰ In one voice the Supreme Court's opinion (in Part II) constitutes a paean to the role of effective assistance of counsel in promoting a fair trial for any criminal defendant. The Court's language focuses on the role of effective counsel as a precondition for a fair trial:

That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.⁸¹

76. Goodpaster, *supra* note 6.

77. Ivan K. Fong, Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461, 470-80 (1987), points out that, despite numerous cases where counsel's conduct was questionable, if not clearly ineffective, as of the writing of the Note, only four capital defendants had gained relief because of trials that had been tainted by poor lawyering, three of which came out of a single court of appeals, including *Jones v. Thigpen*, 788 F.2d 1101 (5th Cir. 1986); *Blake v. Kemp*, 758 F.2d 523 (11th Cir.), *cert. denied*, 474 U.S. 998 (1985); *Tyler v. Kemp*, 755 F.2d 741 (11th Cir.), *cert. denied*, 474 U.S. 1026 (1985); *King v. Strickland*, 748 F.2d 1462 (11th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985).

78. See, e.g., Martin C. Calhoun, Note and Comment, *How to Thread the Needle: Toward A Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 458 (1988). The author of that study conducted a computer-assisted research study of ineffective assistance of counsel claims from *Strickland* until May 30, 1988 and found that only 30 successful claims had been brought in the circuit courts of appeals out of 702 cases during the period studied. Most of these cases came from the Fifth, Seventh, and Eleventh Circuits. Many circuits had no successful cases. Even these numbers are deceptive because they include cases involving ineffective assistance of appellate counsel where the only remedy is resumption of the appeal. Thus appellate ineffective assistance of counsel has far fewer adverse ramifications for the judiciary, and is far less important than trial error from the perspective of one who may be facing a prosecution that involves the death penalty.

79. See *infra* part II.G.

80. Fong, *supra* note 77, at 481.

81. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

The Court accepts the nominally more liberal "reasonably effective assistance standard,"⁸² then changes voice and eviscerates it. The naive reader, up to this point, might have supposed that the opinion would belatedly apply the same standard of professional negligence to criminal defense lawyers as those that apply in the civil realm to all other professions and callings.⁸³ That reader would have been wrong. In its second voice the Court isolates the criteria by which lower courts are to evaluate claims of Sixth Amendment violations. The new standards apply, without modification, to a capital sentencing proceeding.⁸⁴

By itself this might seem innocuous, but the same day that the Court decided *Strickland* it also decided a noncapital ineffective assistance of counsel case—*United States v. Cronin*.⁸⁵ When the two cases are read *in pari materia* the import of *Strickland's* application to capital proceedings becomes clear. *Cronin* involved the appointment of a neophyte real estate attorney to a complex mail fraud case. The lawyer, who had never handled a jury trial, had only twenty-five days to prepare;

82. *Id.* at 683-84, 687-88.

83. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 32, 185-93 (5th ed. 1984).

84. A badly fractured Supreme Court struck down all death penalty statutes in *Furman v. Georgia*, 408 U.S. 238 (1972). Four years later the Court sustained "guided discretion" death penalty regimes 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). At the same time, the Court struck down mandatory death penalty laws in *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325 (1976). The successful death penalty statutes all divided capital trials into two parts: a guilt phase, and a penalty or sentencing phase. This second step is only reached if the jury or judge has, at the first stage, found the defendant guilty of a capital crime, as defined by statute. At the penalty phase the prosecution submits evidence in aggravation of the offense, and the defense is entitled to introduce evidence in mitigation. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Green v. Georgia*, 442 U.S. 95 (1979), *Lockett v. Ohio*, 438 U.S. 586 (1978). In most states, the jury (assuming a jury trial) then decides whether the defendant lives or dies (in a few states, such as Florida, the jury's verdict is only advisory). *Strickland*, 466 U.S. at 672. Alabama and Indiana also allow the trial judge to sentence a defendant to death despite a jury's recommendation of life. William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 12 n.48 (1988). For a discussion of how this bifurcated procedure works in Virginia, see Alan W. Clarke, *Virginia's Capital Murder Sentencing Proceeding: A Defense Perspective*, 18 U. RICH. L. REV. 341 (1984). The reasons for the extraordinary complexity of the capital sentencing proceeding are detailed in the next section.

85. 466 U.S. 648 (1984).

the government had taken over four and one-half years to prepare. The Tenth Circuit Court of Appeals inferred inadequate representation from the circumstances.⁸⁶ The Supreme Court reversed and remanded, holding that the "criteria used by the Court of Appeals [did] not demonstrate that counsel failed to function in any meaningful sense as the Government's adversary."⁸⁷ This exposes the nub of the problem, particularly for capital defendants: all that is required is some minimal adversarial testing of the government's case, but it does not require that counsel have any knowledge, experience, or expertise, regardless of how complex or difficult the case. Even a real estate lawyer fresh out of law school has the wit to ask a few reasonably pointed questions. This suffices, in the Court's opinion, to meaningfully test the government's case. Thus, anyone with a bar card can, and in many parts of the country does, handle the most complex capital trial.

Reading both *Cronic* and *Strickland*, we learn that a lawyer's defense of a capital defendant, at a capital sentencing hearing, is to be judged not by the standards and professional norms of people who regularly represent capital defendants, nor even by the standards practiced by experienced criminal defense lawyers. The pool from which we determine the performance standards in capital cases is that of all persons who have passed the bar and possess a license to practice.⁸⁸ Furthermore, it is arguable that the standard actually applied will be the "local professional norm"⁸⁹ requiring the condemned person to use a local expert to attempt to prove former counsel's incompetence. In areas where the standard of practice is low this will have the effect of further lowering the standard by which counsel's performance will be judged.

A physician who holds herself out to be a specialist will be held to the high standard of care applicable to specialists in the field,⁹⁰ and a physician who lacks sufficient expertise must refer the patient to a specialist who possesses the requisite

86. *Id.* at 652.

87. *Id.* at 666.

88. Green, *supra* note 11, at 465.

89. Goodpaster, *supra* note 6, at 79.

90. D.E. Evins, Annotation, *Physicians and Surgeons: Standard of Skill and Care Required of a Specialist*, 21 A.L.R.3d 953-54 (1968).

expertise.⁹¹ This requirement that professional competency be measured against others with similar superior knowledge or skill applies to those of all other professions, including lawyers,⁹² except criminal defense lawyers and, most tellingly, criminal defense lawyers in capital cases. There, and only there, does a basic license suffice.

One might argue that the criminal context is different, that it is not the lawyer's competence that is at issue but the fairness of the trial and thus, a different standard is appropriate. Justice Marshall, in dissent, correctly observed that "[s]eemingly impregnable cases can sometimes be dismantled by good defense counsel" and one cannot confidently "ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer."⁹³ There are experienced criminal defense lawyers throughout the South's "death belt"⁹⁴ who try dozens of egregious capital murder cases without suffering a single death sentence. This can be contrasted with the all too frequent example of the novice who loses her first jury trial ever in a capital sentencing proceeding where life itself is the only issue. Justice Stevens in *Cronic* dismissed the argument that this complex mail fraud trial was seriously affected by the fact that it was the young and nervous real estate lawyer's first jury trial. The Justice asserted that "[e]very experienced criminal

91. Jerald J. Director, J.D., Annotation, *Malpractice: Physician's Failure to Advise Patient to Consult Specialist of One Qualified in a Method of Treatment Which Physician is Not Qualified to Give*, 35 A.L.R.3d 349 (1971).

92. See KEETON ET AL., *supra* note 83.

93. *Strickland v. Washington*, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting).

94. The NAACP Legal Defense and Educational Fund, Inc. has tracked and compiled statistics on every death row inmate, and every execution since the advent of the modern death penalty statutes. NAACP Legal Defense and Education Fund, Inc., *Death Row U.S.A.* (Summer 1993) (unpublished manuscript, on file with the *University of Richmond Law Review*) [hereinafter *Death Row USA*]. Their *Death Row USA* figures show that as of July 1993, five southern states (Texas, Florida, Louisiana, Virginia and Georgia) accounted for 76.18% of all executions in the U.S. Thus, the famous civil rights lawyer, Jack Greenberg, observes that the death penalty "has been employed almost exclusively in a few formerly slaveholding states, and there it has been used almost exclusively against killers of whites, not blacks, and never against white killers of blacks." Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670 (1986). Thus, the South is often referred to as the "death belt" by human rights organizations such as Amnesty International, and The Southern Coalition on Jails and Prisons.

defense attorney once tried his first criminal case."⁹⁵ That is indubitably true. But most good trial lawyers start with small cases involving misdemeanors or small civil disputes—not capital cases. Saddling an indigent capital defendant (as all too often happens) with inexperienced and ill-prepared counsel does to the indigent what no knowledgeable paying consumer of legal services would ever do—it entrusts a significantly complex case, where the stakes are mortally high, to a neophyte. Gross disparities in competence contribute to the reality that "[s]ince at least 1967, the death penalty has been inflicted only rarely, erratically, and often upon the least odious killers, while many of the most heinous criminals have escaped execution."⁹⁶ Merely having a warm body that can propound a few reasonably coherent questions does not constitute a fair trial any more than having a chiropractor do neurosurgery constitutes fair or competent brain surgery.⁹⁷

b. Presumptions and Rules of Construction: A Springboard to Vault the Lowered Threshold?

Strickland establishes a very low threshold standard for evaluating the effective assistance of counsel.⁹⁸ The subtext in *Strickland* takes the already modest threshold standard for evaluating a criminal defense counsel's competency, and gives the lower courts marching orders to return, de facto, if not de

95. *United States v. Cronin*, 466 U.S. 648, 665 (1984).

96. Greenberg, *supra* note 94, at 1670.

97. The metaphor of the chiropractor as brain surgeon to illustrate the inequity in allowing an inexperienced person who happens to hold a bar card do capital litigation was used by capital defense lawyer Stephen B. Bright in his report to the American Bar Association Criminal Justice Section. Stephen B. Bright, *American Bar Association Criminal Justice Section Report to the House of Delegates: Minority Report of Stephen B. Bright*, 40 AM. U.L. REV. 209, 219 (1990).

We are told that some states just do not have the money to attract qualified lawyers and that in some places, particularly rural areas, there is simply no one qualified available. These considerations should not excuse lack of adequate legal representation in capital cases. There are many small communities that do not have surgeons. But this does not mean we allow chiropractors do to brain surgery in those communities.

Id. This metaphor was later used by Vivian Berger (Vice Dean at Columbia Law School) in her article, *The Chiropractor as Brain Surgeon: Defense Lawyering In Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 249 (1990-91). Given the complexity of capital cases compared to routine types of office practice, this analogy seems fair.

98. Genego, *supra* note 75, at 196.

jure, to "farce and mockery." The hypothetical lawyer, who need have no criminal defense experience, must still perform as "reasonably competent counsel." Regardless of experience or expertise, this standard is presumably better than no standard at all. But how much better? For the *Strickland* Court a showing that a lawyer's performance was deficient entails a "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment."⁹⁹ In other words, a lawyer's effort is "reasonably competent" if it is perceived sufficient by the reviewing court if the court finds the attorney to be functioning as counsel. It is not immediately apparent how this standard differs from "farce and mockery." In either case counsel must be barely better than no attorney at all. Little wonder that one commentator refers to the emperor *Gideon* as having no clothes,¹⁰⁰ while others speak of defense lawyering in capital cases as being akin to having chiropractors perform brain surgery.¹⁰¹

Lest a lower court be confused by the Supreme Court's obligatory curtesy to the notion of a fair trial, the Court continued to undercut the meaning of the phrase "reasonably competent counsel":

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenge action "might be considered sound trial strategy."¹⁰²

99. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

100. Klein, *supra* note 11.

101. See Bright, *supra* note 97, at 219.

102. *Strickland*, 466 U.S. at 689 (citations omitted). Among other things, Justice

Thus, the Court added a "strong presumption" that counsel in fact cleared the competence hurdle and encouraged lower courts to be deferential to trial counsel's exercise of judgment.¹⁰³ Justice Marshall responded to these additional obstacles by charging that "strongly presuming' that [counsel's] behavior will fall within the zone of reasonableness, is covertly to legitimate convictions and sentences obtained on the basis of incompetent conduct by defense counsel."¹⁰⁴ Professor Goodpaster described this presumption as "a result-oriented addition to the *Strickland* 'reasonable competency' standard, designed to ensure the discouragement and ready defeat of ineffective assistance claims."¹⁰⁵

After *Strickland*, the courts will rarely, if ever, seriously review cases of substandard lawyering—even in capital cases. The standard by which counsel's performance will be gauged is the minimal performance required of all for passing the bar. Reasonable assistance is defined as any minimal testing of the government's case, such as being able to ask a few reasonably related questions of the prosecutions witnesses. It does not require adequate investigation, or the ability to mount a coherent case in rebuttal. It does not even require the lawyer to be able to make the appropriate legal motions and arguments. Finally, the courts must apply a heavy presumption that the lawyer has met this minimal burden. In addition, the courts should defer to anything that can be characterized as a judgment call, thus rendering anything that involves judgment immune from attack. The rare convict or death row inmate that can meet this demanding challenge is, however, not finished. The Court erected a final barrier—the prejudice prong of *Strickland*.

O'Conner's opinion at this point constitutes a non sequitur. It does not follow from the difficulties inherent in evaluating a lawyer's performance that a presumption of competency is called for. The same difficulties inhere in evaluating the competence of all other professionals such as physicians, dentists, engineers or accountants. All must exercise judgement. The courts have no problem in evaluating this without the aid of any presumption of competency.

103. *Id.* at 691.

104. *Id.* at 713 (Marshall, J., dissenting).

105. Goodpaster, *supra* note 6, at 73.

2. The Prejudice Component

The *Strickland* Court divides effective assistance of counsel claims into two components: (1) the performance of counsel must have been deficient (as discussed above); and, (2) “the defendant must show that the deficient performance prejudiced the defense.”¹⁰⁶ These are what are often referred to as the “cause” and “prejudice” tests of *Strickland*. Both components are equally important. As we will see, *Strickland*’s prejudice prong creates special problems for death sentenced habeas petitioners.¹⁰⁷

Even before *Strickland*, as courts groped toward a “reasonable competence” standard, both state¹⁰⁸ and federal¹⁰⁹ courts began to append a requirement that the defendant whose trial suffered from inept lawyering show that she was prejudiced by the substandard attorney performance. The courts developed a variety of standards governing the requirement that a defendant show prejudice. For example, the Court of Appeals for the D.C. Circuit appears to have viewed it as a burden shifting device. A defendant had first to show that her counsel’s inadequacy prejudiced her defense.¹¹⁰ Once that was accomplished, the government had the “opportunity to prove beyond a reasonable doubt that counsel’s deficiencies were harmless.”¹¹¹ On the other hand, the Second Circuit Court of Appeals required a showing of actual prejudice (which appears to be outcome determinative with a vengeance) under either the “farce and mock-

106. *Strickland*, 466 U.S. at 687.

107. This has peculiar significance to death row prisoners bringing successor petitions. A death sentenced petitioner bringing a successive, abusive, or defaulted habeas claim has a much heavier burden of proving actual innocence of the death penalty, which, under *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992) requires for relief a showing that his or her execution “would be a fundamental miscarriage of justice.” *Id.* at 2524. Counsel’s failure—even if prejudicial—to mount an available line of mitigating evidence is, at this juncture, insufficient. Petitioner must prove much more; she must undercut the elements that make her death eligible.

108. Sarno, *supra* note 65, at 83-99.

109. Goodpaster, *supra* note 14, at 345-352.

110. *United States v. Hinton*, 631 F.2d 769, 771 (D.C. Cir. 1983).

111. *Id.* at 771; *see also*, *Knight v. State*, 394 So.2d 997, 1001 (Fla. 1981).

ery" test¹¹² or under the "reasonable competence" test.¹¹³ The Third Circuit Court of Appeals required the defendant to "prove that he was prejudiced by his counsel's incompetency,"¹¹⁴ while the Fourth Circuit Court of Appeals, upon a showing of attorney incompetence, cast the burden upon the state to prove lack of prejudice.¹¹⁵

Strickland ended the confusing profusion of standards for evaluating prejudice. According to *Strickland*, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."¹¹⁶ The conviction cannot be reversed unless the attorney error was "prejudicial to the defense."¹¹⁷ Prejudice was defined as "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."¹¹⁸ The Court summarized the test:

When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent that it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.¹¹⁹

Although courts are enjoined to avoid the "distorting effects of hindsight"¹²⁰ when evaluating counsel's performance, they

112. *Lipuma v. Department of Corrections*, 560 F.2d 84, 92 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977).

113. *United States v. Aulet*, 618 F.2d 182, 187 (2d Cir. 1980).

114. *United States v. Swinehart*, 617 F.2d 336, 341 (3d Cir. 1980).

115. *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

116. *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

117. *Id.* at 692.

118. *Id.* at 694.

119. *Id.* at 695.

120. *Id.* at 689.

must gaze backward (reweighing the evidence in some cases¹²¹) to determine whether death was warranted.

The jury's decision, in a capital sentencing proceeding, is solely to determine life or death.¹²² That determination is emotional and complex.¹²³ Under *Strickland's* prejudice prong, the death sentenced prisoner undertakes the sisyphian task of proving "how a sentencing authority would have responded emotionally to evidence the sentencer did not hear."¹²⁴

Strickland's prejudice requirement establishes a far heavier burden for a habeas corpus petitioner than might otherwise appear upon a superficial reading. Habeas corpus proceedings are statutory, and are often first heard by the trial judge who originally sentenced the petitioner to death.¹²⁵ After that, the

121. Two years after *Strickland*, the Supreme Court in *Cabana v. Bullock*, 474 U.S. 376, 392 (1986), held that a state appellate court could correct a deficiency in the findings at the trial by independently reweighing the evidence, or conducting harmless error analysis. This allowed federal courts to remand a defective case (as where the jury had not been properly instructed on the intent requirement before a death sentence could be imposed) to the same state appellate courts that had already denied relief. These courts, in turn, could supply (without any rehearing at the trial level) the missing fact finding either by reweighing the evidence or by harmless error analysis. See *Clemmons v. Mississippi*, 494 U.S. 738 (1990). This method of salvaging defective death sentences reached its apex in *Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991) cert. denied, 112 S. Ct. 1591 (1992). There, the Fourth Circuit Court of Appeals ruled that the Supreme Court of Virginia's proportionality review of Willie Jones' death sentence in 1984 cured all sentencing phase error. *Id.* at 1117. The supreme court was required statutorily to review all death sentences, and to "independently evaluate the propriety of the sentence." Clarke, *supra* note 84 at 358. Jones' jury had been instructed in the disjunctive on the meaning of "vileness" such that the jury could have split any number of ways in determining whether the crime was sufficiently vile to warrant death. *Jones*, 947 F.2d 1116. Thus, the defendant was denied assurance of jury unanimity on this point. The Fourth Circuit held that the supreme court's generalized review of the sentence cured this problem, citing *Cabana*. *Id.* at 1117. *Cabana* was not decided until 1986 so the supreme court could not have been doing the task ascribed to it by the Fourth Circuit Court of Appeals. Not only that, *Cabana*-style reweighing does not apply in any event to nonspecific proportionality reviews. See, e.g., *Stringer v. Black*, 112 S. Ct. 1130, 1140 (1992). Willie Jones was executed by the Commonwealth of Virginia at Jarret at 11:00 P.M. on September 15, 1992. Sue Anne Pressley, *Killing Me Softly with His Song*, WASH. POST., Sept. 11, 1992, at F1.

122. Clarke, *supra* note 84, at 341-42.

123. Cf. Geimer & Amsterdam, *supra* note 84 (explaining the complexity of attempting to determine why jurors vote life or death).

124. Goodpaster, *supra* note 6, at 84.

125. See, e.g., VA. CODE ANN. § 8.01-654(B)(1) (Michie Repl. Vol. 1992 & Cum. Supp. 1995); *In re High Pine*, 535 P.2d 174 (Mont. 1975); *In re Buccheri*, 431 P.2d

case goes through an elaborate appellate process.¹²⁶ In the federal habeas proceedings, the matter will proceed on the basis of a cold record, without additional evidence *ore tenus*, unless the state trial court failed to give the petitioner a full and fair and adequate hearing or failed to meet one of the other narrow procedural technicalities of 28 U.S.C. § 2254.¹²⁷ Thus, a habeas petitioner's only realistic opportunity to make a record is before the same judge that originally imposed the death sentence.¹²⁸

A criminal defendant's right to trial by jury is fundamental.¹²⁹ The trial bar tends to see the jury as somewhat less hardened and more open to argument, unlike a trial judge who sees many difficult cases, and who may be less willing to allow emotional considerations to palliate the severity of the sentence. Nonetheless, once trial counsel fails to adduce appropriate, available and mitigating evidence before the sentencing authority (often a jury), the condemned's only remaining recourse on habeas review is to persuade the trial judge who originally

91, 102 (Ariz. 1967) ("Nor do we believe it proper that new factual allegations be made for the first time in this, an appellate court. The general law seems well established that a habeas corpus petitioner must first present his case to the trial court." (citations omitted)).

126. See *supra* note 9 for an explanation of the various steps in a typical capital habeas proceeding.

127. 28 U.S.C. § 2254(d)(6) (1988). If petitioner for any reason fails to fully develop the record before the state trial court she is thereafter barred from raising the issue unless she can meet the stringent "cause and prejudice" test of *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 6 (1992), which overruled *Townsend v. Sain*, 372 U.S. 293 (1963). By applying the demanding "cause and prejudice" test to failure to fully develop a state habeas record, the majority in *Keeney* arguably overruled Congress judicially. See *Keeney*, 504 U.S. at 12 (O'Connor, J., Blackmun, J., Stevens, J., and Kennedy, J., dissenting).

128. This same state trial judge's findings of fact will be entitled to a presumption of correctness by the federal district court in its habeas review under 28 U.S.C. § 2254 (1988). This means that the facts on all subsequent habeas review will be those determined by the state habeas judge, unless one of the narrow exceptions of 28 U.S.C. § 2254 happens to apply. What constitutes a full, fair, and adequate hearing, and the other exceptions is beyond the scope of this paper. Because of *Keeney*, a death sentenced habeas petitioner must try to plead and prove everything that is colorable at the state habeas hearing. The state's attorney will resist and make it difficult to make the appropriate record, and where the ruling is against the petitioner, the state's attorney will usually volunteer to draft the order so as to insure that the fact findings will be impregnable on appeal and on federal habeas review.

129. *Duncan v. Louisiana*, 391 U.S. 145, 149-54 (1968).

imposed the death sentence¹³⁰ (and who also may have appointed the allegedly incompetent trial lawyer¹³¹) that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹³² Where the facts of the crime are particularly egregious, a reviewing court is practically invited to assume that no amount of mitigating evidence would have made any difference. As Professor Green states: "[p]recisely because so little is understood about how juries exercise their discretion, it will be difficult to prove convincingly that lawyers' poor performance made a difference, even if it did."¹³³

Trial judges (particularly in small rural jurisdictions where all bar members and judges know each other intimately) may well be reluctant to criticize trial counsel's performance. *Strickland* invites the court to take the path of least resistance—to simply find that even if errors occurred, those errors did not prejudice the defendant:

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.¹³⁴

Courts that depend on local lawyers continuing to take criminal appointments can be expected to be sympathetic to the com-

130. See, e.g., VA. CODE ANN. § 19.2-264.5 (Michie Repl. Vol. 1995).

131. See, e.g., VA. CODE ANN. § 14.1-183 (Michie Repl. Vol. 1993).

132. *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

133. Green, *supra* note 11, at 503.

134. *Strickland*, 466 U.S. at 697.

mand that they avoid allowing ineffectiveness claims to become burdensome to defense counsel. After all, this same judge (who sentenced petitioner to death, perhaps appointed defense counsel in the first instance, and practiced law in the jurisdiction before elevation to the bench) is likely to need the goodwill of the bar in order to keep the courts running smoothly. *Strickland* requires trial judges to perform a nearly impossible task—to extricate themselves from their surroundings and background—and then to accurately determine the subjective weight that a jury of twelve would have attached to evidence that was never presented.

The cause and prejudice requirements combine to create a nearly insurmountable obstacle confronting all habeas petitioners. They are particularly daunting to the death sentenced petitioner. *Cronic* and *Strickland* appear to be “designed to help reviewing courts deal efficiently with these claims rather than seriously address the potential injustice problems caused by incompetent trial counsel.”¹³⁵ The Courts refusal to deal with this problem realistically appears to be part of a larger trend by the Court that is hostile to the “results of relevant social science findings” and is “[u]nfettered by empirical evidence relating to capital punishment administration.”¹³⁶ The current Court emphasizes judicial efficiency and finality over other values, such as fairness or accuracy. Because *Strickland* creates such a demanding standard of review, few cases are reversed for reasons of ineffective assistance of counsel. This allows those who are willing to reason circularly to conclude that bad lawyering is not much of a problem for the criminal justice system. Reality is otherwise.

E. *Would a Checklist Approach Help?*

Several commentators have suggested that the courts and the bar respond to *Strickland*'s challenge by developing a checklist or performance-based criteria for evaluating the effective assis-

135. Goodpaster, *supra* note 6, at 67.

136. James R. Acker, *A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986-1989*, 27 L. & SOC'Y. REV. 65, 80-81 (1993).

tance of counsel.¹³⁷ These efforts to develop performance standards can help courts in determining the minimum that any lawyer must do. Experienced capital defense lawyers, for example, know that mitigating evidence exists in virtually every capital case. Failure to aggressively search for mitigating evidence in capital cases astounds competent and knowledgeable lawyers. Yet courts can and do find that the failure to even look for mitigating evidence does not violate *Strickland*.¹³⁸ Would a performance standard that required counsel either to look for mitigating evidence, or to have an extremely compelling reason for the failure to so do, cause courts to view this issue differently? If it did, then performance standards would have served a useful function.

There are two potential problems with attempting to set out criteria or performance standards for the effective assistance of counsel. First, many of these standards will have to be articulated at such a level of generality as to be of little utility to a court. For example, one proposed criterion is that “[d]efense counsel must interview the defendant as soon as practicable to determine all relevant facts known to the defendant and must explain to him the attorney’s obligation of confidentiality and the importance of fully disclosing all relevant facts.”¹³⁹ Beyond telling the court and counsel what common sense should already have mandated—that the lawyer should talk to the client and discuss confidentiality and the need for full disclosure—the standard does little to show how an effective interview should be conducted. Presumably one short meeting would satisfy this standard even in the most complex capital case.

Second, and more importantly, checklists have an insidious way of fostering a checklist mentality. Any checklist is merely a guide, a way of ensuring that one has not forgotten a step. The danger is that the checklist will become an end in itself. Neither counsel nor a reviewing court should assume that counsel was effective simply because a checklist was followed. Checklists do not ensure that counsel has understood the governing

137. See, e.g., Klein, *supra* note 11; Calhoun, *supra* note 78.

138. See, e.g., Mitchell v. Kemp, 483 U.S. 1026, 1027 (1987), (Marshall, J., dissenting from denial of certiorari); Burger v. Kemp, 483 U.S. 776 (1987).

139. Calhoun, *supra* note 78, at 438.

law, made the appropriate motions, understood the facts, and prepared a coherent strategy. So long as the standard governing counsel's performance is that of any lawyer (and not that of criminal defense or capital defense lawyers), checklists by themselves will be insufficient. Indeed, they may hinder the development of law in this important area if they are used to justify shoddy attorney performances in capital cases. While checklists may help address some of the absurdities created by *Strickland*, they cannot replace human judgment and should not be used to justify incompetent attorney performance.

F. *The Court Applies Strickland: Lockhart v. Fretwell*

The most striking cases joining arrant fatuity, counsel, and the condemned appear in numerous lower court opinions. Few cases, however, better illustrate the complexity, subtlety, and difficulty of these cases than the recent Supreme Court case *Lockhart v. Fretwell*.¹⁴⁰

In 1985, the Eighth Circuit Court of Appeals in *Collins v. Lockhart*¹⁴¹ decided that the Arkansas death penalty statute unconstitutionally failed to narrow the class of persons eligible for the death penalty where the sole aggravating circumstance found by the jury duplicated an element of the crime. The Fifth Circuit rejected the Eighth Circuit's reasoning shortly thereafter,¹⁴² thus creating a conflict between the circuit courts of ap-

140. 113 S. Ct 838 (1993).

141. *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), cert. denied, 474 U.S. 1013 (1985). In *Collins*, the only aggravating circumstance found by the jury was that the murder was committed for pecuniary gain. *Id.* at 263. This circumstance duplicated an element of the underlying crime, that the murder was committed in the course of robbery. *Id.* While this double counting did not violate state law, the Eighth Circuit held, relying on *Godfrey v. Georgia*, 446 U.S. 420 (1980) and *Zant v. Stephens*, 462 U.S. 862 (1983), that this scheme failed to appropriately narrow the class of persons eligible for the death penalty. *Id.* at 263-64. Thus, according to the Eighth Circuit, the statute, as applied, violated both the Eighth and Fourteenth Amendments. *Id.*

142. *Wingo v. Blackburn*, 783 F.2d 1046 (5th Cir. 1986). *Wingo* involved aggravated burglary, aggravated escape and armed robbery, all of which were both elements of first degree murder in Louisiana, and aggravating circumstances at the penalty phase of trial. *Wingo*, relying on *Collins*, argued that this duplication of the elements of the crime to show aggravating circumstances (where there were no other aggravating circumstances found) violated the Eighth and Fourteenth Amendments. *Id.* at 1051. The Fifth Circuit expressly rejected the *Collins*' analysis stating, "[w]e fail to see why aggravating circumstances narrow the sentencing discretion any less by being

peal on this important Eighth and Fourteenth amendment issue.¹⁴³ The Supreme Court resolved the conflict in *Lowenfield v. Phelps*,¹⁴⁴ holding that such double counting did not violate the Constitution. The Eighth Circuit relying on *Lowenfield*, reversed its decision in *Collins*.¹⁴⁵ Thus, between *Collins* (January 1985) and *Lowenfield* (October 1987), there was a window of opportunity for alert and competent defense counsel in Arkansas to avoid having the ultimate penalty imposed in the narrow class of capital cases where the sole aggravators mirrored elements of the offense.

Bobby Ray Fretwell's lawyer was neither alert nor competent. The only aggravator in Fretwell's case, murder for pecuniary gain, was a constituent element of the underlying robbery/murder case. The jury instructions in Fretwell's case squarely violated *Collins*, which had been decided eight months previously. Fretwell was convicted and sentenced to death, and his case began the laborious series of direct and habeas appeals. The federal district court, on habeas review, noted that double counting had been prohibited in the Eighth Circuit for more than four years.¹⁴⁶ The district court found "trial counsel's ignorance of *Collins* to have been a serious and significant error."¹⁴⁷ It was also prejudicial, according to the district court, because, had the issue been properly raised, there was "no reason to believe that the trial court would have chosen to disregard" *Collins*, and therefore, Fretwell's death sentence flowed directly from the attorney error.¹⁴⁸ The district court was attempting to apply *Strickland*,¹⁴⁹ and the Eighth Circuit

made a constituent element of the crime." *Id.*

143. A conflict between decisions of the courts of appeals in circumstances involving an important issue of federal law will "usually, but not necessarily" result in a grant of certiorari by the Supreme Court. "[A] square and irreconcilable conflict . . . ordinarily should be enough to secure review." Robert L. Stern, et al., Supreme Court Practice § 4.4 at 197 (6th ed. 1986).

144. 484 U.S. 231 (1988).

145. *Perry v. Lockhart*, 871 F.2d 1384, 1393 (8th Cir.) cert. denied, 493 U.S. 959 (1989) ("We conclude, therefore, that *Collins* can neither be harmonized with nor distinguished from *Lowenfield*, and we therefore deem it to have been overruled by *Lowenfield*.").

146. *Fretwell v. Lockhart*, 739 F. Supp. 1334, 1337 n.2 (E.D. Ark. 1990), *aff'd*, 946 F.2d 571 (8th Cir. 1991), *rev'd*, 113 S. Ct. 838 (1993).

147. *Id.* at 1337.

148. *Id.* at 1337-38.

149. *Id.* at 1336.

agreed, saying that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹⁵⁰ This analysis seems flawless. Once the district court found ineffective assistance of counsel, it appears beyond peradventure that the result would have been different had the appropriate objections been made and preserved. Yet the Supreme Court reversed.¹⁵¹ The majority neither disputed that counsel had been "so deficient that it met the *Strickland* standard,"¹⁵² nor did the Court seriously question that counsel's error was prejudicial, at least under *Strickland's* original formulation.¹⁵³ But the majority, with the benefit of hindsight, reasoned that the accuracy of the proceeding was not affected (Fretwell was, after all, guilty and the no double counting rule had been overruled, albeit after Fretwell's case). Thus, even though *Strickland* appeared on its face to apply, the fair trial basis (which the Court now equates with innocence) did not apply, and therefore, the rule would not apply to this case: "the 'prejudice' component of the *Strickland* test does not implicate these concerns. It focuses on the question whether counsel's deficient performance rendered the result of the trial or the proceeding fundamentally unfair."¹⁵⁴

Fretwell's message to the few lower courts that still had not gotten the message was clear. Absent a clear case of innocence of the death penalty, that is, a provable absence of one of the constituent elements of a capital crime, the Supreme Court will not countenance reversals of death sentences, even where counsel's goof clearly (as it did in *Fretwell's* case) affected the result. When *Cronic*, *Strickland*, *Sawyer v. Whitley*, and *Fretwell* are read together, it becomes clear that very few claims of ineffective assistance of counsel can ever succeed. The petitioner must have had truly abysmal lawyering, and since the court seems to equate the fairness of the trial with innocence, the defendant must prove innocence in at least some sense (including the odd concept of innocence of the death penalty) before relief will be forthcoming. While *Fretwell* does not

150. *Fretwell v. Lockhart*, 946 F.2d 571, 577 (1991).

151. *Lockhart v. Fretwell*, 113 S. Ct. 838 (1993).

152. *Id.* at 850 (Stevens, J., dissenting).

153. *Id.* at 851 (Stevens, J., dissenting).

154. *Id.* at 844.

appear to be the worst possible example of attorney incompetence, it does show what can happen when a lower court attempts to apply *Strickland's* fair trial language, while faithfully applying the announced criteria. The Supreme Court majority's impatience with the delays inherent in death penalty habeas cases is well known. *Fretwell* provides one more example of how the Court is dealing with that impatience.¹⁵⁵

G. *Horribles*¹⁵⁶

One cannot know, much less recount, all of the egregious examples of indifference to inferior attorney performances in capital cases since *Strickland*. What can be demonstrated is that attorney conduct in capital cases is often execrable. Inept lawyering can, and often does, fall below that which any one of us would tolerate from our own lawyer, doctor, dentist or accountant. Yet under the present lax criteria, lawyers who are impaired by drugs or alcohol, who conduct little or no investigation, who are ignorant of basic legal principles, and who are venal, lazy, indifferent and foolish, are found by the courts to have competently performed while losing capital cases. Some are even later disbarred; yet their clients are still executed. What follows is an impressionistic review of some of the cases that demonstrate the need to reconsider the present standard of review in ineffective assistance of counsel cases, particularly where the death penalty is involved.

1. *Smith* and *Machetti*: Death as a Lottery

John Eldon Smith, aka Tony Machetti, his wife Rebecca Adkins Smith Machetti, and John Maree plotted the murder of,

155. *Fretwell* also involved the application of a new rule on habeas review in so far as *Lowenfield* had overruled *Collins*. Application of new rulings on habeas corpus review had been prohibited by *Teague v. Lane*, 489 U.S. 288 (1989). Not surprisingly, the Court majority found this to be no impediment—*Teague* was now to apply only against habeas petitioners that happened to be prisoners and the rule never would work against the state.

156. The NAACP Legal Defense and Educational Fund, Inc., which is commonly known as the LDF, prepared and disseminated a two page document entitled "Horribles," which summarized a few of the more egregious instances of inept lawyering in capital cases.

and then killed, Rebecca Machetti's former husband, Joseph Adkins and his wife, Juanita.¹⁵⁷ The evidence against Maree was the strongest so he struck a deal,¹⁵⁸ testified against the others, and received a life sentence.¹⁵⁹ Smith and Machetti received death sentences.¹⁶⁰

Both Smith and Machetti had volunteer lawyers on their first state habeas cases; Machetti's pro bono lawyer specialized in employment discrimination, Smith's in utilities law.¹⁶¹ Machetti's discrimination lawyer challenged, for the first time in state habeas, the composition of the jury that convicted her because it systematically underrepresented women. Although this issue was technically subject to a procedural default for having been raised for the first time at state habeas,¹⁶² the Georgia courts denied the claim on the merits, thus paving the way for federal habeas review.¹⁶³ The Eleventh Circuit sus-

157. *Smith v. Kemp*, 715 F.2d 1459 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983).

158. *Id.* at 1476 (Hatchett, J., dissenting).

159. *Id.* at 1463-65.

160. Rebecca Machetti's case is reported: *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983).

161. Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980's*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 840 n.312 (1986).

162. The Supreme Court in *Taylor v. Louisiana*, 419 U.S. 522 (1975), had held that a statute that excluded women from jury duty unless they opted in was unconstitutional. "In January, 1979, one year after the filing of Machetti's federal habeas corpus petition, the Supreme Court, in *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L.Ed.2d 579 (1979), held unconstitutional a state opt-out statute which also exempted women from jury service on request." *Machetti v. Linahan*, 679 F.2d 236, 239 (11th Cir. 1982). The rule in *Duren* was held to have retroactive application in *Lee v. Missouri*, 439 U.S. 461 (1979). Thus, the only possible bar to retroactive application of the rule in *Duren* would be if there were a valid procedural default. A federal habeas corpus court cannot review an issue that was not properly raised and preserved in the state trial courts in violation of the state's contemporaneous objection rule absent a showing of "cause" for the noncompliance and a showing of "prejudice." *Wainwright v. Sykes*, 433 U.S. 72 (1977). One of the ways in which one might show both cause and prejudice for a procedural default is to show that counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), which has its own "cause" and "prejudice" requirements. Thus, the claim that counsel was ineffective is inextricably intertwined with the notion of procedural default. Most, but not all, claims of ineffective assistance of counsel result from some default (that is a missed claim or objection) at or on appeal. Conversely, most defaulted claims, but not all, result in a claim on habeas review that the default resulted from the ineffective assistance of counsel.

163. *Machetti*, 679 F.2d at 238 n.4. Federal courts must hear an otherwise procedurally defaulted claim on the merits of habeas review if the state appellate or

tained her claim, ordered a new trial, "and, at that trial, a jury which fairly represented the community imposed a sentence of life imprisonment."¹⁶⁴ Smith's lawyers failed to raise the jury composition issue on the first state habeas "because they were unaware of the U.S. Supreme Court decision on point."¹⁶⁵ Both Smith and Machetti had identical claims. Machetti's case was heard on the merits, he procured a new trial, and he lives. Smith's claim was not heard; he was executed.¹⁶⁶ Judge Hatchett, concurring in part and dissenting in part, summed up the arbitrariness of this death sentence:

This case again illustrates the difficulty, if not the impossibility, of imposing the death penalty in a fair and impartial manner. It is a classic example of how arbitrarily this penalty is imposed. Maree, who bargained to receive \$1,000 for the murder and on whom the evidence was the strongest, is eligible for parole in November 1983. He will live because the evidence against him was overwhelming and the prose-

post-conviction courts do not rely on the default and decide the merits of the issue. If it is not clear from the state court's opinion whether it is relying on the default or deciding the merits, the Supreme Court has ruled that the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032 (1983) applies to federal habeas corpus proceedings. *Harris v. Reed*, 489 U.S. 255 (1989). This rule permits a federal court to reach the otherwise defaulted federal question "unless the state court's opinion contains a 'plain statement' that [its] decision rests upon adequate and independent state grounds." *Id.* at 261. Adequate and independent state grounds can include application of a state's procedural default or contemporaneous objection rules. There appears to be some weakening of the "plain statement" rule in federal habeas corpus as defendants attempt to take advantage of one of the few remaining avenues for avoiding the impact of a procedural default. See *Coleman v. Thompson*, 501 U.S. 722 (1991). Ironically, the original usage of the "plain statement" rule in *Michigan v. Long* was to reverse a state court that had been overly generous in its application of the constitutional prohibition against unreasonable searches and seizures, as applied to the trunk and interior of an automobile. The Michigan Supreme Court had excluded the "fruit" of the search, thus establishing a rule favorable to the defendant. Once habeas prisoners began to use the rule to their advantage, the Supreme Court narrowed its application in the *Coleman* case by allowing the habeas court to look beyond the bare record to deduce the state court's reliance on the procedural default. *Coleman* 501 U.S. 722 (1991). This allowed the federal courts to avoid a merits review of Roger Coleman's death sentence. Coleman's case attracted world-wide attention as his lawyers at Arnold and Porter attempted to establish his innocence. See, e.g. Steve Twomey, *Night of Brutality on Death Row*, WASH. POST., July 2, 1992, at D1. He was executed by the Commonwealth of Virginia on May 22, 1992. *Death Row U.S.A.*, *supra* note 94.

164. Bright, *supra* note 97, at 212.

165. *Id.* at 211 n.7.

166. *Id.* at 212.

ctor needed his testimony to convict Smith and Machetti. Thus, a deal was struck.

Machetti, the mastermind in this murder, has had her conviction overturned, has had a new trial, and has received a life sentence. This court overturned her first conviction because in the county where her trial was held, women were unconstitutionally underrepresented in the jury pool. *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982). Her lawyers timely raised this constitutional objection. They won; she lives.

John Eldon Smith was tried in the same county, by a jury drawn from the same unconstitutionally composed jury pool, but because his lawyers did not timely raise the unconstitutionality of the jury pool, he faces death by electrocution. His lawyers waived the jury issue. Judicial economy, as required by recent decisions of the United States Supreme Court, dictate that we not reach the underrepresentation of women issue, even under principles of "manifest injustice." The fairness promised in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), has long been forgotten.¹⁶⁷

The *Smith* case does not represent gross incompetence of counsel. At most it represents neglect, and, indeed, in so far as the rule is that counsel is not constitutionally required for habeas corpus proceedings,¹⁶⁸ even for capital cases,¹⁶⁹ it does not involve a constitutional question of ineffective assistance of counsel at all. This case, along with *Fretwell*, illustrates the dramatic difference that effective lawyering can make. Even the worst cases can be won in the sense that the defendant receives a life sentence rather than death, where counsel is truly effective; other cases can result in a death verdict where the attorney is indifferent. Unlucky defendants lose the lawyer lottery¹⁷⁰ and these cases are not rare.¹⁷¹

167. *Smith v. Kemp*, 715 F.2d 1459, 1476 (1983) (Hatchett, J., dissenting).

168. *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

169. *Murray v. Giarratano*, 492 U.S. 1 (1989).

170. Bright, *supra* note 97, at 212.

171. See Stephen B. Bright, *Death By Lottery—Procedural Bar of Constitutional Claims In Capital Cases Due To Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679 (1990).

Yet *Smith* is hardly an isolated example. The second person executed in Georgia was a mentally retarded offender, who was denied relief despite

Even though innocence was not at issue, we still should be troubled by this case. The arbitrary imposition of the death penalty on the least culpable party solely because he had the worst lawyer is unjust. Arbitrariness is a fact of life in the criminal justice system; it is inevitable and tolerable in ordinary cases. Certainly the outcome of any case may depend on how good one's lawyer is, and a system of justice can only go so far in correcting these kinds of inequities. But the death penalty is different. Death should not be capriciously imposed on those who cannot afford competent counsel and who lose the luck of the draw in receiving court appointed counsel. This level of arbitrariness calls into question the validity of the death penalty itself and demonstrates the overlap between the Sixth Amendment right to counsel and the Eighth Amendment right to be free of cruel and unusual punishments. Is it not cruel and unusual punishment to impose death as the penalty because someone cannot afford competent counsel?

2. John Young—The Lawyer as Drug Abuser

John Young murdered three elderly people in their own homes.¹⁷² The jury rejected his insanity plea and imposed the death sentence.¹⁷³ Young's trial lawyer, who was later disbarred,¹⁷⁴ admitted to a drug problem, but "felt it had never interfered with his practice of law."¹⁷⁵ The trial lawyer, who had disappeared, was not available for the first habeas hearing,¹⁷⁶ and the second proceeding was thereby saddled with the additional burden of being a successor petition.¹⁷⁷ As Ronald J. Tabak describes it:

a jury instruction which unconstitutionally shifted the burden of proof on intent because his attorney did not preserve the issue by raising an objection at trial. His more culpable codefendant was granted a new trial on the unconstitutional instruction. Again a switch of the lawyers would have reversed the outcomes of the two cases.

Id. at 695-96 (citations omitted).

172. *Young v. State*, 236 S.E.2d 1 (Ga.), *cert. denied*, 434 U.S. 1002 (1977).

173. *Young*, 236 S.E.2d at 2.

174. Tabak, *supra* note 161, at 841.

175. *Young v. Zant*, 727 F.2d 1489, 1492 (11th Cir. 1984), *cert denied*. 470 U.S. 1009 (1985).

176. Tabak, *supra* note 161, at 841.

177. *Young v. Kemp*, 758 F.2d 514, 515 (11th Cir. 1985).

As a result of this lawyer's incompetence, the jury never learned that Young, at the age of three, had witnessed the murder of his mother while he was in bed with her. Nor was the jury told about a psychiatric evaluation which had found that Young may have suffered from post-traumatic stress syndrome, an illness often present in children who have been affected by homicides.

The federal courts also refused to consider Young's claim that the prosecutor in his case had made the same type of closing argument that has been held unconstitutional and highly prejudicial in other cases. The courts held that Young was barred from raising that claim because his lawyers did not obtain a transcript of the closing argument and did not raise the issue sooner.¹⁷⁸

The Eleventh Circuit Court of Appeal's opinion failed to even discuss trial counsel's failure to adduce this psychiatric evidence. It concluded cursorily that defense counsel "presented a vigorous and capable defense. Petitioner has failed to carry his burden of establishing that counsel's representation was defective to the point that he was constitutionally ineffective."¹⁷⁹ The extreme variance between the court's and Ronald J. Tabak's rendition of the facts of this case calls into question the integrity of the process. Has the court fairly addressed the facts of the case, or did it decide the case and then address only those facts which tended to support the decision?

3. John Sterling Gardner—Lawyer As Drug Abuser Redux

John Sterling Gardner murdered two workers at a Steak and Ale Restaurant in Winston-Salem, North Carolina. Evidence surfaced after his first round habeas claims had been adversely decided. His lawyers, hoping to circumvent the draconian rules concerning successor petitions, attempted to have the case reheard under the "newly discovered" evidence prong of Rule 60 (b)(2).¹⁸⁰ In an attempt to secure an evidentiary hearing, Gardner's habeas attorneys proffered seven affidavits alleging

178. Tabak, *supra* note 161, at 841-42 (citations omitted).

179. Young v. Zant, 727 F.2d at 1493.

180. Gardner v. Dixon, No. 92-4013 (4th Cir. Oct. 21, 1992) (LEXIS, Genfed library, Omni file).

that the trial attorney had abused drugs during the entire time that he was preparing and trying Gardner's case. The state proffered affidavits containing the attorney's denial and various court officials' opinions that the attorney appeared alert and competent. The affidavit from the trial attorney's former wife, as reported by the Fourth Circuit and corroborated by the other affidavits, is startling in its detailed description of the lawyer's cocaine and alcohol abuse, his drug binges and his resultant irresponsible behavior.¹⁸¹ This, together with the other corroborative affidavits, was not sufficient according to the Fourth Circuit, to even merit a remand for an evidentiary hearing. John Gardner was executed on October 23, 1992.¹⁸²

There is a tension, if not an outright contradiction, in the Fourth Circuit's treatment of this case. At one point the court says that "Gardner simply does not identify, in any way or manner, any action that Fraser could have taken to enhance his chances of success."¹⁸³ The court, not surprisingly, concludes from this that petitioner failed to establish that counsel's performance was deficient. The court then turns to the prejudice component of the ineffective assistance of counsel claim. There the court acknowledges that petitioner's claim is that had counsel not "neglected his duty to investigate, he could have discovered and presented . . . testimony" of petitioner's "childhood woes."¹⁸⁴ The court fails to elaborate what this evidence might be and simply concludes that it was merely cumulative of evidence that was presented at trial; therefore, the failure to present the evidence was not prejudicial. Whatever this evidence may have been, it is clear that habeas counsel did identify actions that trial counsel could have taken to have improved petitioner's chances. The Fourth Circuit Court of Appeals' cursory treatment of the facts leaves us in the dark about how important this testimony might have been. However, the court's cavalier treatment of the facts leaves one profoundly unsettled at the result. Few people would want their lives to depend upon the investigation and preparation of a drug-dependent lawyer. This case is troubling; it demonstrates just how

181. *Id.* at *17-19.

182. *Death Row U.S.A.*, *supra* note 94.

183. *Gardner*, at *13.

184. *Id.* at *14.

demanding and unfair the prejudice prong of *Strickland* is. One has the sense that a much better case in mitigation could have been made in *Gardner*. Would that have made a difference? *Strickland* places the burden of proof on the petitioner to affirmatively establish prejudice. That is a burden few petitioners will be able to carry where the claim is only that trial counsel failed to discover and produce additional available mitigating evidence.

4. Billy Mitchell—No Investigation Is Good Enough

Billy Mitchell was executed in 1987 in Georgia.¹⁸⁵ His court “appointed attorney made *no* attempt to interview *any* potential mitigating witnesses. . . . Counsel made *no* inquiries into his client’s academic, medical, or psychological history.”¹⁸⁶ According to Justice Marshall,

Counsel’s failure to investigate mitigating circumstances left him ignorant of the abundant information that was available to an attorney exercising minimal diligence in fighting for Billy Mitchell’s life. The affidavits of individuals who would have testified on petitioner’s behalf fill 170 pages of the record in the District Court. Among these potential witnesses are family members, a city councilman, a former prosecutor, a professional football player, a bank vice president, and several teachers, coaches, and friends.

Had defense counsel tapped these resources, he would have been able to present the sentencing judge with a picture of a youth who, despite growing up in “the most poverty-stricken and crime-ridden section of Jacksonville, Florida,” had impressed his community as a person of exceptional character. He had been captain of the football team; leader of the prayer before each game; an above-average student; an active member of the student council, school choir, church choir, glee club, math club, and track team; a Boy Scout; captain of the patrol boys; and an attendant to the junior high school queen. . . .

185. Berger, *supra* note 11, at 248.

186. Mitchell v. Kemp, 483 U.S. 1026, 1027 (Marshall, J., dissenting), *denying cert.* to 762 F.2d 886 (11th Cir. 1985).

An account of what happened to this well-adjusted young person was also readily available to anyone who took the time to ask. When petitioner was 16 years old, his parents were divorced, and soon thereafter petitioner got into trouble. He and two friends were arrested for attempted robbery. Petitioner professed his innocence, but was persuaded by his father to plead guilty. . . . Petitioner was sentenced to six months in prison, where he was subjected to repeated violent homosexual attacks, experienced severe depression, and lost 30 pounds. When he was released, he continued to be highly depressed, and eventually committed the crime for which he received a sentence of death.¹⁸⁷

Justice Marshall's stinging dissent from the denial of certiorari in this case came on the same day that the Supreme Court decided in another case that presentation of no mitigating evidence constituted sufficient competency from a court appointed lawyer.¹⁸⁸ One might imagine a hypothetical case where investigation of mitigating evidence would be prohibitively difficult. Furthermore, one might imagine a valid excuse for the failure to seek mitigating evidence. However, there will be available mitigating evidence in most cases, and one cannot know what an investigation might turn up until one has looked. Therefore, Justice Marshall's dissenting conclusion in *Mitchell*, that counsel ought always to look for mitigating evidence, is sound.

H. *The Capital Sentencing Proceeding Is Uniquely Difficult*

One partial measure of the difficulty or complexity of nearly anything revolves around cost. Death penalty cases are surprisingly expensive, costing up to one million dollars per trial.¹⁸⁹ The reasons for this inordinate expense when compared to more ordinary criminal litigation have been well documented and

187. *Id.* at 1027-29 (citations omitted).

188. *Burger v. Kemp*, 483 U.S. 776 (1987).

189. See Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45, 52-54 (1989); Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 133-138 (1989). This expense is only the beginning since most capital defendants then begin the appeals and habeas rounds which also are more expensive than in other more usual types of criminal litigation.

appear to be inherent.¹⁹⁰ Cost, however accurate it may be as a marker, remains a peculiarly unsatisfying and unilluminating way to understand complexity. This is especially true when life itself hangs on the balance of that complexity. The scandalously penurious payments to court appointed trial counsel¹⁹¹ no doubt contributes to the often miserable performance by lawyers in capital cases. But it fails to explain, or at least provides an inadequate account of, this systemic failure. Even otherwise competent and diligent lawyers find capital litigation difficult. Commentators have pointed out for nearly a decade that “[c]apital murder trials present a unique challenge” because “[t]he lawyer who focuses entirely on the guilt stage without attending to the sentencing stage may be consigning his client to the electric chair.”¹⁹² The problem that even good lawyers often have lies with the unique and, to most trial lawyers, totally alien nature of the penalty phase of a capital trial. Judge Heaney’s dissent in one case illustrates the problem: “This case presents a scenario all too common in capital cases: trial counsel focused all of his energies on the guilt phase of the trial and virtually ignored the crucial ‘trial for life’ during the penalty phase.”¹⁹³

Lawyers all too often do a competent job of investigating and trying the guilt phase of a capital trial while neglecting, failing to understand, and ultimately bungling the penalty phase. The reasons are simple. The guilt phase of a capital trial is much like the trial of any other criminal case, and it is ordinarily the part that many lawyers attend to first. The penalty phase confounds many otherwise competent lawyers, not only because it

190. See Barry Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 69 (1978). Professor Nakell points out that the bifurcated trial process, the use of expert witnesses, the exploration of defendant’s life at the penalty phase, the increased use of juries, and the need for such cases ordinarily to be tried rather than plead all contribute to the expense of capital litigation. The article goes on to illustrate how and why the entire appellate and habeas process costs so much.

191. Tabak, *supra* note 161, at 801-03. For example, until recently, the average fee for death penalty lawyers in Virginia was \$687 per case, and in Florida the maximum fee was \$3500. The Alabama Supreme Court upheld a \$1000 fee cap in capital cases. Even though these low fee schedules are changing, securing adequate compensation for capital cases remains an impediment to competent representation of persons charged with capital crimes. See *id.*

192. Clarke, *supra* note 84, at 341.

193. Schlup v. Armontrout, 941 F.2d 631, 647 (8th Cir. 1991).

is vastly different, but also because there is an inherent tension, sometimes approaching outright contradiction, between the goal of the penalty phase and that of the guilt phase. The normal combative inclination of most trial lawyers (and neophyte would-be trial lawyers with more *Matlock* than experience to inform their instincts) is to focus all energies on seeking an acquittal that will bring glory and approbation. In most noncapital cases, if not over-done, this is a useful, if distasteful, part of the adversary system. We rightly expect zealous advocacy from criminal defense lawyers. We expect advocates to take considered risks. For capital defendants this inclination can, and often does, lead to utter ruin. Prosecutors, quite naturally, like to win. They tend to aggressively seek the death penalty when the evidence is strong and the probability of conviction is high. The prosecutor will have the "right to cull the venire of jurors who are so opposed to the death penalty that they cannot abide by their oaths to consider the death penalty; this yields a jury that is willing to find guilt"¹⁹⁴ and impose the death penalty. Thus, complete denial combined with headlong resistance at the guilt phase renders the defendant in a peculiar position at the penalty phase. How does one credibly argue to the jury that "I didn't do it, but if I did I am sorry?" Often some of the best life saving arguments are short-circuited by the strategic decision to combat the guilt stage full-bore. And where counsel, whether experienced or not, remains unaware of this tension between the two phases of trial, the decision to put all energies into contesting the guilt phase can hardly be said to be a strategic decision.

Even when defense counsel appropriately recognizes this tension between the two trial stages, the penalty phase is uniquely difficult. Marie Deans, one of the foremost mitigation specialists in the U.S., eschews the lawyer as lone gunslinger approach. She recommends a team approach to capital litigation, utilizing mitigation specialists who are "investigators, paralegals, social workers, psychologists and others who have a thorough understanding of mitigation and how it works into the capital trial and who are skilled interviewers."¹⁹⁵ Lawyers

194. Clarke, *supra* note 84, at 353.

195. Marie Deans, *The Case In Mitigation In the Capital Case*, (Mar. 17, 1992) (unpublished manuscript on file with the *University of Richmond Law Review*).

rarely have strong skills in these areas, often fail to recognize their own limitations in attempting to do these things (that appear to be easier than they are) and, sadly, often do not recognize the need until too late. The enormity of the job also daunts counsel. Even where one realizes the need, the resources to interview family, friends, teachers, coworkers, pastors, and the like, together with collecting all of the records necessary to construct a complete life history for the accused¹⁹⁶ is a huge and, for those who are not prepared for it or who fail to understand it, impossible task.

In many cases the client is mentally and intellectually disturbed; the nuclear family is dysfunctional. Both the client and family may confabulate, cover up, forget, and otherwise make it difficult for the lawyer to construct a persuasive case in mitigation. The trial lawyer may not learn of all of the good mitigation evidence that was readily available until the habeas lawyers, who will have conducted a proper investigation, bring it out. By then it is often too late.

The use of experts is quite different in death penalty cases. Many lawyers understand and effectively present straightforward insanity defenses. Few understand the sophisticated opportunities and pitfalls presented by the use of mental health experts pursuant to *Ake v. Oklahoma*.¹⁹⁷ Few lawyers are prepared to combat the states' use of "Dr. Death" psychiatrists who testify to the alleged future dangerousness of the accused. It is not easy for lawyers, who may lack insight into the process, to

196. *Id.*

197. 470 U.S. 68 (1985). *Ake* held that where a defendant made a preliminary showing that the sanity of the accused was likely to be a significant issue at trial the defendant was entitled to have a psychiatrist at state expense if she could not otherwise afford one. In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Court held that psychiatric testimony regarding a defendant's future dangerousness was admissible at the sentencing phase of a capital trial. *Id.* at 896-99. A number of states' psychiatrists, such as Dr. James Grigson of Texas, regularly testify that these defendants will be dangerous in the future. These doctors are often referred to by the ironic appellation "Dr. Death" for the number of times that they testify to future dangerousness. Because of the power that this sort of "scientific" evidence has with juries, The American Psychiatric Association is critical of this type of diagnosis because "[p]sychiatric categories have little or no demonstrated relationship to violence, and their use often obscures the unimpressive statistical or intuitive bases for prediction." *Barefoot v. Estelle*, 463 U.S. 880, 931-32 (1983) (Blackmun, J., dissenting) (citations omitted).

see how use of mental health experts can, without testifying to insanity, place the crime, which may otherwise appear to be inexplicable, in a mitigating context that allows the jury to see the accused as a flawed person rather than as a less than human monster.¹⁹⁸

Often lawyers see only their client's sordid history, replete with repeated crimes, and become disheartened. Or they fail to understand the need for a thorough investigation of mitigating evidence. Experienced capital defense lawyers, however, argue that "[t]he defendant's social history will 'always disclose mitigating evidence' that can aid the defendant at the sentencing stage. If the attorney did not find it, it was because he 'didn't look hard enough.'"¹⁹⁹

Penalty phase trials are complex, alien creatures that can, and do, ensnare otherwise competent lawyers. Lawyers such as the ones that Smith, Young, Gardner and Mitchell had could never hope for even a glimmer of comprehension of the complexity and subtlety of even the simplest capital case. Sadly, the majority of the Supreme Court Justices likewise fail to appreciate the nature of their own creation.

I. *Proposals*

This paper has demonstrated how the right to counsel has been seriously undermined by the Supreme Court's narrowly pinched view of the right of a capital defendant to face the ultimate penalty armed with reasonably competent counsel. A person on trial for life is entitled to counsel that is prepared to fight for that life with vigor, skill and determination. The proposals that follow will ensure that no one will be condemned to death without a fair trial, a trial that the public can have confidence in, and a trial whose result is reliable.

First, lawyers in death penalty cases should be certified. Minimum experience requirements are crucial. No capital defendant should face trial with a lawyer who lacks significant jury

198. For an excellent discussion of the problems associated with the use of psychiatry in capital cases see Richard J. Bonnie, *Psychiatry and the Death Penalty: Emerging Problems in Virginia*, 66 VA. L. REV. 167 (1980).

199. White, *supra* note 61, at 342.

trial experience in serious felony and murder cases. Since there should be at least two defense lawyers in any capital case, the lawyer or lawyers who sit second chair could have less trial experience than lead counsel. In this way, new or inexperienced lawyers will be trained. In order to maintain capital-case certification, a lawyer should undergo continuing legal education in capital punishment issues as well as general criminal practice each year. At least some states have begun tentative, if inadequate, procedures to certify capital defense attorneys.²⁰⁰

Second, while checklists of performance standards have their limitations, the bar should set minimum standards for performance in a capital case with the understanding that these standards should not be deemed to be exclusive or determinative. However, some things need to be done in virtually every capital case, and standards established by the bar can make this point. While the bar cannot make law, one would assume that bar sponsored performance standards for capital case litigation would be persuasive in many courts. For example, attorneys should investigate the existence of mitigating evidence in virtually all capital cases. The failure to investigate should ordinarily be strongly indicative of inadequate performance absent a compelling explanation for the failure to investigate.

Third, and most importantly, the test for determining whether counsel has performed adequately in a capital case should be measured against the standards and norms of what is reasonable among the capital defense bar in the nation as a whole (at least that part of it that retains capital punishment). The standard by which counsel is judged should not bottom on the performance standards applicable to anyone who happens to possess a bar card; neither ought we revert to a locality rule, where the standard is gauged by whoever the 'good old boys' of

200. Virginia, for example, now requires that lawyers in capital cases at trial, on appeal, and on state habeas review, be appointed from a list compiled by the Public Defender Commission. VA. CODE ANN. § 19.2-163.7 (Cum. Supp. 1994). The author played a peripheral role in drafting some of the initial legislation and was present when the Virginia House of Delegates' Courts of Justice Committee weakened the original proposals. The present standards, although not as strong as needed to insure adequate representation in capital cases, are an improvement. Another state with a program for establishing qualifications to try capital cases is Ohio. Ohio C.P. Rule 65(I)(A)(1). For an excellent article on the meaning of licensure on capital cases see Green, *supra* note 11.

the local bar happen to be. Once the petitioner has made a prima facie showing of prejudice, the burden needs to be on the state to establish the lack of prejudice beyond a reasonable doubt. The burden of making a prima facie showing should be akin to a simple showing of probable cause to believe that counsel's errors affected the jury's verdict in any way, including its disposition to impose the death penalty. Failure to present a coherent case in mitigation, when mitigating evidence exists, should in ordinary circumstances be enough to warrant an inference of prejudice.

If states truly wish to execute the most heinous murderers they will continue to be able to do so. Granting a capital defendant competent counsel will not change this. If the jurisdictions wishing to execute find that poorly tried cases simply have to be retried, often years down the road, then the states themselves will ensure that competent lawyers are provided to see that the job is done right the first time. Ford did not remedy the Pinto (whose gas tank exploded on contact) until it suffered defeat in the courts. The same incentive, applied to the states in the form of reversals by habeas courts in capital cases with directions to retry the petitioner, will indubitably have a salutary effect.

The present system of appointing and evaluating the performance of defense counsel in capital cases is not working. While the same may be true to a lesser extent in the entire criminal justice system, it is in the death penalty arena that the situation concerns life itself. These cases are so much more complex that they justify different treatment on that ground as well. Thus, the goal of this section has been to advocate change in this most limited class of cases, where life itself hangs in the balance.

III. THE EXHAUSTION OF STATE REMEDIES REQUIREMENT OF FEDERAL HABEAS CORPUS

A. Introduction: The General Rule Requiring Exhaustion of State Remedies

The doctrine compelling state prisoners to exhaust state avenues of relief before proceeding in federal habeas corpus was

created judicially in 1886 by *Ex parte Royall*.²⁰¹ This rule gave federal trial courts discretion, as a matter of comity,²⁰² to refuse to consider a claim until the state courts had received an opportunity to act.²⁰³ Codification in 1948²⁰⁴ rendered the requirement mandatory. The Supreme Court's case law strictly enforces this statute.²⁰⁵ A federal habeas court may not entertain an unexhausted claim even though the violation of constitutional rights is clear.²⁰⁶ Although the rule is mandatory, it

201. 117 U.S. 241 (1886).

202. "Comity" refers to this principle "in accordance with which the courts of our state on jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of difference and respect." BLACK'S LAW DICTIONARY 267 (6th ed. 1990). The states within the United States are not independent nations with respect to the federal government, so the doctrine does not, strictly speaking, apply. However, courts in the United States frequently use the term by analogy, to refer to the respect that the various courts (when not constrained by positive law, such as the full faith and credit clause of the Constitution) owe to each other. The federal courts in particular, when deferring to state courts, will speak of doing so as a matter of comity. For example, the Supreme Court in *Ex parte Royall*, in its opinion which deferred to the Virginia courts, quoted *Covell v. Heyman*, 111 U.S. 176, 182 (1883), in the course of the decision:

[T]he forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity.

Ex parte Royall, 117 U.S. at 252.

203. *Ex parte Royall*, 117 U.S. at 251.

204. 28 U.S.C. § 2254 (1988) provides in pertinent part:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

205. See, e.g., *Rose v. Lundy*, 455 U.S. 509, 518 (1982). However, until *Rose v. Lundy*, trial judges apparently retained some discretion with respect to hearing unexhausted claims. See, e.g., *Frisbie v. Collins*, 342 U.S. 519 (1952). Even now, some extremely limited discretion is retained by the intermediate appellate courts (and perhaps, to an even lesser extent, the trial courts) in the event that the state inadvertently fails to promptly raise lack of exhaustion as a defense. This is discussed more fully in section D *infra*.

206. *Duckworth v. Serrano*, 454 U.S. 1 (1981).

is not jurisdictional,²⁰⁷ and can be waived under certain circumstances. The rules surrounding the exhaustion requirement are not as complex as some of the other jurisprudential habeas thickets—such as procedural default or ineffective assistance of counsel issues. The consequences of a mistake, which can result in loss of claims in some instances,²⁰⁸ warrants careful attention to the exhaustion requirement.

B. *Defining the Claim for Exhaustion Purposes*

The exhaustion doctrine requires “that the substance of a federal habeas corpus claim must first be presented to the state courts.”²⁰⁹ This dictates that “once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied.”²¹⁰

What constitutes a fair presentation to the state courts? *Picard v. Connor* held that a “claim that an indictment is invalid is not the substantial equivalent of a claim that it results in an unconstitutional discrimination.”²¹¹ While a federal claim must be substantially equivalent to the claim presented in state court, it need not be identical. A petitioner “need not spell out each syllable”²¹² of the federal claim in the state court. Furthermore, a federal habeas court may, in its discretion, “‘supplement and clarify’ the state-court record presented for review.”²¹³ Thus, the doctrine requires petitioner to fairly present the legal and factual bases of the claim, but presentation of the substance suffices. Federal habeas courts need not, and should not, engage in hyper-technical parsing of the claim presented to the state with a view to finding a shade of difference for exhaustion purposes. Presentation of additional facts in

207. *Strickland v. Washington*, 466 U.S. 668, 684 (1984).

208. The dilemma faced by death row prisoners who may have to choose between the loss of their federal stay of execution and running the risk of running afoul of the abuse of the writ rule is discussed in section E *infra*. Failure to properly exhaust a claim can also result in a procedural default which can mean loss of the claim.

209. *Picard v. Connor*, 404 U.S. 270, 278 (1971).

210. *Id.* at 275 (citations omitted).

211. *Id.* at 278 (citations omitted).

212. 1 JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 5.3 at 54 (1988).

213. *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986).

support of the base claim,²¹⁴ or the citation of additional legal authority,²¹⁵ that do not change the underlying legal theories, will not render the claim "unsuitable for federal habeas review without prior consideration by the state courts."²¹⁶ Petitioner must assert the federal basis for the claim; presenting the state with a claim based solely upon state law fails to exhaust one's remedies despite similarity to a later federal claim. State courts should have a "fair opportunity" to address the federal claim.²¹⁷

Justice O'Connor's dissent in the denial of certiorari in *Vela v. Estelle*,²¹⁸ demonstrates continuing sentiment among some Justices for a more stringently applied exhaustion requirement. This would, in one commentator's opinion, authorize federal habeas jurisdiction "only upon submission of a photocopy of the state petitions."²¹⁹

Framing the issue in terms of fair presentation presents two problems. First, there is the question of whether there is substantial identity of legal and factual issues between fora. Any change in the pleadings between state and federal court is fraught with potential danger. A court that is inclined to rigidly enforce the exhaustion doctrine may rule that the changes suffice to render the claim new and, therefore, unexhausted. This possibility propels counsel counter to the opposing force of strict pleading requirements²²⁰ in federal habeas corpus; these pleading rules impel counsel to attempt to plead as much detail as possible even at the risk of markedly modifying pleadings.

Second, with substantial disagreement amongst Justices at the Supreme Court over how much change renders a claim new for exhaustion purposes, a petitioner cannot be certain that the rules will remain constant even during the course of the litiga-

214. *Id.* at 257-58.

215. *Liebman, supra* note 212, at 54-55.

216. *Vasquez*, 474 U.S. at 257.

217. *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (citing *Picard v. Connor*, 404 U.S. 270 (1971)).

218. *McKaskle v. Vela*, 464 U.S. 1053 (1984) (O'Connor, J., dissenting from denial of certiorari).

219. Thomas G.F. Del. Beccaro, *The Exhaustion Rule and Habeas Corpus Procedure: The Plain Statement Solution—A Long Time Coming*, 27 SANTA CLARA L. REV. 161, 180 (1987).

220. 28 U.S.C. § 2242 (1988) (providing for fact pleading).

tion. Death penalty habeas petitions can take years. Changes are sometimes necessary. Diligent counsel will continue to work on their case. Lawyers are well advised to reinvestigate during death penalty federal habeas corpus proceedings, yet any deviations from the way in which issues were framed in the state proceedings may generate problems.

C. *What Constitutes Exhaustion*

1. The Meaning of "Remedies Available In the Courts of the State"

The exhaustion statute, 28 U.S.C. § 2254(b) (1988), precludes habeas relief "unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . ." The drafters of this language had earlier failed in an attempt to nearly "eliminate the federal courts' power to entertain petitions from state prisoners."²²¹ They apparently intended this language to "eliminate, for all practical purposes, the right to apply to the lower federal courts for habeas corpus in all states in which successive applications may be made. . . . to the state courts. . . ."²²² If this view had prevailed, and if a state allowed successive post-conviction procedures without applying res judicata or collateral estoppel, then a state prisoner could forever be locked in state court litigation. Access to the federal forum would be barred regardless of how often or how decisively the prisoner's claims had been rejected. This literal construction, however, was not adopted by the Supreme Court.

A claim is fairly presented, and thus exhausted, when it has been asserted in the highest state court that has the power to consider it. *Brown v. Allen*²²³ held that the exhaustion doctrine does not require that a claimant exhaust all avenues of state review. The Court said "[w]e do not believe Congress intended to require repetitious applications to state courts."²²⁴

221. Larry W. Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393, 411 (1983).

222. *Id.* at 412.

223. 344 U.S. 443 (1953).

224. *Id.* at 448-49 n.3.

Most constitutional claims will ordinarily have to be presented to the trial and appellate courts on direct review.²²⁵ This suffices to exhaust these claims. Other claims, most notably ineffective assistance of counsel claims, will ordinarily require the development of an evidentiary record in a state post-conviction proceeding.²²⁶ Petitioner will also be required to employ any post-conviction appellate processes that are available. A claim need only be presented one time through one full state trial or evidentiary hearing and the attendant appellate process, in order to be exhausted. If the state court chooses to address a claim on the merits which is presented for the first time on appeal, that too constitutes exhaustion.²²⁷ A claim is not fairly presented, and is not exhausted, when presented for the first time to a state appellate court that declines to decide the issue, under discretionary review procedures limited to review only when "there are special and important reasons therefor."²²⁸ A state court's refusal to entertain a claim that was not fairly presented will be respected by the federal courts. Petitioner is not required to seek certiorari in the United States Supreme Court from an adverse state appellate ruling to exhaust a claim.²²⁹

2. Mixed Petitions: The Rule of *Rose v. Lundy*

Federal petitions for habeas corpus are often prepared by prisoners pro se, or by other prisoners. Death row petitions can be extremely complex. Thus, federal courts are frequently faced with mixed petitions—that is, habeas petitions that contain a mixture of exhausted and unexhausted claims. In *Rose v.*

225. If not presented at the proper times and in the appropriate manner under state law, these claims may, in many jurisdictions, be subject to the bar of procedural default. See *Coleman v. Thompson*, 501 U.S. 722 (1991); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

226. States have no constitutional obligation to provide post-conviction proceedings, and, if a state does choose to provide a post-conviction process, it need not appoint counsel where petitioner is indigent, even though the case involves the death penalty. *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

227. LIEBMAN, *supra* note 212, at 47.

228. *Castile v. Peoples*, 489 U.S. 346, 351 (1989) (quoting PA. R. APP. P. 1114).

229. *Fay v. Noia*, 372 U.S. 391 (1963), *overruled on other grounds by Coleman v. Thompson*, 501 U.S. 722 (1991).

Lundy,²³⁰ the Supreme Court dismissed the prisoner's petition, "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court."²³¹ In her majority opinion Justice O'Connor advised petitioners, "before you bring any claims to federal court, be sure that you have first taken each one to state court."²³² It is doubtful that state prisoners acting pro se will understand, much less heed, this admonition.²³³ The intricacy of death penalty habeas corpus procedures renders compliance with this rule problematic.

3. State Remedies that are Inadequate or Futile

The federal habeas statute accords state fact-finding a presumption of correctness.²³⁴ This presumption receives rigorous enforcement in the federal courts.²³⁵ States that wish to circumscribe federal habeas oversight have a strong incentive to provide post-conviction evidentiary hearings because the court's findings of fact will generally be respected by the federal courts. Nonetheless, cases occasionally crop up²³⁶ that meet the Su-

230. 455 U.S. 509 (1982).

231. *Id.* at 510.

232. *Id.* at 520.

233. Justice O'Connor justifies this stringent enforcement of the exhaustion doctrine:

A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional issues.

Id. at 518-19.

234. 28 U.S.C. § 2254(d) (1988). This rule admits of a number of exceptions that are beyond the scope of this paper. *See id.* § 2254(d)(1)-(8).

235. At least some of the Justices would go beyond rigorous enforcement of this presumption and would treat state fact-finding as *res judicata*. Such a rule would reverse *Brown v. Allen*, 344 U.S. 443 (1953). *See, e.g.,* *Wright v. West*, 505 U.S. 277 (1992) (Justice Thomas's plurality opinion). Cessation of the federal court's ability to develop a factual record in appropriate cases would virtually end modern federal habeas corpus practice. Furthermore, failure to develop a claim in state court has, under this statute, been held to require rigorous cause and prejudice analysis before such failure to develop the factual record can be excused. *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

236. *See* IRA P. ROBBINS, HABEAS CORPUS CHECKLISTS § 10.07, 10-18 to 10-33

preme Court's futility exception to the rule requiring exhaustion. "An exception is made 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."²³⁷ Many of these cases involve inordinate delays in the state's appellate process.²³⁸ Others involve "futile" state procedures, *i.e.*, ones that offer no possibility of success.²³⁹ Still others involve rulings by the highest state court in a different case that is squarely against petitioner's claim.²⁴⁰ Because most state officials perceive it to be in the state's interest to foreclose federal intervention, these cases are relatively rare.

D. *Waiver by the State*—*Granberry v. Greer*

While the exhaustion rule is strictly enforced, it is not jurisdictional.²⁴¹ It follows that a federal court has the power to determine an unexhausted claim should the state fail to object. But what is the court's duty when a failure to exhaust is belatedly asserted by the state? In *Granberry v. Greer* the state asserted petitioner's failure to exhaust for the first time on appeal. The Supreme Court confronted three possibilities.²⁴² It could have: (1) treated the state's failure to assert timely the exhaustion issue in the federal district court as a procedural default, thus treating the issue as waived; (2) treated the exhaustion issue as nearly jurisdictional, and thereby dismiss the case under the rule of *Rose v. Lundy*; or (3) given the district courts discretion to "decide whether the administration of justice would be better served by insisting on exhaustion or by reaching the merits of the petition forthwith."²⁴³ The Court chose the third option.

(1994 ed.) for an exhaustive listing of cases in which exhaustion was excused where further proceedings in state court would have been inadequate or futile.

237. *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981).

238. ROBBINS, *supra* note 236, § 10.07.

239. LIEBMAN, *supra* note 212, at 51.

240. *Id.* at 51-52.

241. *Granberry v. Greer*, 481 U.S. 129, 131 (1987); *Strickland v. Washington*, 466 U.S. 668, 684 (1984).

242. 481 U.S. 129 (1987).

243. *Id.* at 131.

The Court recognized that:

As the *Strickland* case demonstrates, there are some cases in which it is appropriate for an appellate court to address the merits of a habeas corpus petition notwithstanding the lack of complete exhaustion. Although there is a strong presumption in favor of requiring the prisoner to pursue his available state remedies, his failure to do so is not an absolute bar to appellate consideration of his claims.²⁴⁴

The Court noted three criteria that should inform a lower court in deciding whether a state's failure to raise the exhaustion question should excuse a failure to exhaust. Where "the case presents an issue on which an unresolved question of fact or of state law might have an important bearing"²⁴⁵ the case should ordinarily be dismissed to compel exhaustion. When petitioner raises a meritless issue, the court may simply dismiss the case without forcing a meaningless return trip to the state courts.²⁴⁶ Finally,

if a full trial has been held in the district court and it is evident that a miscarriage of justice has occurred, it may also be appropriate for the court of appeals to hold that the nonexhaustion defense has been waived in order to avoid unnecessary delay in granting relief that is plainly warranted.²⁴⁷

While a clear violation of a state prisoner's constitutional rights alone will not excuse a failure to exhaust, it can work in tandem with an inadvertent state waiver of the issue to give the federal district judge discretion to excuse exhaustion. This exception will rarely be applied. It is hard to imagine even the most inept state's attorney contesting a meritorious constitutional defense while omitting a potentially successful exhaustion defense. The return trip to the state courts could highlight a previously undetected procedural default or, because this first submission of the claim to state court may be procedurally late, it may even create the procedural default. Few state's attorneys

244. *Id.* at 131.

245. *Id.* at 134-35.

246. *Id.* at 135 & n.7.

247. *Id.* at 135.

will miss such an important issue. The exception excusing exhaustion where the claim is meritless will probably be the most used.²⁴⁸

A state may expressly waive the exhaustion requirement. This is often done to expedite an execution.²⁴⁹ This generally will be allowed.²⁵⁰

E. *The Death Row Dilemma*

The exhaustion doctrine intersects curiously with the 'abuse of the writ' doctrine in Habeas Corpus Rule 9(b).²⁵¹ A new claim brought in a subsequent habeas petition constitutes an abuse of the writ unless petitioner can show both cause for her failure to present the claim in the initial petition and prejudice.²⁵² In order to meet this standard a prisoner—even one

248. Cf. David B. Franks, *Federal Court Discretion and the Exhaustion Doctrine: Granberry v. Greer*, 26 CRIM. L. BULL. 210, 225-29 (1990) (discussing cases that have applied this exception). For a recent example in a death penalty case dealing with a late assertion of an unexhausted meritless issue see *Spann v. Martin*, 963 F.2d. 663, 673 (4th Cir. 1992) ("any dismissal to allow a reexhaustion . . . is an abuse of discretion, because the claim is obviously frivolous, and a dismissal at this stage of a federal habeas proceeding would only add to the embarrassing length of time that has elapsed since the case was filed in the federal courts.").

249. Cf. Richard J. Bonnie, *Preserving Justice in Capital Cases While Streamlining the Process of Collateral Review*, 23 U. TOL. L. REV. 99, 113 (1991) (states' attorneys are the strongest supporters of the present exhaustion doctrine because they "prefer for fact-bound claims to be heard by state judges." (citations omitted)). Professor Bonnie points out the irony in this "because state officials should want to expedite collateral review rather than perpetuate the most inefficient aspect of the process." *Id.*

250. See *Anderson v. Collins*, 18 F.3d 1208 (5th Cir.) *cert. denied*, 114 S. Ct. 1637 (1994), for an example of an express waiver by the state prosecutor in a death penalty case. For a non-death penalty case where the prosecutor waived exhaustion, and the issue was later determined to be meritless, see *Prather v. Rees*, 822 F.2d. 1418 (6th Cir. 1987).

251. See 28 U.S.C. § 2254(b) (1994).

252. *McCleskey v. Zant*, 499 U.S. 467, 493 (1991). The cause and prejudice standard now applies to a variety of situations all relating to some error or omission by petitioner or her counsel.

Unless a habeas petitioner shows cause and prejudice, see *Wainwright v. Sykes*, 433 U.S. 72 (1977), a court may not reach the merits of: (a) *successive claims* which raise grounds identical to grounds heard and decided on the merits of a previous petition, *Kuhlmann v. Wilson*, 477 U.S. 431 (1986); (b) new claims, not previously raised which constitutes an *abuse of the writ*, *McCleskey v. Zant*, 499 U.S. 487; or (c) *procedurally defaulted claims* in which the petitioner failed to follow applicable state procedural rules in raising the claims. *Murray v. Carrier*, 477 U.S. 478 (1986).

on death row—when challenged that the petition abuses the writ, must show either a miscarriage of justice or actual innocence.²⁵³ *Rose v. Lundy*²⁵⁴ puts a prisoner in a bind with this doctrine. In the ordinary case the prisoner must either temporarily drop the federal case and accept the delay, and potentially additional incarceration, if the claim proves ultimately to be meritorious. Alternatively, she must abandon the unexhausted claim and risk losing it as an abuse of the writ upon later resurrection.

Some state court judges remain unsympathetic with the entire post-conviction process; some such judges set execution dates and then refuse to stay the execution pending investigation and orderly post-conviction litigation. In this situation, a federal habeas corpus petition may be filed seeking a stay of execution. Even in more hospitable jurisdictions a death row inmate's lawyer may discover a potentially meritorious claim late in the process when stays are harder to procure. Returning to state court to exhaust a claim risks loss of the stay.²⁵⁵ A

Sawyer v. Whitley, 112 S.Ct. 2514, 2518 (1992).

253. *McCleskey*, 499 U.S. at 494. Actual innocence in a death penalty case includes the curious concept referred to as "innocence of the death penalty." A prisoner may be guilty of murder without being guilty of capital murder. Under *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992), a showing of the absence of one or more of the elements which made the prisoner death eligible constitutes a showing of actual innocence of the death penalty. *Id.* at 2523. A showing of actual innocence requires a showing "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Id.* at 2525 (Blackmun, J., concurring). There may be a distinction between "abuse of the writ" situations and "successive petition" cases. It is not clear whether the miscarriage or ends of justice prong of a showing of 'cause' is limited in abuse of the writ situations to a showing of actual innocence. Successive petitions (which involve renewal of previously rejected claims as opposed to new claims on a successor habeas petition) are limited to a showing of actual innocence—the ends of justice exception collapses entirely into the innocence prong. *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (plurality opinion). Professor Robbins notes that "[a]lthough the plurality in *Kuhlmann v. Wilson* intended for the ends-of-justice test to apply only to successive-petitions cases, some lower federal courts have used the test to determine whether the petitioner has abused the writ." ROBBINS, *supra* note 236, § 16.03 at 16-11 (citations omitted).

254. 455 U.S. 509 (1982).

255. *See, e.g.,* ROBBINS, *supra* note 236, at 11-7. Professor Liebman, *supra* note 212 § 4.3, at 35, points out that "[t]he petitioner then may ask the federal court to stay the execution and to defer adjudicating the federal petition pending completion of the unexhausted proceedings. . . ." The granting of a stay in this instance is discretionary and not all federal judges are inclined to grant stays. *See, e.g.,* LIEBMAN, *supra* note

death row inmate may have to abandon a potentially meritorious claim in order to remain in federal court.

F. Conclusion

The exhaustion doctrine began as a discretionary concept predicated upon comity. The rules have increasingly become more rigid until they have in some ways come to mimic jurisdictional concepts.²⁵⁶ These rules can operate with peculiar harshness in capital cases. A lawyer handling a federal habeas corpus petition cannot ignore the exhaustion doctrine, she must keep it firmly in mind in drafting the petition and any amendments thereto, and she must be prepared at all stages to meet the objection that an issue has not been exhausted.

Part Two of this article will appear in a forthcoming issue of the University of Richmond Law Review.

212, § 6.3. Certain judges in Texas and Louisiana have been notorious for their refusal to grant death row inmates stays in any circumstances. The problem is, apparently, a continuing one. *Deputy v. Taylor*, 19 F.3d 1485 (3d Cir. 1994), illustrates the point. This death row habeas petition was dismissed on March 28, 1993 by the district court "as a mixed petition which contained both exhausted and unexhausted claims." *Id.* at 1488. On July 30, 1993 the Delaware Superior Court dismissed all but one of the unexhausted claims as procedurally barred and set an execution date of August 19, 1993. *Id.* at 1489. On August 11, before the state court had yet acted on the one unexhausted and defaulted claim, the petitioner abandoned his one unexhausted claim in federal court and elected to proceed without it (petitioner was no doubt motivated at this point to try to secure a stay from any possible source). *Id.* at 1488. The district court denied all of petitioner's motions and summarily denied habeas relief. *Id.* Only on August 18, one day before the execution date, did the court of appeals grant a stay so that the court could consider the case. *Id.* at 1489. Neither the state judges nor the federal district judge would enter a stay, and unless both the court and counsel were extraordinarily efficient, there appears to have been little time for consideration of petitioner's claims. *Id.*

256. Yackle, *supra* note 221 *passim*.