

DECISIONS IN DEATH-PENALTY CASES
(United States Supreme Court cases since 1991)

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A. PRETRIAL ISSUES

1. Motion to Suppress Defendant's Statements

(a) Motion to suppress defendant's statements—*Miranda*

Bobby, Warden v. Dixon, 565 US ___, 132 S Ct 26, 181 L Ed 2d 328 (2011) (*per curiam*). Petitioner Dixon and Hoffner robbed and beat the victim (Hammer), stole his identification and car, and then they literally buried him alive. The next day, November 4, 1993, police officer happened to talk with petitioner about Hammer's disappearance and gave him *Miranda* warnings, but petitioner said he would not answer questions without a lawyer present, and he left. The officers later discovered that petitioner had sold Hammer's car and used his identification, so they arrested him on November 9 on a forgery charge. The officers deliberately did not give petitioner *Miranda* warnings, but questioned him at length about the victim's disappearance. Petitioner admitted using the victim's identification and selling his car, but insisted that the victim had given him permission and said he had no idea where the victim was. The officers then upped the ante by telling him (evidently falsely) that Hoffner "was providing them more useful information" and suggesting that he come clean before Hoffner did in order to get a better deal. Petitioner stuck by his story, and the officers booked him on the forgery charge at 3 p.m. Later that same day, Hoffner led the police to the Hammer's body, but placed the blame on petitioner. About 7:30 p.m., petitioner was brought back to meet with the officers for further questioning, and he told them that he had heard that they had found the body. He said, "I talked to my attorney, and I want to tell you what happened." The officers gave him *Miranda* warnings, he waived his rights, and confessed, but he attempted to put the blame on Hoffner. The trial court excluded all of petitioner's statements as having been obtained in violation of *Miranda*, but the state appealed and the Ohio Court of Appeals reversed, holding that petitioner's statements during the interview after 7:30 p.m. were admissible because the officers had given him *Miranda* warnings. Petitioner was convicted and sentenced to death. On petitioner's appeal, the Ohio Supreme Court affirmed, relying on *Oregon v. Elstad*, 470 US 298 (1985). Petitioner then filed a *habeas corpus* petition in federal court challenging the admissibility of his post-*Miranda* confession. The district court denied his petition, but the Sixth Circuit reversed, concluding that under § 2254(d)(1) the state courts had violated "clearly established Federal law" in three different respects. *Held*: Reversed, reinstating state judgment. [1] The Court rejected the Sixth Circuit's first ruling that, under *Miranda*, petitioner's invocation during the first encounter with the officer on November 4 precluded any subsequent questioning: "That is plainly wrong. It is undisputed that [petitioner] was not in custody during his chance encounter with police on November 4. And this Court has never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than custodial interrogation." [2] The Court rejected the Sixth Circuit's second ruling that the officers "violated the Fifth Amendment by urging [petitioner] to 'cut a deal' before his accomplice Hoffner did so"; the Court ruled: "Because no holding of this Court suggests, much less clearly establishes, that police may not urge a suspect to confess before another suspect does so, the Sixth Circuit had no authority to issue the writ on this ground." [3] Finally, the Court rejected the Sixth Circuit's ruling that, in light of *Missouri v. Seibert*, 542 US 600 (2004), the Ohio Supreme Court misapplied *Elstad*: "Unlike in *Seibert*, there is no concern here that police gave [petitioner] *Miranda* warnings and then led him to repeat an earlier murder confession, because there was no earlier confession to repeat. Indeed, [petitioner] *contradicted* his prior unwarned statements when he confessed to Hammer's murder. Nor is there any evidence that police used [petitioner's] earlier admission to forgery to induce him to waive his right to silence later: He declared his desire to tell police what happened to Hammer before the second interrogation session even began. As the Ohio Supreme Court reasonably concluded, there was simply 'no nexus' between [petitioner's] unwarned admission to forgery and his later, warned confession to murder." Moreover: "Four hours passed between [petitioner's] unwarned interrogation and his receipt of *Miranda* rights, during which time he traveled from the police station to a separate jail and back again; claimed to have spoken to his lawyer; and learned that police were talking to his accomplice and had found Hammer's body. Things had changed. Under *Seibert*, this significant break in time and dramatic change in circumstances created 'a new and distinct experience,' ensuring that [petitioner's] prior, unwarned interrogation did not undermine the effectiveness of the *Miranda* warnings he received before confessing to Hammer's murder."

Montejo v. Louisiana, 556 US ___, 129 S Ct 2079, 173 L Ed 2d 955 (2009). Defendant was charged with first-degree murder at a preliminary hearing required by Louisiana law. When he stood mute, the court ordered appointment of counsel. Later the same day and before specific counsel was appointed, the officers recontacted defendant to continue questioning him, gave him *Miranda* warnings, obtained a waiver, and induced him to go with them to recover the murder weapon. During the excursion, he wrote an inculpatory letter to the victim's widow. When they returned, defendant first met with his newly appointed counsel. Defendant's apology letter was admitted at trial over his objection based on *Michigan v. Jackson*, 475 US 625 (1986), and defendant was convicted of murder and was sentenced to death. The Louisiana Supreme Court affirmed the judgment, concluding that *Jackson* did not apply because defendant had not expressly asked for counsel or invoked his right to counsel at the hearing. *Held*: In a 5-4 opinion by Justice Scalia, the Court overruled *Jackson* but remanded. [1] The state court's attempt to limit *Jackson* is untenable, and defendant's argument that the mere appointment of counsel precludes all further questioning is inconsistent with the rationale behind *Jackson*. *Id.* at 2085. [2] Relevant factors in deciding whether to adhere to the principle of *stare decisis* include "workability" of the rule, "the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." In creating a prophylactic rule to protect a constitutional right, "the relevant reasoning is the weighing of the rules benefits against its costs." The "marginal benefits" of the *Jackson* rule "are dwarfed by its substantial costs." The prophylactic rules adopted in *Miranda*, *Edwards v. Arizona*, 451 US 477 (1981), and progeny adequately protect an in-custody defendant from police "badgering." *Id.* 2088-90. [3] The Court remanded to allow defendant to argue that the letter should have been excluded under *Edwards* if he can show that he actually had invoked his right to counsel during questioning. *Id.* at 2091-92.

Notes: [a] In its opinion, the Court summarily rejected defendant's argument that ethical rules barring a lawyer from contacting a represented party had relevance to the analysis: "But the Constitution does not codify the ABA's Model Rules, and does not make investigating police officers lawyers." *Id.* at 2087. [b] The Oregon Supreme Court held in *State v. Joslin*, 332 Or 373, 383 (2001), that if the police know that a specific counsel has been appointed or retained to represent the suspect they must so advise him before continuing questioning.

(b) Motions to suppress defendant's statements—VCCR

Leal Garcia v. Texas, 564 US ___, 131 S Ct 2866, 180 L Ed 2d 872 (2011) (*per curiam*). Petitioner is a Mexican national who has resided in the United States since he was 2 years old. In 1994, he kidnapped a 16-year-old girl, "raped her with a large stick, and bludgeoned her to death with a piece of asphalt." He was convicted of capital murder in Texas state court and was sentenced to death, and the sentence was affirmed by the state and federal courts. On the eve of his execution, he petitioned the Court for a stay of execution on the ground that the arresting officers had violated the Vienna Convention on Consular Relations by not immediately advising him of his right to assistance from the Mexican consulate and that a bill was pending in Congress that would allow review of such a claim. *Held*: Petition denied (in a 5-4 *per curiam* decision). [1] Petitioner's claim based on the VCCR "is foreclosed by *Medellin v. Texas*, 552 US 491 (2008), in which we held that neither the [ICJ's decision in the *Avena* case] nor the President's Memorandum purporting to implement that decision constituted directly enforceable federal law." [2] Petitioner's claim that the Due Process Clause requires a stay that precludes Texas from executing the death sentence "so that Congress may consider whether to enact legislation implementing the *Avena* decision" has no merit: "The Due Process Clause does not prohibit a State from carrying out a lawful judgment in light of unenacted legislation that might someday authorize a collateral attack on that judgment. ... Our task is to rule on what the law is, not what it might eventually be." [3] The dissent's concern about possible political repercussions does not warrant relief: "We have no authority to stay an execution in light of an 'appeal of the President' presenting free-ranging assertions of foreign policy consequences, when those assertions come unaccompanied by a persuasive legal claim." [4] Finally, petitioner failed to demonstrate that the alleged VCCR violation was sufficiently prejudicial to entitle him to relief, noting that the district court had rejected the claim on the basis that it was "harmless."

Note: The Court expressed skepticism that legislation would be enacted any time soon: "It has now been seven years since the ICJ ruling and three years since our decision in *Medellin*, making a stay based on

the bare introduction of a bill in a single house of Congress even less justified. If a statute implementing *Avena* had genuinely been a priority for the political branches, it would have been enacted by now.”

Medellin v. Dretke, 544 US 660, 125 S Ct 2088, 161 L Ed 2d 982 (2005). The International Court of Justice (ICJ) ordered numerous American state courts to review and reconsider, regardless of any procedural bars, death sentences imposed on petitioner and 50 other Mexican nationals on the ground that at the time of their arrests they allegedly were not informed of the right under the Vienna Convention on Consular Relations (VCCR) to seek help from the Mexican consulates. The Court had granted certiorari to determine whether a federal *habeas corpus* court is bound by the ICJ’s ruling and whether a federal court should give it effect as a matter of comity and uniform treaty interpretation. After the Court granted certiorari, however, petitioner filed a *habeas corpus* petition in the Texas Court of Criminal Appeals, relying in part upon a memorandum from the President (issued after the cert grant) stating that the United States would discharge its obligations under the ICJ ruling by having state courts give it effect. In a 5-4 *per curiam* decision, the Court dismissed the writ of certiorari as improvidently granted. The Court concluded that, because the federal case before it presents several difficult threshold jurisdictional issues, it is preferable to dismiss the writ and allow the Texas state courts to address the matter, subject to possible later review by the Court.

2. *Brady* Claims

Cone v. Bell, 556 US ___, 129 S Ct 1769, 173 L Ed 2d 701 (2009). In 1981, petitioner was convicted of two murders in state court and was sentenced to death, and the Tennessee Supreme Court affirmed the judgment. While prosecuting a post-conviction proceeding in state court, petitioner discovered that the prosecutor had failed to disclose witness statements and police reports that he asserted would have supported his insanity and mitigation defenses, and he amended his petition to assert a *Brady* claim. The post-conviction court denied his petition and the state appellate court affirmed. In rejecting his *Brady* claim, the post-conviction and appellate court mistakenly assumed that petitioner previously had raised that *Brady* claim on direct appeal. Petitioner then filed a § 2254 petition in federal district court in which he *inter alia* asserted his *Brady* claim. The district court denied that claim as procedurally barred, and the Sixth Circuit affirmed on that ground and also on the ground that the material not disclosed was not a *Brady* violation. *Held*: Reversed and remanded. In what is essentially an error-correction decision that does not announce any new law, the Court concluded that petitioner’s *Brady* claim was not procedurally barred because he in fact had not raised the issue on direct appeal and the state courts in the post-conviction proceeding had not considered and denied the claim on the merits. *Id.* at 1782. Although the evidence that the prosecutor had not disclosed was not helpful to his guilt-phase insanity defense, the evidence might have been material to his mitigation defense during the penalty phase because of “the far lesser standard that a defendant must establish to qualify evidence as mitigating in a penalty hearing in a capital case.” *Id.* at 1785. Because the evidence may have “a mitigating, though not exculpatory, role,” the Court remanded for a full review of petitioner’s claims of prejudice. *Id.* at 1786.

Banks v. Dretke, 540 US 668, 124 S Ct 1256, 157 L Ed 2d 1166 (2004). In a § 2254 proceeding challenging a state-court conviction for aggravated murder and sentence of death, the Fifth Circuit denied *habeas corpus* relief on petitioner’s claim that the state had concealed impeachment evidence that a key prosecution witness was a paid police informant. *Held*: Reversed. Based on the state’s suppression of that evidence and the fact that it was material to impeachment, petitioner established cause and prejudice for failing to have raised that claim in his state post-conviction proceeding. *Id.* at 697-703.

Strickler v. Greene, 527 US 263, 119 S Ct 1936, 144 L Ed 2d 286 (1999). Petitioner was charged with capital murder and related crimes. His counsel did not file a pretrial motion for discovery of possible exculpatory evidence because an open-file policy gave petitioner access to all of the evidence in the prosecutor’s files. At the trial, a state’s witness gave detailed eyewitness testimony about the crimes and petitioner’s role as one of the perpetrators. The prosecutor failed to disclose exculpatory materials in the police files that cast serious doubt on significant portions of her testimony. The jury found petitioner guilty and sentenced him to death. Petitioner then filed a federal *habeas corpus* petition and was granted access to

the exculpatory materials for the first time. *Held*: Although petitioner has demonstrated cause for failing to raise a *Brady* claim, Virginia did not violate *Brady* and its progeny by failing to disclose exculpatory evidence to petitioner. There are three essential components of a true *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the state, either willfully or inadvertently; and (3) prejudice must have ensued. The record in this case unquestionably establishes two of those components. In order to obtain relief, petitioner must convince the Court that there is a reasonable probability that his conviction or sentence would have been different had the suppressed documents been disclosed to the defense. Petitioner did not show prejudice sufficient to excuse his procedural default due to the considerable forensic and other physical evidence linking petitioner to the crime. *Id.* at 281-292.

3. Guilty Pleas

Bradshaw v. Stumpf, 545 US 175, 125 S Ct 2398, 162 L Ed 2d 143 (2005). Defendant pleaded guilty to aggravated murder, and he was sentenced to death after a contested hearing before a three-judge panel in which the state contended that he was the triggerman or, alternatively, that he deserved death even if he was only an accomplice. At his codefendant’s subsequent jury trial, the state presented evidence (obtained after defendant was sentenced) that the codefendant admitted shooting the victim. The Sixth Circuit granted *habeas corpus* relief. *Held*: Reversed. [1] The defendant’s plea was valid. “We have never held that the judge must himself explain the elements of each charge to the defendant on the record. Rather, the constitutional prerequisites of a valid plea may be satisfied where [as here] the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel.” *Id.* at 183. [2] “[A] plea’s validity may not be collaterally attacked merely because the defendant made what turned out, in retrospect, to be a poor deal. Rather, the shortcomings of the deal [petitioner] obtained cast doubt on the validity of his plea only if they show either that he made the unfavorable plea on the constitutionally defective advice of counsel, or that he could not have understood the terms of the bargain he and [the state] agreed to.” *Id.* at 186. [3] The state’s use of inconsistent arguments in the two cases did not require voiding the defendant’s guilty plea because: (a) under state law, the identity of the triggerman was not material to the validity of defendant’s conviction, and (b) the prosecution’s post-plea use of inconsistent arguments could not have affected his plea decision. *Id.* at 186-87.

Note: In concurring, Justice Thomas observed: “This Court never has hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants on inconsistent theories.” *Id.* at 190.

B. GUILT-PHASE ISSUES

1. Jury Selection

(a) Jury selection—*Batson* challenge

Thaler v. Haynes, 559 US ___, 130 S Ct 1171, 175 L Ed 2d 1003 (2010) (*per curiam*). Petitioner was charged with capital murder for killing a police officer. During *voir dire*, one judge presided over individual questioning but a second judge was presiding when the parties exercised peremptory challenges. When the prosecutor used a challenge against a prospective juror who was black, defense counsel asserted a *Batson* objection. The judge accepted the prosecutor’s demeanor-based justification as race-neutral and overruled the objection. Petitioner was convicted and sentenced to death. On direct review, the state appellate courts rejected petitioner’s argument that no deference can be granted to a trial judge’s ruling on a *Batson* objection when the judge did not personally observe the *voir dire*, and it affirmed that ruling. In petitioner’s subsequent *habeas corpus* proceeding, the Fifth Circuit vacated the conviction, holding that the state court’s ruling was not entitled to deference under AEDPA “because the state courts engaged in pure appellate fact-finding for an issue that turns entirely on demeanor.” *Held*: Reversed and remanded. [1] Neither of the Court’s previous decisions on *Batson* objections held or necessarily implied “that a demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalls the relevant aspect of the juror’s demeanor.” *Id.* at 1174. [2] Because “no decision of this Court clearly

establishes the categorical rule on which the Court of Appeals appears to have relied,” that court erred under § 2254(d)(1) when it ruled that the state court’s ruling violated *Batson*. The Court remanded for reconsideration applying the AEDPA deference standard. *Id.* at 1175.

(b) Jury selection—“death qualification”

Uttecht v. Brown, 551 US 1, 127 S Ct 2218, 167 L Ed 2d 1014 (2007). Petitioner was convicted of capital murder and sentenced to death. The state courts affirmed the judgment. In his *habeas corpus* petition, petitioner alleged that the trial court improperly excluded for cause several prospective jurors for expressing opposition to the death penalty. The district court denied the petition, but Ninth Circuit reversed, agreeing with respect to one juror, even though defense counsel had not objected to the prosecutor’s challenge to that juror. *Held*: Reversed, reinstating district court’s judgment. [1] Under the *Witherspoon-Witt* standard, “a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible.” Also, “in determining whether the removal of a potential juror would vindicate the State’s interest without violating the defendant’s right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by the reviewing courts.” *Id.* at 9. [2] The Washington Supreme Court’s opinion discloses that it correctly identified the applicable rule and applied an abuse-of-discretion standard—“there is no requirement . . . that a state appellate court make particular reference to the excusal of each juror.” *Id.* at 17. [3] “From our own review of the state trial court’s ruling, we conclude that the trial court acted well within its discretion in granting the State’s motion to excuse Juror Z.” *Id.* at 17. Even though “there is no independent federal requirement that a defendant in state court object to the prosecution’s challenge,” and Washington law did not require a specific objection, the federal court may “take into account voluntary acquiescence to, or confirmation of, a juror’s removal.” *Id.* at 18. A failure to object deprives the trial court of an opportunity to avoid the error or explain its ruling and deprives a reviewing court of an adequate record. Moreover, it could have been a tactical decision. *Id.* at 18-9.

Morgan v. Illinois, 504 US 719, 112 S Ct 2222, 119 L Ed 2d 492 (1992). Petitioner was sentenced to death for committing a murder-for-hire. *Held*: Reversed and remanded. [1] The trial court’s refusal to inquire whether potential jurors would automatically impose the death penalty upon convicting petitioner was inconsistent with the Due Process Clause of the Fourteenth Amendment. *Id.* at 729. [2] Due process demands that a jury provided to a capital defendant at the sentencing phase must stand impartial and indifferent to the extent commanded by the Sixth Amendment. Based on this impartiality requirement, a capital defendant may challenge for cause any prospective juror who will automatically vote for the death penalty, because such a juror will fail to consider the evidence of aggravating and mitigating circumstances in good faith. *Id.* at 729. [3] On *voir dire*, a trial court must, at a defendant’s request, inquire into the prospective jurors’ views on capital punishment. Petitioner could not exercise his challenge for cause against prospective jurors who would unwaveringly impose death after a finding of guilt unless he was given the opportunity to identify such persons by questioning them at *voir dire* about their views on the death penalty. *Id.* at 733-34. [4] The trial court’s *voir dire* was insufficient to satisfy petitioner’s right to make inquiry. The general fairness and “follow the law” questions asked by the trial court were not enough to detect those in the *venire* who would automatically impose death. *Id.* at 735-36. [5] A juror to whom mitigating evidence is irrelevant is plainly saying that they will not follow the law. Since the state statute plainly indicates that a lesser sentence is available in every case where mitigating evidence exists, a juror who would invariably impose the death penalty would not give the mitigating evidence the consideration the statute contemplates. *Id.* at 738.

2. Exclusion of Evidence Offered by Defendant

Holmes v. South Carolina, 547 US 319, 126 S Ct 1727, 164 L Ed 2d 503 (2006). Based on a home-invasion robbery in which the elderly victim died after being beaten and raped, defendant was convicted of murder and was sentenced to death. On appeal, he contended that the trial court erred in excluding his proffered evidence that a third person actually had committed the crime. The state supreme court affirmed,

ruling that because the forensic evidence of defendant's guilt was overwhelming, the proffered evidence was too speculative to create a "reasonable inference" of defendant's innocence. *Held*: Reversed and remanded.

[1] Although states "have broad latitude under the Constitution to establish rules excluding evidence from criminal trials, ... the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. This right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Id.* at 324.

[2] "Well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." And those rules may exclude evidence of third-party responsibility that is only "speculative or remote." *Id.* at 326-27.

[3] The state's evidentiary rule in this case was "arbitrary," and hence violated the defendant's right to present a defense, because the court excluded his proffered evidence of third-party responsibility based on its assessment that the case against the defendant was strong: "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id.* at 331.

3. Trial

Bradshaw v. Stumpf, 545 US 175, 125 S Ct 2398, 162 L Ed 2d 143 (2005). Defendant pleaded guilty to aggravated murder, and he was sentenced to death after a contested hearing before a three-judge panel in which the state contended that he was the triggerman or, alternatively, that he deserved death even if he was only an accomplice. At his codefendant's subsequent jury trial, the state presented evidence (obtained after defendant was sentenced) that the codefendant admitted shooting the victim. The Sixth Circuit granted *habeas corpus* relief. *Held*: Reversed. The state's use of inconsistent arguments in the two cases did not require voiding the defendant's guilty plea because: (a) under state law, the identity of the triggerman was not material to the validity of defendant's conviction, and (b) the prosecution's post-plea use of inconsistent arguments could not have affected his plea decision. *Id.* at 186-87.

Note: In concurring, Justice Thomas observed: "This Court never has hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants on inconsistent theories." *Id.* at 190.

4. Jury Instructions

Mitchell v. Esparza, 540 US 12, 124 S Ct 7, 157 L Ed 2d 263 (2003) (*per curiam*). Acting alone, petitioner robbed a store and murdered a clerk. He was charged *inter alia* with aggravated felony murder, was tried, convicted on that charge, and was sentenced to death. He petitioned for post-conviction relief on the ground that the indictment was insufficient to charge capital murder because that count failed to allege and the state thus failed to prove, as required, that he was the "principal offender." The court rejected that claim as harmless, because he was the only actor, and that ruling was affirmed on appeal. In a § 2254 *habeas corpus* proceeding, the Sixth Circuit vacated the death sentence, concluding the failure to allege the "principal offender" language cannot be harmless error under the Eighth Amendment because that allegation was necessary to render him eligible for the death penalty. *Held*: Reversed. [1] "In noncapital cases, we have held that the trial court's failure to instruct the jury on all of the statutory elements of an offense is subject to harmless-error analysis. ... We cannot say that because the violation occurred in the context of capital sentencing proceeding that our precedent requires the opposite result." Consequently, the Sixth Circuit "exceeded its authority under § 2254(d)(1)" because "a federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." *Id.* at 16-18. [2] Because petitioner was the only one charged in the indictment and the evidence at trial established that he was the only assailant, the state court properly determined that the failure to allege and prove the "principal offender" factor is harmless. *Id.* at 18-19.

C. PENALTY-PHASE ISSUES

1. Eighth Amendment Limitations

Kennedy v. Louisiana, 554 US ___, 128 S Ct 2641, 170 L Ed 2d 525 (2008). Defendant was convicted in Louisiana of a violent rape of his 8-year-old stepdaughter, and he was sentenced to death under a state statute that authorized capital punishment for the rape of a child under 12. The state supreme court affirmed the judgment after rejecting the defendant's challenge to the statute based on his claim that his sentence constituted cruel and unusual punishment. *Held*: Death sentence vacated. The Eighth Amendment prohibits the imposition of the death penalty for the rape of a child if the crime did not result, and was not intended to result, in the victim's death. "The difficulties in administering the death penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards [of decency that mark the progress of a maturing society] and in cases of crimes against individuals, for crimes that take the life of the victim." *Id.* at 2665.

Schiro v. Smith, 546 US 6, 126 S Ct 7, 163 L Ed 2d 6 (2005) (*per curiam*). Petitioner was convicted of capital murder and sentenced to death. His conviction and sentence was affirmed on direct appeal and in a state post-conviction proceeding, and the district court denied his § 2254 petition. During the course of an appeal in the Ninth Circuit, the Court issued its opinion in *Atkins v. Virginia*, 536 US 304 (2002). Thereafter, petitioner raised for the first time a claim that he is mentally retarded and hence cannot be executed under *Atkins*. The Ninth Circuit suspended further proceedings in that case and directed petitioner to file a proceeding in state court to litigate that claim and further ordered that that issue "must be determined ... by a jury unless the right to a jury is waived by the parties." *Held*: Reversed and remanded. "The Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve [petitioner's] mental retardation claim. *Atkins* stated in clear terms that we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences. States, including Arizona, have responded to that challenge by adopting their own measures for adjudicating claims of mental retardation. While those measures might, in their application, be subject to constitutional challenge, Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit preemptively imposed its jury trial condition. Because the Court of Appeals exceeded its limited authority on *habeas* review, the judgment below is vacated[.]" *Id.* at 9.

Roper v. Simmons, 543 US 551, 125 S Ct 1183, 161 L Ed 2d 1 (2005). When he was 17 years old, petitioner committed a brutal and senseless thrill murder by kidnapping a woman at random and throwing her bound off a bridge. He assured his accomplices that they would get away with it because they were minors. When he was 18, he was convicted of aggravated murder and sentenced to death. *Held*: Sentence vacated. In a 5-4 decision, the majority applied the "evolving standards of decency" standard under the Eighth Amendment, overruled *Stanford v. Kentucky* and held that a state cannot impose the death penalty on a murderer who was under the 18 years old when he committed the crime. The Court reasoned that (a) objective indicia exists of a national consensus against execution of juveniles (*viz.*, a majority of states forbid such executions, such executions are infrequent even in states that permit them, and the consistent trend has been toward abolition of the practice); (b) juveniles are not as "deserving of execution" as adults because juveniles are less mature than adults, juveniles are more vulnerable or susceptible to negative influences and peer pressure, and "the character of a juvenile is not as well formed as that of an adult"; and (c) the overwhelming weight of international opinion against the death penalty confirms that death is a disproportionate punishment for juvenile offenders. *Id.* at 568.

Note: There are very forceful dissents by Justices Scalia and O'Connor.

Bobby v. Bies, 556 US ___, 129 S Ct 2145, 173 L Ed 2d 1173 (2009). Petitioner was convicted ten years ago for kidnapping, molesting, and murdering a 10-year-old boy. He presented evidence at the penalty phase that he is mentally retarded, and the jury was instructed in accordance with *Penry v. Lynaugh*, 492 US 302 (1989), to consider that as mitigating evidence to be weighed against the aggravating evidence. The jury sentenced him to death. The Ohio appellate courts affirmed, also concluding that the aggravating evidence

outweighed his evidence of mental retardation. Petitioner exhausted his state post-conviction remedy, and then filed a § 2254 petition in federal district court seeking *habeas corpus* relief. Meanwhile, the Court issued *Atkins v. Virginia*, 536 US 304 (2002), in which it overruled *Penry* and held that the Eighth Amendment precludes execution of someone who is mentally retarded. The district court stayed the proceedings to allow the state court to resolve petitioner’s new *Atkins*-based claim. When the state court set an evidentiary hearing to resolve whether petitioner, in fact, is mentally retarded, he asked the federal court to block that hearing, contending that issue already had been resolved in his favor and cannot be relitigated. The district court agreed, and the Sixth Circuit affirmed. *Held*: Reversed and remanded. [1] The Double Jeopardy Clause does not preclude the state from relitigating, in light of *Atkins*, whether petitioner in fact is mentally retarded. Because he was sentenced to death at the original hearing, he was not implicitly “acquitted,” either as a matter of fact or law. *Id.* at 2151-52. [2] The relitigation is not barred by issue-preclusion principles discussed in *Ashe v. Swenson*, 397 US 436 (1970), because it cannot be said that petitioner’s mental condition actually was determined and was necessary to the ultimate outcome at the original sentencing, at which only the *Penry* rule, not the *Atkins* rule, was applied. Under the *Penry* rule, the state did not have an incentive at the penalty phase to contest the precise level of petitioner’s mental incapacity, and it did not concede at trial or on appeal that he, in fact, is mentally retarded under the standard that the Court later adopted in *Atkins*. *Id.* at 2152-53.

Atkins v. Virginia, 536 US 304, 122 S Ct 2242, 153 L Ed 2d 335 (2002). The Eighth Amendment precludes a state from executing a murderer who is mentally retarded. *Id.* at 321.

2. Double Jeopardy Limitations

Bobby v. Bies, 556 US ___, 129 S Ct 2145, 173 L Ed 2d 1173 (2009). Petitioner was convicted ten years ago for kidnapping, molesting, and murdering a 10-year-old boy. He presented evidence at the penalty phase that he is mentally retarded, and the jury was instructed in accordance with *Penry v. Lynaugh*, 492 US 302 (1989), to consider that as mitigating evidence to be weighed against the aggravating evidence. The jury sentenced him to death. The Ohio appellate courts affirmed, also concluding that the aggravating evidence outweighed his evidence of mental retardation. Petitioner exhausted his state post-conviction remedy, and then filed a § 2254 petition in federal district court seeking *habeas corpus* relief. Meanwhile, the Court issued *Atkins v. Virginia*, 536 US 304 (2002), in which it overruled *Penry* and held that the Eighth Amendment precludes execution of someone who is mentally retarded. The district court stayed the proceedings to allow the state court to resolve petitioner’s new *Atkins*-based claim. When the state court set an evidentiary hearing to resolve whether petitioner, in fact, is mentally retarded, he asked the federal court to block that hearing, contending that issue already had been resolved in his favor and cannot be relitigated. The district court agreed, and the Sixth Circuit affirmed. *Held*: Reversed and remanded. [1] The Double Jeopardy Clause does not preclude the state from relitigating, in light of *Atkins*, whether petitioner in fact is mentally retarded. Because he was sentenced to death at the original hearing, he was not implicitly “acquitted,” either as a matter of fact or law. *Id.* at 2151-52. [2] The relitigation is not barred by issue-preclusion principles discussed in *Ashe v. Swenson*, 397 US 436 (1970), because it cannot be said that petitioner’s mental condition actually was determined and was necessary to the ultimate outcome at the original sentencing, at which only the *Penry* rule, not the *Atkins* rule, was applied. Under the *Penry* rule, the state did not have an incentive at the penalty phase to contest the precise level of petitioner’s mental incapacity, and it did not concede at trial or on appeal that he, in fact, is mentally retarded under the standard that the Court later adopted in *Atkins*. *Id.* at 2152-53.

Sattazahn v. Pennsylvania, 537 US 101, 123 S Ct 732, 154 L Ed 2d 588 (2003). Defendant was convicted of capital murder, and the jury in penalty phase hung on the sentence. Because state law provides that a life sentence must be imposed if the jury cannot unanimously agree on a death sentence, the court imposed a life sentence. Defendant appealed and obtained a new trial due to an error in the guilt phase. On retrial, and over defendant’s objection, the state sought and obtained a death penalty. The state supreme court affirmed. *Held*: Affirmed. [1] Retrial on the death sentence did not violate the Double Jeopardy Clause, because he had not been “acquitted” of the death penalty at the first trial; rather, the life sentence was

imposed only by default. *Id.* at 106. [2] The Due Process Clause does not provide greater protection in this context than the Double Jeopardy Clause. *Id.* at 116.

3. Notice of Possible Death Penalty

Lankford v. Idaho, 500 US 110, 111 S Ct 1723, 114 L Ed 2d 173 (1991). At petitioner's arraignment on two counts of first-degree murder, the trial judge advised him that the maximum punishment if convicted on either charge was life imprisonment or death. The jury found him guilty on both counts and the court entered an order requiring the state to provide notice whether it would seek the death penalty. The state filed a negative response, and there was no discussion of the death penalty as a possible sentence at the sentencing hearing. At the hearing's conclusion, however, the trial judge indicated that he considered petitioner's testimony unworthy of belief, stated that the crimes' seriousness warranted punishment more severe than that recommended by the state, and mentioned the possibility of death as a sentencing option. Subsequently, petitioner was sentenced to death based on five specific aggravating circumstances. In affirming, the state supreme court concluded that the express advice given to petitioner at his arraignment, together with the terms of the Idaho Code, were sufficient notice to him that the death penalty might be imposed. *Held*: Reversed and remanded. [1] The pre-sentencing order entered by the trial court requiring the state to advise the court and the defendant whether it sought the death penalty was comparable to a pretrial order limiting the issues to be tried. It was reasonable for the defense to assume that there was no reason to present argument or evidence relevant to the death penalty, because the defense was complying with the order's implied limitations. *Id.* at 120. [2] The trial court's silence following the state's response to the pre-sentencing order had the practical effect of concealing from the parties the principal issue to be decided at the hearing. By not giving notice of the issues to be resolved, petitioner's right to due process was violated. *Id.* at 127. [3] It is unrealistic to assume that the notice provided by the statute and the arraignment survived the state's response to an order that would have no purpose other than to limit the issues in future proceedings. *Id.* at 123.

4. Right to Jury

Schiro v. Smith, 546 US 6, 126 S Ct 7, 163 L Ed 2d 6 (2005) (*per curiam*). Petitioner was convicted of capital murder and sentenced to death. His conviction and sentence was affirmed on direct appeal and in a state post-conviction proceeding, and the district court denied his § 2254 petition. During the course of an appeal in the Ninth Circuit, the Court issued its opinion in *Atkins v. Virginia*, 536 US 304 (2002). Thereafter, petitioner raised for the first time a claim that he is mentally retarded and hence cannot be executed under *Atkins*. The Ninth Circuit suspended further proceedings in that case and directed petitioner to file a proceeding in state court to litigate that claim and further ordered that that issue "must be determined ... by a jury unless the right to a jury is waived by the parties." *Held*: Reversed and remanded. "The Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve [petitioner's] mental retardation claim. *Atkins* stated in clear terms that we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences. States, including Arizona, have responded to that challenge by adopting their own measures for adjudicating claims of mental retardation. While those measures might, in their application, be subject to constitutional challenge, Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit preemptively imposed its jury trial condition. Because the Court of Appeals exceeded its limited authority on *habeas* review, the judgment below is vacated[.]" *Id.* at 9.

Schiro v. Summerlin, 542 US 348, 124 S Ct 2519, 159 L Ed 2d 442 (2004). After petitioner's murder conviction and death sentence were affirmed on appeal, the Supreme Court decided *Ring v. Arizona*, 536 US 584 (2002), in which it invalidated capital-sentencing schemes that allowed judges to find the facts that are necessary to imposition of a death sentence. Relying on *Teague v. Lane*, 489 US 288 (1989), petitioner argued that *Ring* should be applied retroactively to invalidate his sentence. *Held*: The rule in *Ring* does not apply to petitioner's case. [1] The rule in *Ring* is a procedural rule, not a substantive rule, because it merely altered the method of determining the appropriate sentence. *Id.* at 353. [2] *Ring* did not announce a

watershed rule of criminal procedure because it cannot be said that judicial factfinding seriously diminishes the accuracy or reliability of the determination. *Id.* at 355.

Ring v. Arizona, 536 US 584, 122 S Ct 2428, 153 L Ed 2d 556 (2002). The right-to-jury rule in *Apprendi* applies the findings of aggravating factors that are necessary, under state law, in order to render a defendant convicted of murder eligible for the death penalty. *Id.* at 589.

Note: The holding in *Ring* is almost identical to the rule the Oregon Supreme Court adopted almost 21 years previously in *State v. Quinn*.

5. Mitigating Evidence

See also Section C-10(a), “Jury instructions—consideration of mitigating circumstances,” and Section E-8, “Claims of Ineffective Assistance of Counsel,” *below*.

(a) Mitigating evidence—defense counsel did not discover and present

Sears v. Upton, 561 US ___, 130 S Ct 3259, 177 L Ed 2d 1025 (2010) (*per curiam*). Petitioner was convicted of capital murder and was sentenced to death in Georgia based on his role in a robbery/kidnapping that started there but culminated in the victim’s murder in Kentucky. In the penalty phase, his counsel “presented evidence describing his childhood as stable, loving, and essentially without incident” in a calculated attempt “to portray the adverse impact of his execution on family and loved ones.” In his state post-conviction proceeding, he presented evidence of a troubled childhood, including abusive parents and possible sexual abuse, and that he had suffered “significant frontal lobe abnormalities” that caused mental and emotional disabilities. The state court found that trial counsel’s investigation was inadequate for failing to have discovered that evidence, but it concluded that petitioner was not sufficiently prejudiced to warrant relief because his trial counsel had presented a substantial mitigation defense. The Georgia Supreme Court summarily affirmed. *Held:* Reversed and remanded for reconsideration (in a 5-4 decision). [1] Even if trial counsel’s decision was reasonable, that “does not obviate the need to analyze whether his failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced” petitioner. [2] The state court “failed to apply the proper prejudice inquiry”: the Court never has held “that counsel’s effort to present *some* mitigation effort should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Stickland* inquiry required precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below.” The Court remanded for reconsideration of the prejudice ruling.

Wong v. Belmontes, 558 US ___, 130 S Ct 383, 175 L Ed 2d 328 (2009) (*per curiam*). Based on crimes he committed in 1981, petitioner was convicted of murder and was sentenced to death. During the penalty phase, petitioner’s trial counsel successfully kept out evidence that petitioner previously had committed an unrelated murder. The California courts affirmed his convictions and death sentence. Petitioner then filed a § 2254 petition. The district court denied his petition, finding that his trial counsel did not provide constitutionally effective assistance by not presenting additional mitigating evidence during the penalty phase but that he did not prove that he suffered prejudice as a result. The Ninth Circuit reversed, ruling that petitioner was prejudiced. *Held:* Reversed and remanded. [1] “In evaluating [whether petitioner suffered prejudice], it is necessary to consider *all* the relevant evidence that the jury would have had before it if [petitioner’s counsel] had pursued the different path—not just the mitigation evidence [counsel] could have presented, but also [evidence of petitioner’s previous murder] that almost certainly would have come in with it.” Some of the additional mitigating evidence would have been merely cumulative and the rest would have triggered admission of the aggravating evidence of his other murder. *Id.* at 386. [2] The additional testimony from petitioner’s new expert did not establish prejudice because, “The jury simply did not need expert testimony to understand the ‘humanizing’ evidence; it could use its common sense or own sense of mercy.” Moreover, such testimony also may have triggered admission of the aggravating evidence. *Id.* at 388. [3] In evaluating prejudice, the Ninth Circuit erroneously disregarded the state court’s finding that petitioner “was convicted on extremely strong evidence that he committed an intentional murder of

extraordinary brutality.” *Id.* at 390. [4] The Ninth Circuit applied an incorrect standard: “*Strickland* does not require the State to ‘rule out’ a sentence of life in prison to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a ‘reasonable probability’ that the result would have been different.” Petitioner did not carry that burden. *Id.* at 390-91.

Bobby v. Van Hook, 558 US ___, 130 S Ct 13, 175 L Ed 2d 255 (2009) (*per curiam*). In 1986, petitioner was convicted of murder and was sentenced to death. The Ohio courts affirmed his convictions and death sentence. Petitioner then filed a § 2254 petition in which he contended *inter alia* that his trial counsel provided ineffective assistance in the penalty phase. The district court denied all of his claims but the Sixth Circuit, relying on the 2003 version of the ABA’s “guidelines” for capital-defense counsel, ruled that petitioner’s trial counsel did not provide constitutionally effective assistance. *Held*: Reversed and remanded. [1] “Judging counsel’s conduct in the 1980s on the basis of these 2003 Guidelines—without even pausing to consider whether they reflected the prevailing professional practice at the time of trial—was error.” Under *Strickland*, ABA standards “are ‘only guides’ to what reasonableness means, not its definition.” *Id.* at 17. [2] Petitioner did not prove that his trial counsel failed to provide effective assistance by not investigating further. The additional evidence, from more-distant relatives, was merely cumulative; the state courts found that the additional testimony “would have added nothing of value” and that petitioner “has not shown why the minor additional details ... would have made any difference.” *Id.* 19-20.

Rompilla v. Beard, 545 US 374, 125 S Ct 2456, 162 L Ed 2d 360 (2005). [1] In a 5-4 decision, the Court held that even though petitioner and his family members had suggested to his counsel that no mitigating evidence was available, counsel were obliged to make reasonable efforts to obtain and review material that they knew the prosecution likely would rely on as evidence of aggravation at the penalty phase of trial. The Court concluded that defense counsel provided constitutionally ineffective assistance by not examining the state’s file on his prior convictions for rape and assault, given that they knew the prosecution intended to use these prior crimes to show his violent character, which, they would argue, merited the death penalty. *Id.* at 389-90. [2] On *de novo* review of the record, the Court concluded that counsel’s lapse was prejudicial because the file contained information that potentially would have led counsel to significant mitigation evidence that no other source had opened up. *Id.* 390-3.

Wiggins v. Smith, 539 US 510, 123 S Ct 2527, 156 L Ed 2d 471 (2003). Petitioner was convicted of capital murder by a Maryland judge and subsequently elected to be sentenced by a jury. At sentencing, defense counsel told the jury in her opening statement that they would hear, among other things, about petitioner’s difficult life, but such evidence was never introduced. Before closing arguments and outside the presence of the jury, counsel made a proffer to the court, detailing the mitigation case counsel would have presented if the court had allowed a bifurcated proceeding. Counsel never mentioned petitioner’s life history or family background. The jury sentenced petitioner to death, and the state courts affirmed. *Held*: Reversed. The performance of petitioner’s attorneys at sentencing violated his Sixth Amendment right to effective assistance of counsel. In evaluating petitioner’s claim, the Court’s principal concern was not whether counsel should have presented a mitigation case, but whether the *investigation* supporting their decision not to introduce mitigating evidence of petitioner’s background was itself *reasonable*. The Court thus conducted an objective review of their performance, measured for reasonableness under prevailing professional norms, including a context-dependent consideration of the challenged conduct as seen from counsel’s perspective at the time of that conduct. Here, counsel did not conduct a reasonable investigation. Moreover, counsel’s failures prejudiced petitioner’s defense. Had the jury been able to place petitioner’s “excruciating” life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. Thus, the available mitigating evidence, taken as a whole, might well have influenced the jury’s appraisal of his moral culpability. *Id.* at 534, 536.

(b) Mitigating evidence—defendant chose not to allow to be presented

Schiro v. Landrigan, 550 US 465, 127 S Ct 1933, 167 L Ed 2d 836 (2007). After a long history of violent crime, including a previous murder, petitioner escaped from prison and murdered a man during a

burglary. He was found guilty of capital murder by a jury. At sentencing (before the court), petitioner's counsel attempted to present mitigating evidence through petitioner's ex-wife and birth mother but petitioner refused to allow them to testify. In a direct colloquy, petitioner insisted that he did not want any mitigating evidence to be presented and taunted the court to impose a death sentence: "just bring it on." The court did. In his state post-conviction proceeding, petitioner alleged that his counsel should have investigated and presented mitigating evidence despite his refusal to cooperate. The court rejected that claim, and the judgment was affirmed on appeal. Petitioner repeated that claim in his *habeas corpus* petition. The district court refused to grant an evidentiary hearing and dismissed his petition. The Ninth Circuit reversed. *Held*: Reversed, affirming district court. [1] The state court finding that petitioner refused to allow his counsel to present mitigating evidence was a reasonable determination of the facts. Moreover, the court was entitled to conclude that petitioner would have prevented his counsel from presenting whatever mitigating evidence he might have uncovered, and hence that petitioner suffered no prejudice. Thus, the court did not abuse its discretion in refusing to grant an evidentiary hearing. *Id.* at 477. [2] This case is unlike *Wiggins v. Smith*, 539 US 410 (2003), and *Rompilla v. Beard*, 545 US 374 (2005), because here petitioner directly interfered with his counsel's attempt to present mitigating evidence at the sentencing hearing. *Id.* at 478. [3] Petitioner's claim that the record fails to show that his waiver was "informed and knowing" fails: (a) "We have never imposed an 'informed and knowing' requirement upon a defendant's decision not to present evidence" and "we have never required a specific colloquy to ensure that a defendant knowingly and intelligently refused to present mitigating evidence."; (b) that claim is procedurally defaulted; and (c) the record clearly shows that defendant knew what he was doing. *Id.* at 479-80. [4] In any event, petitioner proffered new evidence adds nothing beyond what he had thwarted his counsel from presenting at the sentencing hearing. *Id.* at 480.

(c) Mitigating evidence—the state failed to disclose

Cone v. Bell, 556 US ___, 129 S Ct 1769, 173 L Ed 2d 701 (2009). In 1981, petitioner was convicted of two murders in state court and was sentenced to death, and the Tennessee Supreme Court affirmed the judgment. While prosecuting a post-conviction proceeding in state court, petitioner discovered that the prosecutor had failed to disclose witness statements and police reports that he asserted would have supported his insanity and mitigation defenses, and he amended his petition to assert a *Brady* claim. The post-conviction court denied his petition and the state appellate court affirmed. In rejecting his *Brady* claim, the post-conviction and appellate court mistakenly assumed that petitioner previously had raised that *Brady* claim on direct appeal. Petitioner then filed a § 2254 petition in federal district court in which he *inter alia* asserted his *Brady* claim. The district court denied that claim as procedurally barred, and the Sixth Circuit affirmed on that ground and also on the ground that the material not disclosed was not a *Brady* violation. *Held*: Reversed and remanded. Although the evidence that the prosecutor had not disclosed was not helpful to his guilt-phase insanity defense, the evidence might have been material to his mitigation defense during the penalty phase because of "the far lesser standard that a defendant must establish to qualify evidence as mitigating in a penalty hearing in a capital case." *Id.* at 1785. Because the evidence may have "a mitigating, though not exculpatory, role," the Court remanded for a full review of petitioner's claims of prejudice. *Id.* at 1786.

(d) Mitigating evidence—state-law limitations on admissibility or consideration

Abdul-Kabir v. Quarterman, 550 US 233, 127 S Ct 1654, 167 L Ed 2d 585 (2007). Petitioner was tried and sentenced to death before *Penry I*, and the state courts affirmed the judgment despite his claim that the penalty-phase questions did not all for adequate consideration of the his mitigating evidence (unhappy childhood and impulse-control disorder). The Fifth Circuit rejected his petition for *habeas corpus*, and the Supreme Court remanded for reconsideration in light of *Tennard v. Dretke*, 542 US 274 (2004). On remand, the Fifth Circuit, applying AEDPA, again denied his petition, concluding that when the Texas courts affirmed his sentence in 1999 the law was unsettled whether the defendant must establish a nexus between his mitigating evidence and his criminal conduct, which petitioner had failed to show. *Held*: Reversed. Under AEDPA, the essential question is whether the rule announced in that case was "clearly established

Federal law” insofar as its application to petitioner’s mitigating evidence at the time the state courts finally affirmed the judgment in 1999. *Id.* at 246. Piecing together the Court’s seemingly conflicting jurisprudence at that time, the majority concluded that given the nature of petitioner’s mitigating evidence and the instructions given in the penalty phase, it was clearly established in 1999 that the death sentence violates the rule in *Penry I*. *Id.* 257-58.

Note: In an entertaining dissent, Chief Justice Roberts commented: “We give ourselves far too much credit in claiming that our sharply divided, ebbing and flowing decisions in this area gave rise to ‘clearly established’ federal law. . . . When the state courts considered these cases, our precedents did not provide them with ‘clearly established’ law, but instead a dog’s breakfast of divided, conflicting, and ever-changing analyses.” *Id.* at 266-67.

Ayers v. Belmontes, 549 US 7, 127 S Ct 469, 166 L Ed 2d 334 (2006). Petitioner was convicted of capital murder and sentenced to death, and the California courts affirmed. In his *habeas corpus* petition, he alleged that the trial court’s instruction to the jury to consider “any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime” (so-called “factor (k)”) was error, because it effectively precluded the jury from giving effect to his “forward looking” mitigating evidence of post-crime conduct that he had embraced Christianity and would lead a constructive life if incarcerated rather than executed. The Ninth Circuit agreed. *Held:* Reversed, death sentence reinstated. [1] The only question was “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.” *Id.* at 14. Because petitioner was allowed to introduce all the mitigating evidence he offered and was allowed to argue whatever he wanted, “it is improbable that jurors believed that the parties were engaging in an exercise of futility when respondent presented (and both counsel later discussed) his mitigating evidence in open court.” *Id.* at 16-17. Moreover, the court’s other instructions directed the jurors to consider “all the evidence.” *Id.* at 24. [2] The mere fact that jurors asked questions related to their consideration of mitigating evidence does not demonstrate that the “factor (k)” instruction was constitutionally infirm. *Id.* at 23-24.

Note: The majority assumed that the Eighth Amendment entitled petitioner to present and to have the jury fully consider his purely “forward looking” mitigating evidence even though it had no bearing on his moral culpability for the underlying crime. In their concurrence, Justices Scalia and Thomas reiterated their belief that the Eighth Amendment does not preclude a state from limiting the scope of mitigating evidence that may be considered.

Smith v. Texas, 543 US 37, 125 S Ct 400, 160 L Ed 2d 303 (2005) (*per curiam*): [1] Evidence of significantly impaired intellectual functioning is relevant as mitigating even without establishing a nexus between that disability and the crime because it might serve as a basis for a sentence of less than death. *Id.* at 45. [2] The Eighth Amendment requires that the jury in the penalty phase must be provided an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a low threshold for relevance. *Id.* at 44. A “nullification instruction” that directs the jurors to answer one of the penalty-phase questions “no” despite the evidence, if they believe that death is not appropriate, is not an adequate vehicle because of the ethical conflict it creates. *Id.* at 47-48.

Tennard v. Dretke, 542 US 274, 124 S Ct 2562, 159 L Ed 2d 384 (2004). Petitioner was convicted of aggravated murder in Texas and presented evidence at the penalty phase that he has an IQ of 67. The trial court gave the jury the two statutory questions that the Court later found insufficient in *Penry v. Lynaugh*, 492 US 302 (1989). The district court denied petitioner’s claim, and Fifth Circuit nonetheless denied his request for a certificate of appealability, concluding that no evidence tied petitioner’s IQ to retardation or to the circumstances of his crime. *Held:* Reversed and remanded with directions to issue a COA. The meaning of relevance for purpose of mitigating evidence in a penalty phase is the same for any other proceeding: “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without that evidence.” *Id.* at 275. Petitioner’s low IQ is relevant mitigating evidence regardless of whether it relates to the circumstances of the offense. “Impaired intellectual functioning has mitigating dimension beyond the impact it has on the individual’s ability to act

deliberately.” Moreover, it is debatable that his low IQ constituted retardation for purpose of *Atkins v. Virginia*. *Id.* 288-89.

Penry v. Johnson, 532 US 782, 121 S Ct 1910, 150 L Ed 2d 9 (2001). In 1989, the Court reversed Penry’s death sentence because the jury was not properly instructed on mitigating circumstances. Texas retried Penry in 1990 and defense counsel again presented extensive evidence of mental impairment and childhood abuse. A defense expert testified, based in part on a 1977 psychiatric evaluation prepared at the request of Penry’s then counsel to determine Penry’s competence to stand trial on another charge, that Penry suffered from organic brain impairment and mental retardation. Penry’s expert recited a portion of the report over his counsel’s objection that said Penry would be dangerous to others if released. The judge instructed the jury that if it found mitigating circumstances it should decide how much weight to give them, and if it concluded that a life sentence only were appropriate it should answer one of the three special questions (none of which had anything to do with mitigation) in the negative. The jury answered “yes” to all three questions and Penry was again sentenced to death. *Held*: [1] The admission into evidence of the portion of the earlier psychiatric evaluation referring to future dangerousness was not “contrary to” or an “unreasonable application” of the Court’s precedent, foreclosing *habeas corpus* relief on this issue. The circumstances were distinguishable from the admission of a psychiatrist’s testimony on the topic of future dangerousness, based on a defendant’s uncounseled statements, upheld in *Estelle v. Smith*, 451 US 454 (1981). Not only were there differences between Penry’s case and *Estelle*, the Court in *Estelle* indicated it might have reached a different result had the evidence come in only at the penalty phase. *Id.* at 795. [2] The trial court’s jury instruction did not comply with the Court’s instructions in *Penry I*. The instruction did not give the jury the opportunity to give effect to any finding of mitigating circumstances. *Id.* at 800-04.

Johnson v. Texas, 509 US 350, 113 S Ct 2658, 125 L Ed 2d 290 (1993). Petitioner was convicted of murder for a crime he committed when he was 19 years old. The trial court instructed the jury to answer two special issues during the penalty phase and that in determining each of these issues, it could take into consideration all the evidence submitted to it, whether aggravating or mitigating, in either phase of the trial. A unanimous jury answered yes to both special issues, and the trial court sentenced petitioner to death. The state court of criminal appeals affirmed and denied petitioner’s motion for a rehearing, rejecting petitioner’s contentions that the special issues did not allow the jury to give adequate mitigating effect to evidence of his youth and that *Penry* required a separate instruction on the question. *Held*: Affirmed. [1] A jury in a capital case must be allowed to consider the mitigating qualities of youth in the course of its deliberations over the appropriate sentence. *Id.* at 367. The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside. There is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination. *Id.* at 368. [2] There is no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of petitioner’s youth. The jury was told that, in answering the special issues, it could consider all the mitigating evidence that had been presented during the guilt and punishment phases of petitioner’s trial. *Id.* at 147. Petitioner’s father testified that his son’s actions were due to his youth. *Id.* at 368. [3] The court did not violate the Eighth or Fourteenth Amendments by failing to provide a separate instruction regarding petitioner’s youth in the sentencing phase of his capital trial. *Id.* at 373.

6. Aggravating Evidence

Romano v. Oklahoma, 512 US 1, 114 S Ct 2004, 129 L Ed 2d 1 (1994). During the sentencing phase of petitioner’s first-degree murder trial for killing Sarfaty, the state introduced a copy of the judgment and death sentence he had received during an earlier trial for the separate murder of Thompson. The jury sentenced petitioner to death for the murder of Sarfaty. While his appeal was pending, the state court of appeals reversed and remanded petitioner’s conviction for the earlier murder of Thompson; the court affirmed the lower court’s ruling for the murder of Sarfaty. *Held*: Affirmed. [1] Admission of evidence of petitioner’s previous death sentence did not affirmatively mislead the jury regarding its role in the sentencing process so as to diminish its sense of responsibility for the capital-sentencing decision. Such evidence was

not false at the time it was admitted and did not even pertain to the jury's sentencing role. The trial court's instructions, moreover, emphasized the importance of that role and never conveyed that the jury could shift its responsibility in sentencing. *Id.* at 10. [2] Although the evidence in question may have been irrelevant, the jury's consideration of it did not render the sentencing proceeding so unreliable that it violated the Eighth Amendment. That the evidence may have been irrelevant as a matter of state law does not render its admission federal constitutional error. *Id.* at 10. [3] Introduction of the evidence in question did not so infect the trial with unfairness as to render the jury's imposition of the death penalty a denial of petitioner's right to due process. Presuming that the trial court's instructions were followed, they did not offer the jurors any means by which to give effect to the irrelevant evidence of petitioner's prior sentence, and the relevant evidence presented by the state was sufficient to justify the imposition of the death sentence in this case. *Id.* at 12-13.

Dawson v. Delaware, 503 US 159, 112 S Ct 1093, 117 L Ed 2d 309 (1992). The petitioner was convicted of first-degree murder and other crimes. At the penalty hearing, the prosecution read a stipulation explaining the Aryan Brotherhood, despite petitioner's assertion that the admission of the stipulated facts violated his First and Fourteenth Amendment rights, and introduced evidence that he had the words "Aryan Brotherhood" tattooed on his hand. The jury found that the aggravating circumstances—that the murder was committed by an escaped prisoner, during the commission of a burglary, and for pecuniary gain—outweighed petitioner's mitigating evidence and sentenced petitioner to death. The state supreme court affirmed. *Held: Vacated and remanded.* [1] The Constitution does not create a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment. *Id.* at 165. [2] The narrow stipulation proved only that an Aryan Brotherhood prison gang originated in California in the 1960s, that it entertains white racist beliefs, and that a separate gang in the Delaware prison system calls itself the Aryan Brotherhood and was therefore totally without relevance to petitioner's sentencing proceeding, because the murder victim was white, as is petitioner, and elements of racial hatred were therefore not involved in the killing. *Id.* at 165. [3] Because the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, evidence regarding the Aryan Brotherhood was also not relevant to help prove any aggravating circumstance. *Id.* at 166. [4] Admission of the Aryan Brotherhood evidence violated petitioner's First Amendment rights because the evidence proved nothing more than Dawson's abstract beliefs. *Id.* at 167.

Note: The court acknowledged that the state might have avoided this problem if it had presented evidence showing more than mere abstract beliefs on petitioner's part. The court left the question of whether the wrongful admission of the Aryan Brotherhood evidence at sentencing was harmless error open for consideration on remand.

7. Victim-Impact Evidence

Payne v. Tennessee, 501 US 808, 111 S Ct 2597, 115 L Ed 2d 720 (1991). Petitioner was convicted for first-degree murder of a woman and her two-year-old daughter. The petitioner was sentenced to death, and appealed. The state supreme court affirmed. *Held: Affirmed.* [1] Victim-impact evidence is designed to show each victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from the victim's death might be. *Id.* at 823. [2] A state may properly conclude that for the jury to assess the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. *Id.* at 825. [3] There is nothing unfair about allowing the jury to bear in mind that the child of the victim misses his mother and baby sister at the same time as it considers the mitigating evidence introduced by the defendant. *Id.* at 826. [4] If the state chooses to permit the admission of victim-impact evidence and argument on that subject, the Eighth Amendment erects no *per se* bar. The state may legitimately conclude that victim-impact evidence is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated. *Id.* at 827.

8. Other Evidence

Oregon v. Guzek, 546 US 517, 126 S Ct 1226, 163 L Ed 2d 1112 (2006). Defendant was prosecuted for a double homicide, and the jury rejected his alibi defense, found him guilty, and sentenced him to death. The Oregon Supreme Court affirmed his convictions but remanded for a new penalty-phase hearing. The court further held that defendant is entitled under the Eighth Amendment to introduce additional alibi evidence at the new penalty-phase hearing (even though that evidence was available to him at the time of the original trial). *State v. Guzek*, 336 Or 424 (2004). *Held*: Reversed. “[T]he Eighth Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted.” “Three circumstances, taken together, convince us that the State possesses the authority to regulate, through exclusion, the evidence that Guzek seeks to present. First, sentencing traditionally concerns *how*, not *whether*, a defendant committed a crime. . . . Second, the parties previously litigated the issue to which the evidence is relevant—whether the defendant committed the basic crime. . . . The law typically discourages collateral attacks of this kind. Third, the negative impact of a rule restricting defendant’s ability to introduce *new* alibi evidence is minimized by the fact that Oregon law gives the defendant the right to present to the sentencing jury *all* the evidence of innocence from the original trial regardless.” *Id.* at 526-27.

9. Trial Issues

Florida v. Nixon, 543 US 175, 125 S Ct 551, 160 L Ed 2d 565 (2004): Faced with a complete confession and overwhelming evidence of defendant’s guilt of a brutal double murder, defense counsel decided not to contest the charges of aggravated murder at the guilt phase and instead keyed only on attempting to avoid a death sentence at the penalty phase. When he advised defendant of his decision and sought his view, defendant did not respond much less object. Defendant was convicted and sentenced to death. The Florida Supreme Court reversed, concluding that the absence of any evidence that the defendant personally and affirmatively agreed to waive putting on any defense to the charges rendered the conviction invalid under *United States v. Cronin*, 466 US 648 (1984). *Held*: Reversed. Although a defense counsel “undoubtedly has a duty to consult with the client regarding ‘important decisions,’ including questions of overarching defense strategy,” that obligation “does not require counsel to obtain defendant’s consent to ‘every tactical decision.’” Counsel “must both consult with the defendant and obtain consent” for some decisions, including the decision to plead guilty, but counsel was not required to obtain defendant’s express consent to the decision not to contest the charges, because putting on no defense while requiring the state to prove the charges is not equivalent to a guilty plea. Under the circumstances, defense counsel’s considered decision after consultation with defendant was reasonable under the *Strickland v. Washington* standard and did not constitute a complete abandonment of counsel, which creates a presumption of prejudice, within the meaning of *Cronic*. *Id.* at 187-89, 191-93.

10. Jury Instructions

(a) Jury instructions—consideration of mitigating circumstances

Smith v. Spisak, 558 US ___, 130 S Ct 676, 175 L Ed 2d 595 (2010). Petitioner was convicted of multiple murders and attempted murders, and the jury sentenced him to death. The Ohio courts affirmed his convictions and sentence on direct and collateral review, rejecting his claim that the penalty-phase instructions violated the rules in *Mills v. Maryland*, 486 US 367 (1988), and *Beck v. Alabama*, 447 US 625 (1980). In subsequent review in federal court, the Sixth Circuit granted *habeas corpus* relief. *Held*: Reversed and remanded. [1] Unlike the instructions in *Mills*, the instructions in this case, reasonably construed, did not create “a substantial possibility that reasonable jurors” would have thought that they had to unanimously find a mitigating circumstance before they could consider it in the weighing process. Consequently, the state court’s ruling was not contrary to *Mills* within the meaning of § 2254(d)(1). *Smith*, 130 S Ct at 684. [2] The Sixth Circuit’s reliance on *Beck* also violated § 2254(d)(1) because no previous decision of the Court had extended *Beck* to the capital-sentencing process. *Id.*

Note: In concurring, Justice Stevens stated that he would have held that the Ohio capital-sentencing statutory scheme, which requires the jury to “acquit” unanimously on the death sentence before considering life-sentence options, constitutes an impermissible acquittal-first scheme that violates *Beck*. But he would have held that that error was harmless in this case.

Smith v. Texas, 550 US 297, 127 S Ct 686, 167 L Ed 2d 632 (2007). Petitioner was tried and sentenced to death after *Penry v. Lynaugh*, 492 US 302 (1989), and the court, instead of adding a “fourth question” (*cf. State v. Wagner*), instructed the jurors to answer one of the statutory questions “no” if mitigating circumstances warranted a sentence less than death; petitioner did not object to that instruction. In *Penry v. Johnson*, 523 US 782 (2002), the Court held that practice to be error. The Court then remanded this case for reconsideration. *Smith v. Texas*, 543 US 37 (2004). On remand, the Texas court again affirmed, concluding that petitioner’s failure to preserve the instructional error precluded relief unless he established that the harm was “egregious,” which it concluded it was not. *Held:* Reversed and remanded. The Texas court misconstrued *Penry* and *Smith* decisions. *Id.* at 315. In *Smith*, petitioner argued and the Court held that, under *Penry I*, the penalty-phase questions were inadequate to allow consideration of his mitigating evidence—*viz.*, organic learning disabilities and low IQ—and that the “nullification instruction” was insufficient to cure that error. Therefore, his objection was adequately preserved and the court applied the wrong harmless-error standard. Without resolving whether a *Penry I* error ever can be determined to be harmless, the Court remanded for reconsideration. *Id.* at 316.

Ayers v. Belmontes, 549 US 7, 127 S Ct 469, 166 L Ed 2d 334 (2006). Petitioner was convicted of capital murder and sentenced to death, and the California courts affirmed. In his *habeas corpus* petition, he alleged that the trial court’s instruction to the jury to consider “any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime” (so-called “factor (k)”) was error, because it effectively precluded the jury from giving effect to his “forward looking” mitigating evidence of post-crime conduct that he had embraced Christianity and would lead a constructive life if incarcerated rather than executed. The Ninth Circuit agreed. *Held:* Reversed, death sentence reinstated. [1] The only question was “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.” *Id.* at 14. Because petitioner was allowed to introduce all the mitigating evidence he offered and was allowed to argue whatever he wanted, “it is improbable that jurors believed that the parties were engaging in an exercise of futility when respondent presented (and both counsel later discussed) his mitigating evidence in open court.” *Id.* at 16-17. Moreover, the court’s other instructions directed the jurors to consider “all the evidence.” *Id.* at 24. [2] The mere fact that jurors asked questions related to their consideration of mitigating evidence does not demonstrate that the “factor (k)” instruction was constitutionally infirm. *Id.* at 23-24.

Note: The majority assumed that the Eighth Amendment entitled petitioner to present and to have the jury fully consider his purely “forward looking” mitigating evidence even though it had no bearing on his moral culpability for the underlying crime. In their concurrence, Justices Scalia and Thomas reiterated their belief that the Eighth Amendment does not preclude a state from limiting the scope of mitigating evidence that may be considered.

Kansas v. Marsh, 548 US 163, 126 S Ct 2516, 165 L Ed 2d 429 (2006). Finding an evidentiary error, the state supreme court reversed defendant’s aggravated-murder conviction and death sentence and remanded for a new trial. The court also invalidated the Kansas capital-sentencing statute on the ground that it creates a presumption of death, in violation of the Eighth Amendment, by requiring the jury to return a death sentence unless it finds that mitigating circumstances outweigh aggravating factors (*i.e.*, death is required if the jury finds the evidence in equipoise). *Held:* Reversed and remanded. The Kansas statute is constitutional because a capital-sentencing statute “may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances” and hence “may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise.” *Id.* at 173.

Note: ORS 163.150(1) and (2) do not impose a burden of proof on the fourth question or require a

juror to find that mitigating circumstances “outweigh” aggravating facts in order to vote against either death or a true-life sentence.

Smith v. Texas, 543 US 37, 125 S Ct 400, 160 L Ed 2d 303 (2005) (*per curiam*). [1] The Eighth Amendment requires that the jury in the penalty phase must be provided an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a low threshold for relevance. *Id.* at 44. [2] A “nullification instruction” that directs the jurors to answer one of the penalty-phase questions “no” despite the evidence, if they believe that death is not appropriate, is not an adequate vehicle because of the ethical conflict it creates. *Id.* at 47-48.

Penry v. Johnson, 532 US 782, 121 S Ct 1910, 150 L Ed 2d 9 (2001). In 1989, the Court reversed Penry’s death sentence because the jury was not properly instructed on mitigating circumstances. Texas retried Penry in 1990 and defense counsel again presented extensive evidence of mental impairment and childhood abuse. A defense expert testified, based in part on a 1977 psychiatric evaluation prepared at the request of Penry’s then counsel to determine Penry’s competence to stand trial on another charge, that Penry suffered from organic brain impairment and mental retardation. Penry’s expert recited a portion of the report over his counsel’s objection that said Penry would be dangerous to others if released. The judge instructed the jury that if it found mitigating circumstances it should decide how much weight to give them, and if it concluded that a life sentence only were appropriate it should answer one of the three special questions (none of which had anything to do with mitigation) in the negative. The jury answered “yes” to all three questions and Penry was again sentenced to death. *Held*: The trial court’s jury instruction did not comply with the Court’s instructions in *Penry I*. The instruction did not give the jury the opportunity to give effect to any finding of mitigating circumstances. The jury was instructed that a “yes” answer to each of the three special questions was appropriate only if the evidence supported that answer, and a “no” answer was appropriate only when there was a reasonable doubt as to whether the answer to a special issue should be “yes.” The verdict form listed the three special issues and, with no mention of mitigating circumstances, confirmed and clarified the jury’s two choices (“yes” or “no”) with respect to each issue. That the jury was told it could ignore these guidelines if it found mitigating circumstances—that it could answer a question “no” and avoid imposing the death penalty, even though there was no reasonable doubt that the answer to that question should be “yes”—only made the jury charge internally contradictory and placed law-abiding jurors in an impossible situation. Hence, the state court’s conclusion that the substance of the jury instructions given at Penry’s resentencing satisfied *Penry I* was objectively unreasonable. *Id.* at 800-04.

Buchanan v. Angelone, 522 US 269, 118 S Ct 757, 139 L Ed 2d 702 (1998). Petitioner was convicted for murdering his father, stepmother, and two brothers. The prosecutor sought the death penalty based on Virginia’s aggravating factor that the crime was “vile.” During the sentencing hearing, the prosecutor and defense counsel both made extensive arguments on the mitigating evidence and the effect it should be given in sentencing. The trial court instructed the jury that if it found beyond a reasonable doubt that petitioner’s conduct was vile, “then you may fix the punishment ... at death,” but “if you believe from all the evidence that ... death ... is not justified, then you shall fix the punishment ... at life imprisonment.” The court refused petitioner’s request to give four additional instructions on particular statutory mitigating factors and a general instruction on the concept of mitigating evidence. The jury returned a verdict of death and the state supreme court affirmed. The federal district court then denied petitioner *habeas corpus* relief, and the Fourth Circuit affirmed. *Held*: Affirmed. [1] The Court stressed the need for channeling and limiting the jury’s discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition in the eligibility phase of the capital-sentencing process. In contrast, in the selection phase, the court emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination. The jury instruction directing the jury to base its decision on “all the evidence” afforded jurors an opportunity to consider mitigating evidence and did not constrain the manner in which the jury was able to give effect to mitigation. *Id.* at 277. [2] Considering the two days of testimony relating to petitioner’s family background and mental and emotional problems and the extensive arguments of both defense counsel and the prosecutor on the mitigating evidence and the effect it should be given in the sentencing determination, “there is not a reasonable likelihood that the jurors in petitioner’s case

understood the challenged instructions to preclude consideration of relevant mitigating evidence offered by petitioner.” *Id.* at 278. [3] The absence of an instruction on the concept of mitigation and of instructions on particular statutorily defined mitigating factors did not violate the Eighth or Fourteenth Amendments to the United States Constitution. *Id.* at 279.

Johnson v. Texas, 509 US 350, 113 S Ct 2658, 125 L Ed 2d 290 (1993). Petitioner was convicted of murder for a crime he committed when he was 19 years old. The trial court instructed the jury to answer two special issues during the penalty phase and that in determining each of these issues, it could take into consideration all the evidence submitted to it, whether aggravating or mitigating, in either phase of the trial. A unanimous jury answered yes to both special issues, and the trial court sentenced petitioner to death. The state court of criminal appeals affirmed and denied petitioner’s motion for a rehearing, rejecting petitioner’s contentions that the special issues did not allow the jury to give adequate mitigating effect to evidence of his youth and that *Penry* required a separate instruction on the question. *Held: Affirmed.* [1] A jury in a capital case must be allowed to consider the mitigating qualities of youth in the course of its deliberations over the appropriate sentence. *Id.* at 367. The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside. There is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination. *Id.* at 368. [2] There is no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of petitioner’s youth. The jury was told that, in answering the special issues, it could consider all the mitigating evidence that had been presented during the guilt and punishment phases of petitioner’s trial. *Id.* at 147. Petitioner’s father testified that his son’s actions were due to his youth. *Id.* at 368. [3] The court did not violate the Eight or Fourteenth Amendments by failing to provide a separate instruction regarding petitioner’s youth in the sentencing phase of his capital trial. *Id.* at 373.

(b) Jury instructions—consideration of aggravating circumstances

Brown, Warden v. Sanders, 546 US 212, 126 S Ct 884, 163 L Ed 2d 723 (2006). Petitioner was convicted of capital murder, the jury found four “special circumstances” that made him eligible for the death penalty, and imposed a death sentence. The California Supreme Court invalidated two of the special circumstances but nonetheless affirmed the death sentence. The district court denied petitioner’s § 2254 petition, but the Ninth Circuit reversed, concluding that the jurors’ consideration of the two invalid special circumstances tainted their decision to impose the death sentence. *Held: Reversed.* [1] “Since *Furman v. Georgia*, we have required States to limit the class of murders to which the death penalty may be applied. This narrowing requirement is usually met when the trier of fact finds at least one statutorily defined eligibility factor at either the guilt or penalty phase. Once the narrowing requirement has been satisfied, the sentencer is called upon to determine whether a defendant thus found eligible for the death penalty should in fact receive it. Most States channel this function by specifying the aggravating factors (sometimes identical to eligibility factors) that are to be weighed against mitigating considerations.” *Id.* at 216. [2] The Court jettisoned its former dichotomy between “weighing States” and “non-weighing States” and held: “An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.” *Id.* at 220. [3] “All the aggravating facts and circumstances that the invalidated factor permitted the jury to consider [in this case] were also open to their proper consideration under one of the other factors. The erroneous factor could not have ‘skewed’ the sentence, and no constitutional violation occurred.” *Id.* at 223. The Court rejected petitioner’s argument that having the jurors consider the invalid aggravating factors *per se* unfairly gave them “special emphasis” in the weighing process: “any such impact was inconsequential and ... cannot fairly be regarded as a constitutional defect in the sentencing process.” *Id.* at 225.

Bell v. Cone, 543 US 447, 125 S Ct 847, 160 L Ed 2d 881 (2005) (*per curiam*). Petitioner was convicted of aggravated murder and was sentenced to death on a finding that the murder “was especially

heinous, atrocious, or cruel.” The state supreme court affirmed the judgment on direct appeal, concluding that the evidence supported that factor. Petitioner eventually filed a petition for *habeas corpus* relief, and the Sixth Circuit granted relief on the ground that the “especially heinous” factor is unconstitutionally vague in violation of the Eighth Amendment. *Held*: Reversed. In determining whether an aggravating factor is unconstitutionally vague, the federal court must attempt to determine whether the state courts have further defined the vague terms in a manner that provides sufficient guidance to the sentencer. Because the state supreme court previously had adopted a constitutionally sufficient narrowing construction of the factor, the circuit court could not presume that it had not applied that narrowed construction in this case. “Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.” *Id.* at 455-56.

Romano v. Oklahoma, 512 US 1, 114 S Ct 2004, 129 L Ed 2d 1 (1994). During the sentencing phase of petitioner’s first-degree murder trial for killing Sarfaty, the state introduced a copy of the judgment and death sentence he had received during an earlier trial for the separate murder of Thompson. The jury sentenced petitioner to death for the murder of Sarfaty. While his appeal was pending, the state court of appeals reversed and remanded petitioner’s conviction for the earlier murder of Thompson; the court affirmed the lower court’s ruling for the murder of Sarfaty. *Held*: Affirmed. [1] Admission of evidence of petitioner’s previous death sentence did not affirmatively mislead the jury regarding its role in the sentencing process so as to diminish its sense of responsibility for the capital-sentencing decision. Such evidence was not false at the time it was admitted and did not even pertain to the jury’s sentencing role. The trial court’s instructions, moreover, emphasized the importance of that role and never conveyed that the jury could shift its responsibility in sentencing. *Id.* at 10. [2] Although the evidence in question may have been irrelevant, the jury’s consideration of it did not render the sentencing proceeding so unreliable that it violated the Eighth Amendment. That the evidence may have been irrelevant as a matter of state law does not render its admission federal constitutional error. *Id.* at 10. [3] Introduction of the evidence in question did not so infect the trial with unfairness as to render the jury’s imposition of the death penalty a denial of petitioner’s right to due process. Presuming that the trial court’s instructions were followed, they did not offer the jurors any means by which to give effect to the irrelevant evidence of petitioner’s prior sentence, and the relevant evidence presented by the state was sufficient to justify the imposition of the death sentence in this case. *Id.* at 12-13.

(c) Jury instructions—other issues

Bobby, Warden v. Mitts, 563 US __, 131 S Ct 1762, 179 L Ed 2d 819 (2011) (*per curiam*). Petitioner was convicted in Ohio state court of two counts of capital murder. During a separate penalty-phase proceeding, the court instructed the jurors, in accordance with state law, that they first “must determine beyond a reasonable doubt whether the aggravating circumstances, which the defendant was found guilty of committing in the separate counts, “are sufficient to outweigh the mitigating factors you find are present in this case,” and if the jurors so found, “then you must recommend to the Court that the sentence of death be imposed on him.” The court also instructed the jurors that if they did not so find, then they could consider the various “life sentence” options that were available. The jurors imposed a death sentence. The judgment was affirmed by the state courts, and petitioner filed a petition in federal court seeking *habeas corpus* relief. The Sixth Circuit eventually held that the quoted instructions were “acquittal first” instructions that violated the rule announced in *Beck v. Alabama*, 447 US 625 (1980), and it vacated petitioner’s death sentence. *Held*: Reversed. “The instructions here were surely not invalid under our decision in *Beck*.” That decision—which held that it was error in a capital-murder prosecution, not to allow the jury to consider a lesser-included offense—does not apply in the penalty-phase proceedings. “In *California v. Ramos*, 463 US 992 (1983), we rejected an argument that *Beck* prohibited an instruction to ‘a capital sentencing jury regarding the Governor’s power to commute a sentence of life without possibility of parole.’ In so doing, we noted the fundamental difference between the nature of the guilt/innocence determination at issue in *Beck* and the nature of the life/death choice at the penalty phase. In light of that critical distinction, we observed that the concern of *Beck* regarding the risk of an unwarranted conviction is simply not directly translatable to the deliberative process in which the capital jury engages in determining the appropriate penalty.” The decisions

of the state courts were not contrary to “clearly established Federal law” within the meaning of AEDPA.

Note: The instructions mandated by ORS 163.150(1) are not as overtly “acquittal first” as Ohio’s instructions are, but an Oregon jury does not consider “life sentence” options unless it first answers “no” to one of the four penalty-phase instructions. ORS 163.150(2)(a).

Shafer v. South Carolina, 532 US 36, 121 S Ct 1263, 149 L Ed 2d 178 (2001). Capital jurors in South Carolina face two questions at the sentencing phase of a death-penalty case. If the jury does not find an aggravating circumstance, the judge imposes sentence (either life or a mandatory 30-year minimum); if the jury finds an aggravating circumstance, it then recommends one of two potential sentences—death or life imprisonment without the possibility of parole. At trial, the state and defendant disagreed over the application of *Simmons v. South Carolina*, 512 US 154 (1994), which held that where future dangerousness is at issue and the only available sentencing alternative to death is life without parole, the jury must be told of defendant’s parole ineligibility. The prosecutor argued that the jury did not need to be informed of defendant’s parole ineligibility because the state was not intending to argue that Shafer would be a danger in the future. The judge agreed and declined to instruct on parole ineligibility. The South Carolina Supreme Court affirmed, reasoning that the jury had three options, not just two, one of which included a mandatory 30-year minimum sentence, so *Simmons* did not apply. *Held:* Reversed and remanded. The state’s scheme does not give the jury three choices; once it finds an aggravating circumstance it has only two choices—death or true life. It is at the stage that the jury has found circumstances justifying imposition of the death sentence that *Simmons* comes into play. The jury should have been instructed on defendant’s parole ineligibility. In view of the only recent displacement of parole eligibility, it was not sufficient that the jury was told by defense counsel that defendant would die in prison were he given the life sentence. Nor was it sufficient that the judge instructed the jury that life imprisonment meant until defendant’s death. Finally, the Court did not reach the state’s argument that the *Simmons* instruction was not required because the state had not argued defendant’s future dangerousness, leaving it for the lower court to decide in the first instance whether the state in fact had placed defendant’s future-dangerousness at issue. *Id.* at 51, 54-55.

Weeks v. Angelone, 528 US 225, 120 S Ct 727, 145 L Ed 2d 727 (2000). At petitioner’s trial for capital murder, the jury inquired of the court:

“If we believe that Lonnie Weeks, Jr. is guilty of at least one of the alternatives [i.e. aggravating factors], then is it our duty as a jury to issue the death penalty? Or must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences?”

In response, the court directed the jury’s attention to a particular paragraph of its instructions. The jury deliberated for two more hours and eventually returned a death sentence. *Held:* Petitioner was not entitled to *habeas corpus* relief. Juries are presumed to follow instructions and to understand a judge’s answer to its question. In this situation, the Constitution does not require the judge to do anything more than direct the jury’s attention to a constitutionally adequate instruction. *Id.* at 234.

Jones v. United States, 527 US 373, 119 S Ct 2090, 144 L Ed 2d 370 (1999). Pursuant to the Federal Death Penalty Act of 1994, 18 USC § 3591 *et seq.*, defendant was sentenced to death for the crime of kidnapping resulting in the victim’s death. At the sentencing hearing, the trial court instructed the jury and provided it with four “decision forms” on which to record its sentencing recommendation. The court refused petitioner’s request to instruct the jury as to the consequences of jury deadlock. The jury unanimously recommended that defendant be sentenced to death, and the trial court imposed sentence in accordance with the jury’s recommendation. *Held:* The Eighth Amendment does not require that a jury be instructed as to the consequences of their failure to agree. *Id.* at 381.

Simmons v. South Carolina, 512 US 154, 114 S Ct 2187, 129 L Ed 2d 133 (1994). During the penalty phase of petitioner’s trial, the state argued that his future dangerousness was a factor for the jury to consider when deciding whether to sentence him to death or life imprisonment for the murder of an elderly

woman. The court refused to give the jury petitioner’s proposed instruction that he was ineligible for parole. The court instructed the jury not to consider parole in reaching its verdict and that life imprisonment was to be understood to have its plain meaning. The jury sentenced petitioner to death. On appeal, the state supreme court concluded that the jury instruction satisfied his request for a charge on parole ineligibility. *Held*: Reversed and remanded. [1] Where a defendant’s future dangerousness is at issue, and state law prohibits his release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. An individual cannot be executed on the basis of information which he had no opportunity to deny or explain. The jury reasonably may have believed that he could be released on parole if he were not executed, having the effect of creating a false choice between sentencing him to death and sentencing him to a limited period of incarceration. *Id.* at 165-69. [2] An instruction directing the jury that life imprisonment should be understood in its “plain and ordinary” meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular state defines “life imprisonment.” Instructing the jury “not to consider parole” suggested that parole was available but that the jury, for some unstated reason, should be blind to this fact. These instructions did not satisfy in substance petitioner’s request for jury charge on parole ineligibility. *Id.* at 169-70.

11. Harmless Error

Smith v. Texas, 550 US 297, 127 S Ct 686, 167 L Ed 2d 632 (2007). Petitioner was tried and sentenced to death after *Penry v. Lynaugh*, 492 US 302 (1989), and the court, instead of adding a “fourth question” (*see State v. Wagner*), instructed the jurors to answer one of the statutory questions “no” if mitigating circumstances warranted a sentence less than death; petitioner did not object to that instruction. In *Penry v. Johnson*, 523 US 782 (2002), the Court held that practice to be error. The Court then remanded this case for reconsideration. *Smith v. Texas*, 543 US 37 (2004). On remand, the Texas court again affirmed, concluding that petitioner’s failure to preserve the instructional error precluded relief unless he established that the harm was “egregious,” which it concluded it was not. *Held*: Reversed and remanded. The Texas court misconstrued *Penry* and *Smith* decisions. *Id.* at 315. In *Smith*, petitioner argued and the Court held that, under *Penry I*, the penalty-phase questions were inadequate to allow consideration of his mitigating evidence—*viz.*, organic learning disabilities and low IQ—and that the “nullification instruction” was insufficient to cure that error. Therefore, his objection was adequately preserved and the court applied the wrong harmless-error standard. Without resolving whether a *Penry I* error ever can be determined to be harmless, the Court remanded for reconsideration. *Id.* at 316.

Brown, Warden v. Sanders, 546 US 212, 126 S Ct 884, 163 L Ed 2d 723 (2006). Petitioner was convicted of capital murder, the jury found four “special circumstances” that made him eligible for the death penalty, and imposed a death sentence. The California Supreme Court invalidated two of the special circumstances but nonetheless affirmed the death sentence. The district court denied petitioner’s § 2254 petition, but the Ninth Circuit reversed, concluding that the jurors’ consideration of the two invalid special circumstances tainted their decision to impose the death sentence. *Held*: Reversed. [1] The Court jettisoned its former dichotomy between “weighing States” and “non-weighing States” and held: “An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.” *Id.* at 220. [2] “All the aggravating facts and circumstances that the invalidated factor permitted the jury to consider [in this case] were also open to their proper consideration under one of the other factors. The erroneous factor could not have ‘skewed’ the sentence, and no constitutional violation occurred.” *Id.* at 223. The Court rejected petitioner’s argument that having the jurors consider the invalid aggravating factors *per se* unfairly gave them “special emphasis” in the weighing process: “any such impact was inconsequential and ... cannot fairly be regarded as a constitutional defect in the sentencing process.” *Id.* at 225.

Brown v. Payton, 544 US 133, 125 S Ct 1432, 161 L Ed 2d 334 (2005). In petitioner’s federal *habeas corpus* challenge to his death sentence, the Ninth Circuit misapplied AEDPA’s deferential review standard, 28 USC § 2254(d)(1), when it ruled that the California Supreme Court violated federal law when it

held, applying *Boyde v. California*, that there was no reasonable likelihood that the prosecutor’s penalty-phase argument and the trial court’s instructions misled the jurors to believe that they were obliged to disregard petitioner’s mitigating evidence. *Id.* at 143.

Romano v. Oklahoma, 512 US 1, 114 S Ct 2004, 129 L Ed 2d 1 (1994). During the sentencing phase of petitioner’s first-degree murder trial for killing Sarfaty, the state introduced a copy of the judgment and death sentence he had received during an earlier trial for the separate murder of Thompson. The jury sentenced petitioner to death for the murder of Sarfaty. While his appeal was pending, the state court of appeals reversed and remanded petitioner’s conviction for the earlier murder of Thompson; the court affirmed the lower court’s ruling for the murder of Sarfaty. *Held*: Affirmed. [1] Admission of evidence of petitioner’s previous death sentence did not affirmatively mislead the jury regarding its role in the sentencing process so as to diminish its sense of responsibility for the capital-sentencing decision. Such evidence was not false at the time it was admitted and did not even pertain to the jury’s sentencing role. The trial court’s instructions, moreover, emphasized the importance of that role and never conveyed that the jury could shift its responsibility in sentencing. *Id.* at 10. [2] Although the evidence in question may have been irrelevant, the jury’s consideration of it did not render the sentencing proceeding so unreliable that it violated the Eighth Amendment. That the evidence may have been irrelevant as a matter of state law does not render its admission federal constitutional error. *Id.* at 10. [3] Introduction of the evidence in question did not so infect the trial with unfairness as to render the jury’s imposition of the death penalty a denial of petitioner’s right to due process. Presuming that the trial court’s instructions were followed, they did not offer the jurors any means by which to give effect to the irrelevant evidence of petitioner’s prior sentence, and the relevant evidence presented by the state was sufficient to justify the imposition of the death sentence in this case. *Id.* at 12-13. [4] The only evidence supporting the “prior violent felony” aggravating circumstance was the judgment from petitioner’s conviction for the Thompson murder. That evidence was rendered invalid by the reversal of petitioner’s conviction on appeal. However, the state court of appeals acted consistent with Supreme Court precedent by striking the “prior violent felony” aggravator, reweighing the three untainted aggravating circumstances against the mitigating circumstances, and still concluding that the death penalty was warranted. *Id.* at 11.

D. MISCELLANEOUS ISSUES

1. Petition for Certiorari

Howell v. Mississippi, 543 US 440, 125 S Ct 856, 160 L Ed 2d 873 (2005) (*per curiam*). Defendant was convicted of aggravated murder and was sentenced to death. On appeal, he complained that the trial court erred in refusing his request for an instruction on the lesser-included offenses of simple murder and manslaughter; he cited only state-court decisions in support of that claim. The state supreme court rejected all of his claims, and defendant petitioned for certiorari contending that the denial of those instructions violated the rule in *Beck v. Alabama*, 447 US 625 (1980). *Held*: Writ dismissed. [1] The Court will not consider on direct appeal “any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.” Because defendant’s brief to the state supreme court did not cite or rely on any federal-law authorities, he “did not properly present his claim as one arising under federal law.” His “daisy-chain—which depends upon a [federal] case that was cited by one of the [state] cases that [he] cited—is too lengthy to meet this Court’s standards for proper presentation of a federal claim.” *Id.* at 443-44. [2] The Court also rejected defendant’s claim that his citation of state law was sufficient because the state and federal rules on entitlement to instructions on lesser offenses are “virtually identical.” *Id.* at 444-45.

Lawrence v. Florida, 549 US 327, 127 S Ct 1079, 166 L Ed 2d 924 (2007). Petitioner was convicted of capital murder and sentenced to death, and the state appellate courts affirmed the judgment. Petitioner filed a petition for post-conviction relief 364 days later. The post-conviction court denied his petition, and the state appellate courts affirmed the judgment. Petitioner then filed a petition in the U.S. Supreme Court for a writ of certiorari, which the Court eventually denied. Petitioner filed his petition for

habeas corpus relief 113 days after the state appellate judgment but while his petition for cert was still pending. The district court dismissed his petition as time-barred by the one-year limitation in AEDPA, 28 USC § 2244(d)(1). *Held*: Affirmed. Although the one-year period is tolled during both the pendency of a petition for certiorari on direct appellate review and during a timely filed state post-conviction proceeding, it is not tolled during a petition for cert after affirmance of the post-conviction court’s judgment. *Id.* at 337. Because “state prisoners need not petition for certiorari to exhaust state remedies,” an inmate’s state remedies are complete “at the end of state-court review.” *Id.* at 333.

2. Challenges to Execution

See also Section C-1, “Eighth Amendment Limitations,” *above*.

(a) Challenges to execution—manner of execution

Baze v. Rees, 553 US 35, 128 S Ct 1520, 170 L Ed 2d 420 (2008). The lethal-injection protocol, used in 30 states, that involves the use of sodium thiopental, the purpose of which is to ensure that the prisoner does not experience any pain during the administration of other drugs that cause paralysis and cardiac arrest, does not violate the Eighth Amendment ban on cruel and unusual punishment, because it does not present a “substantial” or “objectively intolerable” risk of serious harm. The Court rejected the argument of the petitioners that the suffering that could result from a mistake in administration of sodium thiopental was objectively intolerable; rather, it noted that the risk of such a mistake is very slight when the administration is done by qualified personnel. “The constitution does not demand the avoidance of all risk of pain in carrying out executions.” *Id.* at 47.

Hill v. McDonough, 547 US 573, 126 S Ct 2096, 165 L Ed 2d 44 (2006). Petitioner, a death-row inmate, filed suit under 28 USC § 1983 to enjoin the lethal-injection procedure, contending that it might cause him severe pain in violation of the Eighth Amendment. The district court construed the suit as one for *habeas corpus* relief and dismissed it based on the successive-petition bar in 28 USC § 2244. *Held*: Reversed and remanded. [1] “Challenges to the lawfulness of any confinement or to particulars affecting its duration are the province of *habeas corpus*. An inmate’s challenge to the circumstances of his confinement, however, may be brought under § 1983.” *Id.* at 579. [2] Because petitioner’s “action, if successful, would not necessarily prevent the State from executing him by lethal injection” but merely alter the method by which that is done, “a grant of injunctive relief could not be seen as barring the execution of [his] sentence.” Thus, a § 1983 action is proper. *Id.* at 580-81. [3] “Filing an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course. Both the State and the victims of crime have an important interest in the timely enforcement of a sentence. ... [I]nmates seeking time to challenge the manner in which the State plans to execute them must satisfy all the requirements for a stay, including a showing of a significant possibility of success on the merits. A court considering a stay must also apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” *Id.* at 583-84.

Nelson v. Campbell, 541 US 637, 124 S Ct 2117, 158 L Ed 2d 924 (2004). Petitioner was scheduled to be executed by lethal injection when he filed a complaint under 42 USC § 1983 to challenge the “cut-down procedure” that would be used for the injection due to his collapsed veins. The district court dismissed his petition on the ground that it effectively was a barred successive petition for *habeas corpus* relief under § 2244. *Held*: Reversed and remanded. [1] It is not apparent that a complaint about the *manner* in which an execution will be accomplished falls within the scope of a § 2244 petition, because it does not challenge the validity of either the conviction or sentence. Rather, it falls within the ambit of a § 1983 complaint about medical treatment and the conditions of confinement. Consequently, the rule in *Heck v. Humphrey*, 512 US 477 (1994), does not require dismissal of the complaint. *Id.* at 645-47. [2] Any concerns about last-minute § 1983 challenges to the manner of execution may be addressed through the normal processes including the PLRA. *Id.* at 650.

(b) Challenges to execution—*Ford*-based challenges

Panetti v. Quarterman, 551 US 930, 127 S Ct 2842, 168 L Ed 2d 662 (2007). Petitioner was convicted of capital murder for murdering his in-laws, and he was sentenced to death. Although he suffers from various mental disorders, he was found competent to stand trial and represent himself. The state courts affirmed the judgment, and his petition for *habeas corpus* relief (which did not include a *Ford v. Wainwright* claim) was denied. When the state set an execution date, petitioner filed a motion in state court claiming he is exempt from execution because he is mentally incompetent under the *Ford* standard. The state court denied his claim, and he filed a successive petition for *habeas corpus* in federal court. The district court denied his petition. *Held*: Reversed and remanded. [1] Petitioner’s *Ford*-based petition is not a successive petition subject to 28 USC § 2244(b)(2), because that claim was not ripe when he filed his original petition. *Id.* at 947. [2] Deference under AEDPA is not warranted because the state court failed to provide the minimum procedures required by *Ford* when determining his competence. *Id.* at 945. The test applied by the court of appeals was “too restrictive to afford [petitioner] the protections granted by the Eighth Amendment.” Although petitioner knew that he had been sentenced to death for murdering his in-laws, his mental disorders allegedly caused him to believe he was being executed to stop him from preaching. *Ford* requires that the inmate must “comprehend” or be aware of, at least, the reasons for his execution. The Court remanded for reconsideration. *Id.* 956-57.

Stewart v. Martinez-Villareal, 523 US 637, 118 S Ct 1618, 140 L Ed 2d 849 (1998). Petitioner’s claim that he was incompetent to be executed under *Ford v. Wainwright*, 477 US 399 (1986), is not subject to the restrictions on the “second or successive” applications for relief under the AEDPA, 28 USC § 2244, even though after being convicted on two counts of first-degree murder and sentenced to death, he unsuccessfully challenged his conviction. Petitioner was not required to get authorization to file a “second or successive” application before his *Ford* claim could be heard.

(c) Challenges to execution—other challenges

Leal Garcia v. Texas, 564 US ___, 131 S Ct 2866, 180 L Ed 2d 872 (2011) (*per curiam*). Petitioner is a Mexican national who has resided in the United States since he was 2 years old. In 1994, he kidnapped a 16-year-old girl, “raped her with a large stick, and bludgeoned her to death with a piece of asphalt.” He was convicted of capital murder in Texas state court and was sentenced to death, and the sentence was affirmed by the state and federal courts. On the eve of his execution, he petitioned the Court for a stay of execution on the ground that the arresting officers had violated the Vienna Convention on Consular Relations by not immediately advising him of his right to assistance from the Mexican consulate and that a bill was pending in Congress that would allow review of such a claim. *Held*: Petition denied (in a 5-4 *per curiam* decision). [1] Petitioner’s claim based on the VCCR “is foreclosed by *Medellin v. Texas*, 552 US 491 (2008), in which we held that neither the [ICJ’s decision in the *Avena* case] nor the President’s Memorandum purporting to implement that decision constituted directly enforceable federal law.” [2] Petitioner’s claim that the Due Process Clause requires a stay that precludes Texas from executing the death sentence “so that Congress may consider whether to enact legislation implementing the *Avena* decision” has no merit: “The Due Process Clause does not prohibit a State from carrying out a lawful judgment in light of unenacted legislation that might someday authorize a collateral attack on that judgment. . . . Our task is to rule on what the law is, not what it might eventually be.” [3] The dissent’s concern about possible political repercussions does not warrant relief: “We have no authority to stay an execution in light of an ‘appeal of the President’ presenting free-ranging assertions of foreign policy consequences, when those assertions come unaccompanied by a persuasive legal claim.” [4] Finally, petitioner failed to demonstrate that the alleged VCCR violation was sufficiently prejudicial to entitle to him to relief, noting that the district court had rejected the claim on the basis that it was “harmless.”

Note: The Court expressed skepticism that legislation would be enacted any time soon: “It has now been seven years since the ICJ ruling and three years since our decision in *Medellín*, making a stay based on the bare introduction of a bill in a single house of Congress even less justified. If a statute implementing *Avena* had genuinely been a priority for the political branches, it would have been enacted by now.”

3. Availability of § 1983 Action

Skinner v. Switzer, District Attorney, 562 US ___, 131 S Ct 1289, 179 L Ed 2d 233 (2011). Plaintiff was charged in Texas state court with capital murder for violently murdering his girlfriend and her children. Although he was found cowering in a closet covered in blood, he denied being the murderer. Some of the evidence was tested, and some implicated plaintiff and some did not. His counsel chose not to have the rest of the evidence tested, fearing it would only implicate him further. The jury found him guilty and sentenced him to death. Plaintiff later filed a petition under the new Texas DNA-testing statute to allow testing of the evidence that had not been tested, but the state courts denied his request, concluding that he had not made an adequate showing that he “would not have been convicted if exculpatory results had been obtained” and that there was “no fault” on his part. Plaintiff then filed a § 1983 action in federal court seeking to compel state officials to allow the testing. The district court dismissed the complaint on the ground that plaintiff’s only remedy is in a post-conviction or *habeas corpus* proceeding. *Held*: Reversed and remanded. The federal court had jurisdiction to consider plaintiff’s § 1983 suit. [1] The *Rooker-Feldman* doctrine does not bar the suit because the gravamen of plaintiff’s claim is that the state statute, as construed by the state courts, violates his rights under the Due Process Clause. [2] Applying the rule in *Heck v. Humphrey*, 512 US 477 (1994), a § 1983 action is permitted because a favorable judgment for plaintiff in this proceeding would not necessarily imply the invalidity of his conviction and sentence (because the evidence may well demonstrate his guilt).

Note: ORS 138.690 *et seq.* authorizes post-conviction DNA-testing of untested evidence.

Hill v. McDonough, 547 US 573, 126 S Ct 2096, 165 L Ed 2d 44 (2006). Petitioner, a death-row inmate, filed suit under 28 USC § 1983 to enjoin the lethal-injection procedure, contending that it might cause him severe pain in violation of the Eighth Amendment. The district court construed the suit as one for *habeas corpus* relief and dismissed it based on the successive-petition bar in 28 USC § 2244. *Held*: Reversed and remanded. [1] “Challenges to the lawfulness of any confinement or to particulars affecting its duration are the province of *habeas corpus*. An inmate’s challenge to the circumstances of his confinement, however, may be brought under § 1983.” *Id.* at 579. [2] Because petitioner’s “action, if successful, would not necessarily prevent the State from executing him by lethal injection” but merely alter the method by which that is done, “a grant of injunctive relief could not be seen as barring the execution of [his] sentence.” Thus, a § 1983 action is proper. *Id.* at 580-81. [3] “Filing an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course. Both the State and the victims of crime have an important interest in the timely enforcement of a sentence. ... [I]nmates seeking time to challenge the manner in which the State plans to execute them must satisfy all the requirements for a stay, including a showing of a significant possibility of success on the merits. A court considering a stay must also apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” *Id.* at 583-84.

Nelson v. Campbell, 541 US 637, 124 S Ct 2117, 158 L Ed 2d 924 (2004). Petitioner was scheduled to be executed by lethal injection when he filed a complaint under 42 USC § 1983 to challenge the “cut-down procedure” that would be used for the injection due to his collapsed veins. The district court dismissed his petition on the ground that it effectively was a barred successive petition for *habeas corpus* relief under § 2244. *Held*: Reversed and remanded. [1] It is not apparent that a complaint about the *manner* in which an execution will be accomplished falls within the scope of a § 2244 petition, because it does not challenge the validity of either the conviction or sentence. Rather, it falls within the ambit of a § 1983 complaint about medical treatment and the conditions of confinement. Consequently, the rule in *Heck v. Humphrey*, 512 US 477 (1994), does not require dismissal of the complaint. *Id.* at 645-47. [2] Any concerns about last-minute § 1983 challenges to the manner of execution may be addressed through the normal processes including the PLRA. *Id.* at 650.

4. Clemency Petition

Ohio Adult Parole Authority v. Woodard, 523 US 272, 118 S Ct 1244, 140 L Ed 2d 387 (1998).

[1] Woodard, an Ohio death-row inmate, did not show a protected liberty interest under the Fourteenth Amendment to have the Ohio clemency process in death-penalty cases be subject to judicial scrutiny.

[2] Ohio's process of giving inmates the option of voluntary participation in an interview as part of the clemency proceedings did not violate Woodard's Fifth Amendment right against self-incrimination.

Woodard had challenged the Ohio process by claiming that federal law can create a liberty interest in clemency. Although the Court rejected Woodard's contentions, it was itself divided on the issue of what, if any, constitutional safeguards the Due Process clause provides to a prisoner in clemency proceedings.

E. REVIEW IN FEDERAL HABEAS CORPUS PROCEEDING

1. Jurisdictional Issues / Application of AEDPA

Medellin v. Dretke, 544 US 660, 125 S Ct 2088, 161 L Ed 2d 982 (2005). The International Court of Justice (ICJ) ordered numerous American state courts to review and reconsider, regardless of any procedural bars, death sentences imposed on petitioner and 50 other Mexican nationals on the ground that at the time of their arrests they allegedly were not informed of the right under the Vienna Convention on Consular Relations (VCCR) to seek help from the Mexican consulates. The Court had granted certiorari to determine whether a federal *habeas corpus* court is bound by the ICJ's ruling and whether a federal court should give it effect as a matter of comity and uniform treaty interpretation. After the Court granted certiorari, however, petitioner filed a *habeas corpus* petition in the Texas Court of Criminal Appeals, relying in part upon a memorandum from the President (issued after the cert grant) stating that the United States would discharge its obligations under the ICJ ruling by having state courts give it effect. In a 5-4 *per curiam* decision, the Court dismissed the writ of certiorari as improvidently granted. The Court concluded that, because the federal case before it presents several difficult threshold jurisdictional issues, it is preferable to dismiss the writ and allow the Texas state courts to address the matter, subject to possible later review by the Court. *Id.* at 664-68.

Woodford v. Garceau, 538 US 202, 123 S Ct 1398, 155 L Ed 2d 363 (2003). Amendments made by the AEDPA do not apply to cases pending in federal court on April 24, 1996—the effective date. Petitioner was convicted of first-degree murder and sentenced to death in California state court. After his petition for post-conviction relief was denied, he moved for the appointment of federal counsel and a stay of execution in district court in 1995, and later filed a federal *habeas corpus* application in July, 1996. Although he filed the application *after* the effective date of AEDPA, the court concluded, *inter alia*, that it was not subject to AEDPA because his motions for counsel and a stay were filed before that date. The Ninth Circuit agreed that the application was not subject to AEDPA, but reversed on other grounds. *Held*: A case does not become “pending” until an actual application for *habeas corpus* relief is filed in federal court. Petitioner's application is subject to AEDPA amendments because it was filed after the effective date. *Id.* at 210.

2. Statute of Limitations / Equitable Tolling

Holland v. Florida, 560 US ___, 130 S Ct 2549, 177 L Ed 2d 130 (2010). Petitioner was convicted of first-degree murder and sentenced to death. The state supreme court affirmed, and the U.S. Supreme Court denied petitioner's petition for certiorari on October 1, 2001, starting the one-year AEDPA statute of limitations. Petitioner's appointed counsel filed a petition for post-conviction relief in state court only 12 days before the limitations period expired, staying the running of the AEDPA limitations period. While the petition was pending in the state court, petitioner wrote his counsel several letters asking him to ensure that his claims were preserved for *habeas corpus* review in federal court. The state court denied petitioner's petition and he appealed to the state supreme court. During the following three years, petitioner wrote his counsel several letters asking that, if the court affirmed his convictions, a *habeas corpus* petition be filed timely in district court. Unhappy with his counsel's lack of communication, petitioner also wrote to the state

supreme court, asking it to remove his counsel from his case. The court held that petitioner could not file any *pro se* papers with the court while he was represented by counsel, including papers seeking new counsel and denied his request. On January 18, 2006, petitioner, while working in the prison library, learned for the first time that the state supreme court had denied his petition and had issued a mandate in his case on five weeks earlier, which had restarted the running of the limitations period. Petitioner immediately wrote his own *pro se* federal petition and mailed it to the district court the next day. The district court permitted petitioner's counsel to withdraw from the case, but dismissed the petition as untimely under § 2244(d), holding that petitioner did not demonstrate the due diligence necessary to invoke equitable tolling. On appeal, the Eleventh Circuit affirmed, holding that equitable tolling was *per se* inapplicable because petitioner failed to allege that his counsel made a knowing or reckless factual misrepresentation or that he exhibited dishonesty, divided loyalty, or mental impairment. *Holding*: Reversed and remanded. [1] The AEDPA limitations period is subject to equitable tolling in appropriate cases because (a) the defense is not jurisdictional and therefore subject to a rebuttable presumption in favor of equitable tolling; (b) unlike the limitations periods at issue in *United States v. Brockamp*, 519 US 347 (1997), and *United States v. Beggerly*, 524 US 38 (1998), the AEDPA statute of limitations does not contain language that is unusually emphatic, it does not reiterate its time limitation, application of equitable tolling would not affect the substance of a petitioner's claim, the limitations period is not particularly long, and the subject matter, *habeas corpus*, pertains to an area of the law where equity finds a comfortable home and (c) AEDPA seeks to eliminate delays in the federal review process without undermining basic *habeas corpus* principles and while seeking to harmonize the new statute with prior law, under which a petition's timeliness was always determined under equitable principles. [2] Although the circumstances of a case must be "extraordinary" before equitable tolling can be applied, such circumstances are not limited to those that satisfy the Eleventh Circuit's test requiring bad faith, dishonesty, divided loyalty, or mental impairment on the lawyer's part. [3] Petitioner was seriously prejudiced by counsel's failure to file the federal petition on time, to research the proper filing date, to inform petitioner in a timely manner that the Florida Supreme Court had decided his case, and his failure to communicate with his client over a period of years, despite various letters from petitioner emphasizing the importance of timely filing his petition, providing counsel with the relevant statute, and pleading for information about his case. [4] The district court erroneously relied on a lack of diligence—the diligence required for equitable tolling purposes is "reasonable diligence," not "maximum feasible diligence." The case was remanded to the Court of Appeals to determine whether the facts of this case constitute extraordinary circumstances sufficient to warrant equitable relief.

Lawrence v. Florida, 549 US 327, 127 S Ct 1079, 166 L Ed 2d 924 (2007). Petitioner was convicted of capital murder and sentenced to death, and the state appellate courts affirmed the judgment. Petitioner filed a petition for post-conviction relief 364 days later. The post-conviction court denied his petition, and the state appellate courts affirmed the judgment. Petitioner then filed a petition in the U.S. Supreme Court for a writ of certiorari, which the Court eventually denied. Petitioner filed his petition for *habeas corpus* relief 113 days after the state appellate judgment but while his petition for cert was still pending. The district court dismissed his petition as time-barred by the one-year limitation in AEDPA, 28 USC § 2244(d)(1). *Held*: Affirmed. [1] Although the one-year period is tolled during both the pendency of a petition for certiorari on direct appellate review and during a timely filed state post-conviction proceeding, it is not tolled during a petition for cert after affirmance of the post-conviction court's judgment. *Id.* at 337. Because "state prisoners need not petition for certiorari to exhaust state remedies," an inmate's state remedies are complete "at the end of state-court review." *Id.* at 333. [2] Even if "equitable tolling" applies to § 2244(d), petitioner failed to carry his burden to establish both (a) that he "has been pursuing his rights diligently," and (b) that "some extraordinary circumstance stood in his way and prevented timely filing." The settled state of the law among the circuit courts at that time was that a petition for certiorari did not toll the one-year period. *Id.* at 336. "Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel." *Id.* 336-37. And petitioner failed to prove his claim that his default was caused by "mental incapacity." *Id.* at 337.

3. Successive Petitions

Magwood v. Patterson, 561 US ___, 130 S Ct 2788, 177 L Ed 2d 592 (2010). Petitioner was sentenced to death in 1981 for murdering a sheriff in Alabama, but that sentence was set aside when the district court granted his petition for *habeas corpus* relief based on a ruling that the sentencing court had not adequately considered mitigating evidence. Upon retrial of the penalty phase in 1986, petitioner was again sentenced to death. The state courts affirmed. When the Eleventh Circuit denied his request per § 2244(b)(3)(A) to file a successive petition challenging the 1981 judgment, petitioner filed a *habeas corpus* petition in district court challenging the 1986 judgment and asserting for the first time that the statute under which he was charged did not provide him with fair notice of the possibility of a death sentence. The district court ruled that that petition was not “successive” and ultimately granted relief. The Eleventh Circuit reversed, ruling that that challenge was an impermissible “second or successive” petition under § 2244(b) because petitioner could have raised that challenge in his previous petition and did not arise from the resentencing. *Held*: Reversed and remanded (in a 5-4 decision). The “second or successive” rule is based on the *judgment* challenged, not whether the petitioner could have asserted the *claim* in his petition challenging a previous judgment. Because this petition challenges only the 1986 judgment, it is not a “second or successive” petition.

Notes: The majority noted that because the petition did not assert a challenge to the underlying *conviction* it was unnecessary to consider whether § 2244(b) would permit a petition challenging a new judgment imposed after a sentencing-only retrial to assert such a claim. The dissent would have adopted a “one opportunity” rule, and it warned that the rule adopted by the majority will allow a petitioner in this situation to relitigate all the claims he asserted without success in his previous petition.

Panetti v. Quarterman, 551 US 930, 127 S Ct 2842, 168 L Ed 2d 662 (2007). Petitioner was convicted of capital murder for murdering his in-laws, and he was sentenced to death. Although he suffers from various mental disorders, he was found competent to stand trial and represent himself. The state courts affirmed the judgment, and his petition for *habeas corpus* relief (which did not include a *Ford v. Wainwright* claim) was denied. When the state set an execution date, petitioner filed a motion in state court claiming he is exempt from execution because he is mentally incompetent under the *Ford* standard. The state court denied his claim, and he filed a successive petition for *habeas corpus* in federal court. The district court denied his petition. *Held*: Reversed and remanded. [1] Petitioner’s *Ford*-based petition is not a successive petition subject to 28 USC § 2244(b)(2), because that claim was not ripe when he filed his original petition. *Id.* at 947. [2] Deference under AEDPA is not warranted because the state court failed to provide the minimum procedures required by *Ford* when determining his competence. *Id.* at 945. [3] The test applied by the court of appeals was “too restrictive to afford [petitioner] the protections granted by the Eighth Amendment.” Although petitioner knew that he had been sentenced to death for murdering his in-laws, his mental disorders allegedly caused him to believe he was being executed to stop him from preaching. *Ford* requires that the inmate must “comprehend” or be aware of, at least, the reasons for his execution. The Court remanded for reconsideration. *Id.* 956-57.

Hill v. McDonough, 547 US 573, 126 S Ct 2096, 165 L Ed 2d 44 (2006). Petitioner, a death-row inmate, filed suit under 28 USC § 1983 to enjoin the lethal-injection procedure, contending that it might cause him severe pain in violation of the Eighth Amendment. The district court construed the suit as one for *habeas corpus* relief and dismissed it based on the successive-petition bar in 28 USC § 2244. *Held*: Reversed and remanded. [1] “Challenges to the lawfulness of any confinement or to particulars affecting its duration are the province of *habeas corpus*. An inmate’s challenge to the circumstances of his confinement, however, may be brought under § 1983.” *Id.* at 579. [2] Because petitioner’s “action, if successful, would not necessarily prevent the State from executing him by lethal injection” but merely alter the method by which that is done, “a grant of injunctive relief could not be seen as barring the execution of [his] sentence.” Thus, a § 1983 action is proper. *Id.* at 580-81. [3] “Filing an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course. Both the State and the victims of crime have an important interest in the timely enforcement of a sentence. ... [I]nmates seeking time to challenge the manner in which the State plans to execute them must satisfy all the requirements for a stay,

including a showing of a significant possibility of success on the merits. A court considering a stay must also apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” *Id.* at 583-84.

Nelson v. Campbell, 541 US 637, 124 S Ct 2117, 158 L Ed 2d 924 (2004). Petitioner was scheduled to be executed by lethal injection when he filed a complaint under 42 USC § 1983 to challenge the “cut-down procedure” that would be used for the injection due to his collapsed veins. The district court dismissed his petition on the ground that it effectively was a barred successive petition for *habeas corpus* relief under § 2244. *Held*: Reversed and remanded. [1] It is not apparent that a complaint about the *manner* in which an execution will be accomplished falls within the scope of a § 2244 petition, because it does not challenge the validity of either the conviction or sentence. Rather, it falls within the ambit of a § 1983 complaint about medical treatment and the conditions of confinement. Consequently, the rule in *Heck v. Humphrey*, 512 US 477 (1994), does not require dismissal of the complaint. *Id.* at 645-47. [2] Any concerns about last-minute § 1983 challenges to the manner of execution may be addressed through the normal processes including the PLRA. *Id.* at 650.

Stewart v. Martinez-Villareal, 523 US 637, 118 S Ct 1618, 140 L Ed 2d 849 (1998). Petitioner’s claim that he was incompetent to be executed under *Ford v. Wainwright*, 477 US 399 (1986), is not subject to the restrictions on the “second or successive” applications for relief under the AEDPA, 28 USC § 2244, even though after being convicted on two counts of first-degree murder and sentenced to death, he unsuccessfully challenged his conviction. Petitioner was not required to get authorization to file a “second or successive” application before his *Ford* claim could be heard.

4. Certificate of Appealability

Harbison v. Bell, 556 US ___, 129 S Ct 1481, 173 L Ed 2d 347 (2009). Petitioner was convicted of capital murder, was sentenced to death, and the Tennessee appellate courts affirmed the judgment on direct appeal and in his subsequent state post-conviction proceeding. He then filed a § 2254 petition in federal district court seeking *habeas corpus* relief, and the court appointed the federal public defender to represent him. The federal court rejected his petition, and that judgment was affirmed on appeal. Petitioner then filed a petition in state court seeking appointment of counsel to assist him in preparing a request for clemency from the governor, but the state supreme court denied that request. Petitioner then returned to the federal district court asking that his previously appointed counsel be allowed to assist him, but the district court also denied that request. *Held*: Reversed and remanded. The certificate of appealability required by 28 USC § 2253(c)(1)(A) does not apply to an appeal from the denial of a request for appointment of counsel. *Id.* at 1485.

Tennard v. Dretke, 542 US 274, 124 S Ct 2562, 159 L Ed 2d 384 (2004). Petitioner was convicted of aggravated murder in Texas and presented evidence at the penalty phase that he has an IQ of 67. The trial court gave the jury the two statutory questions that the Court later found insufficient in *Penry v. Lynaugh*, 492 US 302 (1989). The district court denied petitioner’s claim, and Fifth Circuit nonetheless denied his request for a certificate of appealability, concluding that no evidence tied petitioner’s IQ to retardation or to the circumstances of his crime. *Held*: Reversed and remanded with directions to issue a COA. [1] A COA should issue under § 2253(c)(2) if petitioner shows “that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.* at 275. [2] The meaning of relevance for purpose of mitigating evidence in a penalty phase is the same for any other proceeding: “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without that evidence.” *Id.* at 275. [3] Petitioner’s low IQ is relevant mitigating evidence regardless of whether it relates to the circumstances of the offense. “Impaired intellectual functioning has mitigating dimension beyond the impact it has on the individual’s ability to act deliberately.” Moreover, it is debatable that his low IQ constituted retardation for purpose of *Atkins v. Virginia*, 536 US 304 (2002). *Id.* 288-89.

Banks v. Dretke, 540 US 668, 124 S Ct 1256, 157 L Ed 2d 1166 (2004). In a § 2254 proceeding challenging a state-court conviction for aggravated murder and sentence of death, the Fifth Circuit denied *habeas corpus* relief on petitioner’s claim that the state had concealed impeachment evidence that a key prosecution witness was a paid police informant. *Held*: Reversed. Based on the state’s suppression of that evidence and the fact that it was material to impeachment, petitioner established cause and prejudice for failing to have raised that claim in his state post-conviction proceeding. *Id.* at 697-703. The district court and Fifth Circuit erred in refusing to grant a certificate of appealability on that issue. *Id.* at 705.

Miller-El v. Cockrell, 537 US 322, 123 S Ct 1029, 154 L Ed 2d 931 (2003). Pre-*Batson*, petitioner was convicted of capital murder and sentenced to death after prosecutors used preemptory strikes to exclude 10 of the 11 African-Americans eligible to serve on his jury. Upon remand from the Texas Court of Criminal Appeals for new findings in light of *Batson*, the original trial court held a hearing and concluded that petitioner failed to satisfy step one of *Batson* because the evidence did not even raise an inference of racial motivation in the state’s use of preemptory challenges. The court also determined that the state would have prevailed on steps two and three because the prosecutors had proffered credible, race-neutral explanations for the African-Americans excluded—*i.e.*, their reluctance to assess, or reservations concerning, imposition of the death penalty—such that petitioner could not prove purposeful discrimination. After petitioner’s direct appeal and state habeas petitions were denied, he filed a § 2254 petition raising a *Batson* claim and other issues. The district court denied relief in deference to the state courts’ acceptance of the prosecutors’ race-neutral justifications for striking the potential jurors, and subsequently denied his § 2253 application for a certificate of appealability (COA). The Fifth Circuit affirmed. *Held*: The Fifth Circuit should have issued a COA to review the district court’s denial of *habeas corpus* relief. When an applicant seeks a COA, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. This inquiry does not require full consideration of the factual or legal bases supporting the claims. The prisoner need only demonstrate “a substantial showing of the denial of a constitutional right.” § 2253(c)(2). He need not convince a judge, or, for that matter, three judges, that he will prevail, but must only demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong. *Id.* 341-42.

5. Appointment of Counsel

Martel, Warden v. Clair, 565 US ___, 132 S Ct 1276, 182 L Ed 2d 135 (2012). In 1984, petitioner “was a squatter in a vacant house,” and he broke into the house next door and robbed and beat, stabbed, and strangled to death a woman residing there. No forensic evidence connected him to the crime, but a witness reported seeing him with stolen property and blood on his hand right afterwards, and he made some self-incriminatory statements to her. The jury found him guilty and sentenced him to death. The California Supreme Court affirmed. In 1994, petitioner filed a § 2254 petition in federal court and the court appointed him two lawyers as counsel. The court held an evidentiary hearing in 2004, briefing was completed in February 2005, and the case was submitted for decision. About a month later, petitioner filed a motion essentially asking for substitute counsel, asserting that they were not adequately challenging the guilt-phase verdict. After some inquiry about on petitioner’s request, his counsel advised that he had changed his mind. Then, about a month later, petitioner renewed his request, asserted that he had arranged for a separate investigator to check the case and he had discovered that some fingerprints found at the scene had never been examined. The district court summarily denied petitioner’s request and simultaneously issued an extensive opinion denying his petition. Petitioner was appointed new counsel on appeal, and at the request of that lawyer, the Ninth Circuit reversed and remanded for reconsideration, holding that the district court had abused its discretion in summarily denying petitioner’s last-minute request for substitute counsel. *Held*: Reversed and remanded. [1] Under 18 USC § 3599, an indigent defendant is entitled to the appointment of counsel in capital cases, including *habeas corpus* proceedings. Although the statute provides that appointed counsel may be “replaced ... upon motion of the defendant,” it does not specify the standard that the district court should use in evaluating such a motion. “We hold that courts should employ the same ‘interests of justice’ standard that [applies] in non-capital cases under [18 USC § 3006A.]” [2] “In reviewing substitution motions, the [factors to consider] generally include: the timeliness of the motion; the adequacy of the district

court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's own responsibility, if any, for that conflict). Because a trial court's decision on substitution is so fact-specific, it deserves deference; a reviewing court may overturn it only for an abuse of discretion." [3] The district court did not abuse its discretion in denying petitioner's last-minute motion to change counsel: "The timing of that motion precludes a holding that the District Court abused its discretion. The court received [petitioner's] second letter while putting the finishing touches on its denial of his habeas petition. (That lengthy decision issued just two weeks later.) After many years of litigation, an evidentiary hearing, and substantial post-hearing briefing, the court had instructed the parties that it would accept no further submissions. The case was all over but the deciding; counsel, whether old or new, could do nothing more in the trial court proceedings. At that point and in that forum, [petitioner's] conflict with his lawyers no longer mattered." Moreover, the claim that petitioner wanted to assert based on the fingerprints would have been outside the scope of his petition and was procedurally defaulted: "The court was not required to appoint a new lawyer just so [petitioner] could file a futile motion" to amend his petition.

Note: The Court also observed that "the Court of Appeals ordered the wrong remedy even assuming the District Court had abused its discretion in denying [petitioner's] substitution motion without inquiry. The way to cure that error would have been to remand to the District Court to decide whether substitution was appropriate at the time of [petitioner's] letter. Unless that court determined that counsel should have been changed, the Court of Appeals had no basis for vacating the denial of [petitioner's] habeas petition."

Harbison v. Bell, 556 US ___, 129 S Ct 1481, 173 L Ed 2d 347 (2009). Petitioner was convicted of capital murder, was sentenced to death, and the Tennessee appellate courts affirmed the judgment on direct appeal and in his subsequent state post-conviction proceeding. He then filed a § 2254 petition in federal district court seeking *habeas corpus* relief, and the court appointed the federal public defender to represent him. The federal court rejected his petition, and that judgment was affirmed on appeal. Petitioner then filed a petition in state court seeking appointment of counsel to assist him in preparing a request for clemency from the governor, but the state supreme court denied that request. Petitioner then returned to the federal district court asking that his previously appointed counsel be allowed to assist him, but the district court also denied that request. *Held:* Reversed and remanded. The district court has authority under 18 USC § 3599(a) to appoint counsel for a petitioner who has been sentenced to death in a state court to assist him in filing a request for clemency. *Id.* at 1491.

6. Evidentiary Hearing

Cullen, Acting Warden v. Pinholster, 563 US ___, 131 S Ct 1388, 179 L Ed 2d 557 (2011). Petitioner and two accomplices broke into a house in the middle of the night and brutally beat and stabbed to death two men who happened to interrupt the burglary. A jury convicted petitioner of first-degree murder, and he was sentenced to death. At the penalty phase, the prosecution produced eight witnesses, who testified about petitioner's history of threatening and violent behavior. Petitioner's trial counsel, who unsuccessfully sought to exclude the aggravating evidence based on a defect in notice, called only petitioner's mother; counsel did not call a psychiatrist, though they had consulted with Dr. Stalberg, who had diagnosed petitioner with antisocial personality disorder. Petitioner was sentenced to death. He twice sought *habeas corpus* relief in the California Supreme Court, alleging, *inter alia*, that his trial counsel had failed to adequately investigate and present mitigating evidence during the penalty phase, and he presented additional evidence to support this claim: school, medical, and legal records; and declarations from family members, one of his trial attorneys, and a psychiatrist who diagnosed him with bipolar mood disorder and seizure disorders, and who criticized Dr. Stalberg's report. The state supreme court unanimously and summarily denied the claim on the merits. Subsequently, a federal district court held an evidentiary hearing and granted petitioner federal *habeas corpus* relief under 28 USC §2254. Sitting *en banc* and over a strong dissent, the Ninth Circuit considered the new evidence presented in the district court and affirmed. *Held:* Reversed. [1] The district court erred in ruling that an evidentiary hearing was not barred by § 2254(e)(2), because "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) ... requires an examination of the state-court decision at the time it was made. It follows

that the record under review is also limited to the record in existence at that same time—*i.e.*, the state-court record. ... [A] federal habeas court is ‘not required to hold an evidentiary hearing’ when the state-court record ‘precludes habeas relief’ under § 2254(d)’s limitations.” [2] This holding does not render § 2254(e)(2) superfluous: “At a minimum, § 2254(e)(2) still restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court.”

Schriro v. Landrigan, 550 US 465, 127 S Ct 1933, 167 L Ed 2d 836 (2007). After a long history of violent crime, including a previous murder, petitioner escaped from prison and murdered a man during a burglary. He was found guilty of capital murder by a jury. At sentencing (before the court), petitioner’s counsel attempted to present mitigating evidence through petitioner’s ex-wife and birth mother but petitioner refused to allow them to testify. In a direct colloquy, petitioner insisted that he did not want any mitigating evidence to be presented and taunted the court to impose a death sentence: “just bring it on.” The court did. In his state post-conviction proceeding, petitioner alleged that his counsel should have investigated and presented mitigating evidence despite his refusal to cooperate. The court rejected that claim, and the judgment was affirmed on appeal. Petitioner repeated that claim in his *habeas corpus* petition. The district court refused to grant an evidentiary hearing and dismissed his petition. The Ninth Circuit reversed. **Held:** Reversed, affirming district court. [1] AEDPA continues the rule that the decision to grant an evidentiary hearing in a *habeas corpus* proceeding is left to the discretion of the district court. Under AEDPA, the state court’s factual findings are presumed correct unless the petitioner rebuts that by “clear and convincing evidence,” 28 USC § 2254(e)(1), and the district court may not reverse the state-court judgment unless it “was based on an unreasonable determination of the facts,” § 2254(d)(2). A district court “must take into account those standards in deciding whether an evidentiary hearing is appropriate,” and “if the record refused the petitioner’s factual allegations or otherwise precludes *habeas corpus* relief, a district court is not required to hold an evidentiary hearing.” *Id.* 473-74. [2] The state court finding that petitioner refused to allow his counsel to present mitigating evidence was a reasonable determination of the facts. Moreover, the court was entitled to conclude that petitioner would have prevented his counsel from presenting whatever mitigating evidence he might have uncovered, and hence that petitioner suffered no prejudice. Thus, the court did not abuse its discretion in refusing to grant an evidentiary hearing. *Id.* at 477.

Holland v. Jackson, 542 US 649, 124 S Ct 2736, 159 L Ed 2d 683 (2004) (*per curiam*). Petitioner was convicted of murder based on the testimony of Hughes, and his conviction was affirmed on direct appeal and in a subsequent state post-conviction proceeding. Seven years after the conviction, petitioner filed a motion for new post-conviction trial based on an allegedly newly discovered witness. The state court denied the motion, ruling (a) that he failed to establish an adequate excuse for failing to present that evidence at the prior trial and (b) that, in any event, he failed to establish that his trial counsel would have elicited favorable evidence from the new witness. The Sixth Circuit granted petitioner *habeas corpus* relief, concluding that the state court unreasonably applied *Strickland* because the newly proffered evidence would have undermined the credibility of Hughes. **Held:** Reversed and remanded. [1] The state court denied the petition on alternative grounds, and the first ground (procedural default) is an independent and adequate state-law ground to affirm. *Id.* at 652. [2] After defaulting in state court, petitioner was not entitled to an evidentiary hearing in district court unless he met the conditions in § 2254(e)(2). Petitioner’s claim that his post-conviction counsel was inadequate in failing to investigate that witness is not sufficient: “Attorney negligence... is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied.” *Id.* at 653.

7. AEDPA Limitations

(a) AEDPA bars—violation of federal law (§ 2254(a))

Wilson, Superintendent v. Corcoran, 562 US ___, 131 S Ct 13, 178 L Ed 2d 276 (2010) (*per curiam*). Defendant was convicted by a jury of murdering four people and was sentenced to death by a judge after weighing aggravating circumstances. The Indiana Supreme Court remanded for reconsideration, because the sentencing judge’s remarks on the record could be construed that he had considered

inappropriate factors. On remand, the judge clarified his remarks and reimposed a death sentence. The state supreme court accepted his clarification and affirmed. Eventually, the Seventh Circuit reversed, concluding that the state supreme court had made an “unreasonable determination of the facts,” 28 USC § 2254(d)(2), when it accepted the trial court’s representation that it did not rely on those factors as aggravating circumstances. *Held*: Reversed. [1] “But it is only noncompliance with *federal* law that renders a State’s criminal judgment susceptible to collateral attack in the federal courts. The habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner ‘only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.’ 28 USC § 2254(a). And we have repeatedly held that federal habeas corpus relief does not lie for errors of state law.” [2] Section 2254(d)(2) “allows habeas petitioners to avoid the bar to habeas relief imposed with respect to federal claims adjudicated on the merits in state court by showing that the state court’s decision was ‘based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’ It does not repeal the command of § 2254(a) that habeas relief may be afforded to a state prisoner ‘only on the ground’ that his custody violates federal law.” [3] “It is not enough to note that a habeas petitioner *asserts* the existence of a constitutional violation; unless the federal court agrees with that assertion, it may not grant relief.” Because the Seventh Circuit did not find that the state court violated federal law, its disagreement with the state court’s factual finding provides no basis for relief.

Bradshaw v. Richey, 546 US 74, 126 S Ct 602, 163 L Ed 2d 407 (2005) (*per curiam*). Petitioner set fire to an apartment building with the intent to kill his ex-girlfriend and her new boyfriend; they escaped but a 2-year-old child of their neighbor died. Petitioner was convicted of arson and aggravated murder and was sentenced to death. His convictions and sentence were affirmed in the state court on direct appeal and in post-conviction, the district court denied petitioner’s § 2254 petition, but the Sixth Circuit granted relief on two grounds: (a) under state law, transferred intent was not a valid basis to support petitioner’s conviction for intentional murder and sentence of death; and (b) in any event, his trial counsel provided ineffective assistance *vis-à-vis* the forensic evidence establishing arson. *Held*: Reversed and remanded. [1] Currently and at the time petitioner committed the crimes, state law was “clear and unambiguous” that transferred intent is a sufficient basis to support a conviction for intentional murder and sentence of death, and that “provided fully adequate notice to [petitioner] of the applicability of transferred intent.” *Id.* at 76-77. [2] “[A] state court’s interpretation of state law, including one announced on direct appeal of the challenged conviction, binds the federal court sitting in *habeas corpus*.” *Id.* at 76.

Bell v. Cone, 543 US 447, 125 S Ct 847, 160 L Ed 2d 881 (2005) (*per curiam*): Petitioner was convicted of aggravated murder and was sentenced to death on a finding that the murder “was especially heinous, atrocious, or cruel.” The state supreme court affirmed the judgment on direct appeal, concluding that the evidence supported that factor. Petitioner eventually filed a § 2254 petition for *habeas corpus* relief, and the Sixth Circuit granted relief on the ground that the “especially heinous” factor is unconstitutionally vague in violation of the Eighth Amendment. *Held*: Reversed. In determining whether an aggravating factor is unconstitutionally vague, the federal court must attempt to determine whether the state courts have further defined the vague terms in a manner that provides sufficient guidance to the sentencer. Because the state supreme court previously had adopted a constitutionally sufficient narrowing construction of the factor, the circuit court could not presume that it had not applied that narrowed construction in this case. “Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.” *Id.* at 455-56.

(b) AEDPA bars—*independent and adequate state ground / procedural bar*

Maples v. Thomas, Commissioner, 565 US ___, 132 S Ct 912, 181 L Ed 2d 807 (2012). Petitioner was convicted of capital murder in Alabama and he was sentenced to death. After his conviction and sentence were affirmed on direct appeal, he filed a post-conviction petition in state court in 2001. As is common there, two lawyers from a high-profile New York City law firm (Sullivan & Cromwell) volunteered to represent him *pro bono*, and a local lawyer (Butler) moved for their admission *pro hac vice* on the agreement that he would not have to have any substantive involvement with the case. After the case was

submitted for decision by the post-conviction court, both of the lawyers left the Sullivan & Cromwell firm and took positions that precluded them from continuing to work on petitioner's case, but neither lawyer made arrangements with the firm to transfer his responsibility for the case to another lawyer. In 2003, the post-conviction court issued a decision denying petitioner's petition, and notice of the judgment was sent to the lawyers. The law firm sent the notices back stamped "Returned to Sender—Attempted Unknown." The court clerk did not attempt to find the lawyers or to resend the notices. Although a notice was sent to Butler, he did not act on it. Petitioner did not receive a copy of the notice, and he defaulted on filing an appeal. The state's attorney later alerted petitioner of the default. Petitioner contacted his mother, who contacted Sullivan & Cromwell, who then scrambled to attempt to cure the default. But the state courts denied the firm's various motions to set aside the default or to allow them to file an untimely notice of appeal. Petitioner then filed a § 2254 *habeas corpus* petition in federal court, and the district court ruled that his claims were procedurally barred by his failure to appeal from the post-conviction court's judgment and that, under established law, the mistake by his counsel in that proceeding was not "cause" that would excuse his default. The Eleventh Circuit affirmed. *Held*: Reversed and remanded. [1] "As a rule, a state prisoner's habeas claims may not be entertained by a federal court when a state court has declined to address those claims because the prisoner had failed to meet a state procedural requirement, and the state judgment rests on independent and adequate state procedural grounds. The bar to federal review may be lifted, however, if the prisoner can demonstrate cause for the procedural default in state court and actual prejudice as a result of the alleged violation of federal law." [2] "Cause for a procedural default exists where something *external* to the petitioner, something that cannot fairly be attributed to him, impeded his efforts to comply with the State's procedural rule. Negligence on the part of a prisoner's postconviction attorney does not qualify as 'cause.' ... Thus, when a petitioner's postconviction attorney misses a filing deadline, the petitioner is bound by the oversight and cannot rely on it to establish cause. We do not disturb that general rule." [3] But "a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." [4] Because the lawyers' new employments ethically precluded either of them from continuing to represent petitioner, their "agency relationship with him" terminated. [5] Butler, petitioner's local counsel, "also left him abandoned" and "did not even begin to represent" him. [6] "In the unusual circumstances of this case, principles of agency law and fundamental fairness point to the same conclusion: There was indeed cause to excuse [petitioner's'] procedural default. Through no fault of his own, [he] lacked the assistance of any authorized attorney during the 42 days Alabama allows for noticing an appeal from a trial court's denial of postconviction relief. As just observed, he had no reason to suspect that, in reality, he had been reduced to *pro se* status. [Petitioner] was disarmed by extraordinary circumstances quite beyond his control. He has shown ample cause, we hold, to excuse the procedural default into which he was trapped when counsel of record abandoned him without a word of warning."

Wellons v. Hall, 558 US ___, 130 S Ct 727, 175 L Ed 2d 684 (2010) (*per curiam*). Petitioner was convicted of rape and murder and was sentenced to death. After the trial, defense counsel learned of possibly inappropriate contacts between the jury and the judge, including that the jury gave the judge and bailiff odd gifts. The Georgia Supreme Court affirmed the convictions and death sentence, and the state courts denied petitioner's post-conviction petition after he was allowed to interview the jurors regarding the judge/jury contacts. Petitioner then filed a § 2254 petition in which he raised the same improper-contacts claim and asked for discovery and an evidentiary hearing. The district court held that the claim was procedurally defaulted, and the Eleventh Circuit affirmed on that basis. *Held*: GVR. [1] To the extent that the decision of the Eleventh Circuit was premised on petitioner's claim being barred by the decision on direct appeal by the Georgia Supreme Court, which did not have the factual record before it, that ruling was error under *Cone v. Bell*. *Id.* at 731. [2] Although the Eleventh Circuit purported to consider and reject petitioner's claim on the merits, that decision appears to be colored by its erroneous ruling on procedural default and, in any event, did not address petitioner's request for discovery and an evidentiary hearing. *Id.* at 730.

Beard v. Kindler, 558 US ___, 130 S Ct 612, 175 L Ed 2d 417 (2009). In 1984, petitioner was convicted of murder and the jury recommended a death sentence. Petitioner filed post-trial motions but he escaped to Canada before the court could consider those motions and impose a sentence. Based on his

escape, the court summarily dismissed his motions. Petitioner eventually was captured and was extradited. When he came back before the court for resentencing in 1991, he attempted to reinstate his motions but the court denied that request and ultimately imposed a death sentence. The Pennsylvania Supreme Court affirmed, ruling that the trial court properly exercised its discretion under the “fugitive forfeiture” rule to dismiss petitioner’s post-trial motions. Petitioner eventually filed a § 2254 petition, and the district court granted relief. The court that the state court’s ruling based on the fugitive-forfeiture rule was not a sufficient basis to bar federal review because it was merely discretionary, and it then considered and granted relief on two of his procedurally barred claims. The Third Circuit affirmed. *Held*: Reversed and remanded. [1] “The question whether a state procedural ruling is adequate is itself a question of federal law.” *Id.* at 614. [2] “A discretionary state procedural rule can serve as an adequate ground to bar federal habeas review.” *Id.* at 618. Consequently, the state court’s discretionary dismissal of petitioner’s post-trial motions based on his escape can constitute an independent and adequate basis to bar consideration of those claims. *Id.*

Note: The Court remanded for consideration of petitioner’s fall-back argument that as the state courts had applied the rule to his case, it effectively had become a new rule that *mandated* dismissal and hence was not one that was “firmly established and regularly followed.” Justices Kennedy and Thomas, concurring, would have held that such a change, even if it had occurred, would not justify relieving petitioner from the procedural bar.

Cone v. Bell, 556 US ___, 129 S Ct 1769, 173 L Ed 2d 701 (2009). In 1981, petitioner was convicted of two murders in state court and was sentenced to death, and the Tennessee Supreme Court affirmed the judgment. While prosecuting a post-conviction proceeding in state court, petitioner discovered that the prosecutor had failed to disclose witness statements and police reports that he asserted would have supported his insanity and mitigation defenses, and he amended his petition to assert a *Brady* claim. The post-conviction court denied his petition and the state appellate court affirmed. In rejecting his *Brady* claim, the post-conviction and appellate court mistakenly assumed that petitioner previously had raised that *Brady* claim on direct appeal. Petitioner then filed a § 2254 petition in federal district court in which he *inter alia* asserted his *Brady* claim. The district court denied that claim as procedurally barred, and the Sixth Circuit affirmed on that ground and also on the ground that the material not disclosed was not a *Brady* violation. *Held*: Reversed and remanded. In what is essentially an error-correction decision that does not announce any new law, the Court concluded that petitioner’s *Brady* claim was not procedurally barred because he in fact had not raised the issue on direct appeal and the state courts in the post-conviction proceeding had not considered and denied the claim on the merits. *Id.* at 1782. [2] Because the state courts had not resolved the *Brady* claim on the merits, the Court reviewed *de novo*. *Id.* at 1784. Because the evidence may have “a mitigating, though not exculpating, role,” the Court remanded for a full review of petitioner’s claims of prejudice. *Id.* at 1786.

Holland v. Jackson, 542 US 649, 124 S Ct 2736, 159 L Ed 2d 683 (2004) (*per curiam*). Petitioner was convicted of murder based on the testimony of Hughes, and his conviction was affirmed on direct appeal and in a subsequent state post-conviction proceeding. Seven years after the conviction, petitioner filed a motion for new post-conviction trial based on an allegedly newly discovered witness. The state court denied the motion, ruling (a) that he failed to establish an adequate excuse for failing to present that evidence at the prior trial and (b) that, in any event, he failed to establish that his trial counsel would have elicited favorable evidence from the new witness. The Sixth Circuit granted petitioner *habeas corpus* relief, concluding that the state court unreasonably applied *Strickland* because the newly proffered evidence would have undermined the credibility of Hughes. *Held*: Reversed and remanded. [1] The state court denied the petition on alternative grounds, and the first ground (procedural default) is an independent and adequate state-law ground to affirm. *Id.* at 652. [2] After defaulting in state court, petitioner was not entitled to an evidentiary hearing in district court unless he met the conditions in § 2254(e)(2). Petitioner’s claim that his post-conviction counsel was inadequate in failing to investigate that witness is not sufficient: “Attorney negligence... chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied.” *Id.* at 653. [3] The Sixth Circuit erred in granting relief on the ground that the state court misapplied the *Strickland* standard by applying a preponderance-of-the-evidence standard. The state court correctly recited the “reasonable probability” standard from *Strickland* and properly used “preponderance” in relation to

petitioner's state-law burden of proof on factual issues. A state court's use of shorthand formulations does not provide a basis for relief. *Id.* at 654-55.

Bradshaw v. Richey, 546 US 74, 126 S Ct 602, 163 L Ed 2d 407 (2005) (*per curiam*). Petitioner set fire to an apartment building with the intent to kill his ex-girlfriend and her new boyfriend; they escaped but a 2-year-old child of their neighbor died. Petitioner was convicted of arson and aggravated murder and was sentenced to death. His convictions and sentence were affirmed in the state court on direct appeal and in post-conviction, the district court denied petitioner's § 2254 petition, but the Sixth Circuit granted relief on two grounds: (a) under state law, transferred intent was not a valid basis to support petitioner's conviction for intentional murder and sentence of death; and (b) in any event, his trial counsel provided ineffective assistance *vis-à-vis* the forensic evidence establishing arson. *Held*: Reversed and remanded. [1] "[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds the federal court sitting in *habeas corpus*." *Id.* at 76. [2] "[T]he Sixth Circuit erred in its adjudication of [petitioner's *Strickland* claim] by relying on evidence that was not properly presented to the state *habeas* courts without first determining (1) whether [petitioner] was at fault for failing to develop the factual bases for his claims in state court, or (2) whether [petitioner] satisfied the criteria established by 28 USC § 2254(e)(2). Similarly, the Sixth Circuit erred by disregarding the state *habeas* courts' conclusion that the forensic expert whom [petitioner's] trial counsel hired was a 'properly qualified expert' without analyzing whether the state court's factual finding had been rebutted by clear and convincing evidence [under] 28 USC § 2254(e)(1). In addition, ... the Sixth Circuit erred in relying on certain grounds that were apparent from the trial record but not raised on direct appeal ... without first determining whether [petitioner's] procedural default of these subclaims could be excused by a showing of cause and prejudice or by the need to avoid a miscarriage of justice." *Id.* at 79.

Banks v. Dretke, 540 US 668, 124 S Ct 1256, 157 L Ed 2d 1166 (2004). In a § 2254 proceeding challenging a state-court conviction for aggravated murder and sentence of death, the Fifth Circuit denied *habeas corpus* relief on petitioner's claim that the state had concealed impeachment evidence that a key prosecution witness was a paid police informant. *Held*: Reversed. Based on the state's suppression of that evidence and the fact that it was material to impeachment, petitioner established cause and prejudice for failing to have raised that claim in his state post-conviction proceeding. *Id.* at 697-703.

Strickler v. Greene, 527 US 263, 119 S Ct 1936, 144 L Ed 2d 286 (1999). Petitioner was charged with capital murder and related crimes. His counsel did not file a pretrial motion for discovery of possible exculpatory evidence because an open-file policy gave petitioner access to all of the evidence in the prosecutor's files. At the trial, a state's witness gave detailed eyewitness testimony about the crimes and petitioner's role as one of the perpetrators. The prosecutor failed to disclose exculpatory materials in the police files that cast serious doubt on significant portions of her testimony. The jury found petitioner guilty and sentenced him to death. Petitioner then filed a federal *habeas corpus* petition and was granted access to the exculpatory materials for the first time. *Held*: Although petitioner has demonstrated cause for failing to raise a *Brady* claim, Virginia did not violate *Brady* and its progeny by failing to disclose exculpatory evidence to petitioner. There are three essential components of a true *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the state, either willfully or inadvertently; and (3) prejudice must have ensued. The record in this case unquestionably establishes two of those components. In order to obtain relief, petitioner must convince the Court that there is a reasonable probability that his conviction or sentence would have been different had the suppressed documents been disclosed to the defense. Petitioner did not show prejudice sufficient to excuse his procedural default due to the considerable forensic and other physical evidence linking petitioner to the crime. *Id.* at 281-292.

(c) AEDPA bars—"contrary to ... clearly established federal law" (§ 2254(d)(1))

Bobby, Warden v. Dixon, 565 US ___, 132 S Ct 26, 181 L Ed 2d 328 (2011) (*per curiam*). Petitioner Dixon and Hoffner robbed and beat the victim (Hammer), stole his identification and car, and then they

literally buried him alive. The next day, November 4, 1993, police officer Hoffner happened to talk with petitioner about Hammer's disappearance and gave him *Miranda* warnings, but petitioner said he would not answer questions without a lawyer present, and he left. The officers later discovered that petitioner had sold Hammer's car and used his identification, so they arrested him on November 9 on a forgery charge. The officers deliberately did not give petitioner *Miranda* warnings, but questioned him at length about the victim's disappearance. Petitioner admitted using the victim's identification and selling his car, but insisted that the victim had given him permission and said he had no idea where the victim was. The officers then upped the ante by telling him (evidently falsely) that Hoffner "was providing them more useful information" and suggesting that he come clean before Hoffner did in order to get a better deal. Petitioner stuck by his story, and the officers booked him on the forgery charge at 3 p.m. Later that same day, Hoffner led the police to the Hammer's body, but placed the blame on petitioner. About 7:30 p.m., petitioner was brought back to meet with the officers for further questioning, and he told them that he had heard that they had found the body. He said, "I talked to my attorney, and I want to tell you what happened." The officers gave him *Miranda* warnings, he waived his rights, and confessed, but he attempted to put the blame on Hoffner. The trial court excluded all of petitioner's statements as having been obtained in violation of *Miranda*, but the state appealed and the Ohio Court of Appeals reversed, holding that petitioner's statements during the interview after 7:30 p.m. were admissible because the officers had given him *Miranda* warnings. Petitioner was convicted and sentenced to death. On petitioner's appeal, the Ohio Supreme Court affirmed, relying on *Oregon v. Elstad*, 470 US 298 (1985). Petitioner then filed a *habeas corpus* petition in federal court challenging the admissibility of his post-*Miranda* confession. The district court denied his petition, but the Sixth Circuit reversed, concluding that under § 2254(d)(1) the state courts had violated "clearly established Federal law" in three different respects. *Held*: Reversed, reinstating state judgment. [1] The Court rejected the Sixth Circuit's first ruling that, under *Miranda*, petitioner's invocation during the first encounter with the officer on November 4 precluded any subsequent questioning: "That is plainly wrong. It is undisputed that [petitioner] was not in custody during his chance encounter with police on November 4. And this Court has never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than custodial interrogation." [2] The Court rejected the Sixth Circuit's second ruling that the officers "violated the Fifth Amendment by urging [petitioner] to 'cut a deal' before his accomplice Hoffner did so"; the Court ruled: "Because no holding of this Court suggests, much less clearly establishes, that police may not urge a suspect to confess before another suspect does so, the Sixth Circuit had no authority to issue the writ on this ground." [3] Finally, the Court rejected the Sixth Circuit's ruling that, in light of *Missouri v. Seibert*, 542 US 600 (2004), the Ohio Supreme Court misapplied *Elstad*: "Unlike in *Seibert*, there is no concern here that police gave [petitioner] *Miranda* warnings and then led him to repeat an earlier murder confession, because there was no earlier confession to repeat. Indeed, [petitioner] *contradicted* his prior unwarned statements when he confessed to Hammer's murder. Nor is there any evidence that police used [petitioner's] earlier admission to forgery to induce him to waive his right to silence later: He declared his desire to tell police what happened to Hammer before the second interrogation session even began. As the Ohio Supreme Court reasonably concluded, there was simply 'no nexus' between [petitioner's] unwarned admission to forgery and his later, warned confession to murder." Moreover: "Four hours passed between [petitioner's] unwarned interrogation and his receipt of *Miranda* rights, during which time he traveled from the police station to a separate jail and back again; claimed to have spoken to his lawyer; and learned that police were talking to his accomplice and had found Hammer's body. Things had changed. Under *Seibert*, this significant break in time and dramatic change in circumstances created 'a new and distinct experience,' ensuring that [petitioner's] prior, unwarned interrogation did not undermine the effectiveness of the *Miranda* warnings he received before confessing to Hammer's murder."

Note: The Court issued its opinion in *Seibert* after the Ohio Supreme Court issued its opinion but while petitioner's petition for writ of certiorari was still pending. The Court noted that, in that procedural context, "it is thus an open question whether *Seibert* was 'clearly established Federal law'" under § 2254(d)(1) for purpose of reviewing the state court's decision. But the Court noted that "it is not necessary to decide that question here because *Seibert* is entirely consistent with the Ohio Supreme Court's decision."

Wetzel, Secretary, Penn. Dept. of Corrections v. Lambert, 565 US ___, 132 S Ct 1195, 182 L Ed 2d 35 (2012) (*per curiam*). In 1982, petitioner Lambert, along with Reese and Jackson, committed a robbery at

a bar (Prince's Lounge) that resulted in a homicide. At trial, Jackson was the principal witness against Lambert, who was convicted of capital murder and was sentenced to death. Almost 20 years later, Lambert filed a petition for post-conviction relief in state court based on an allegation that the state committed a *Brady* violation by failing to turn over a "police activity sheet" that contained a picture a man named Woodlock with the notations that he was "named as a co-defendant by Jackson" and that picture was shown to victims of the robbery but "no identification was made." Woodlock had admitted having committed numerous other similar bar robberies, but nothing in this case suggested that he ever was a suspect in this case and, apart from the "named as" reference, nothing suggested that Jackson ever had said that Woodlock was involved in *this* robbery. But Lambert contended that the sheet was exculpatory because it would have provided a basis to impeach Jackson's testimony at trial. The state argued, and the state post-conviction court agreed, that the "named as" reference was too ambiguous in context to be material (because it could have been a reference to some other robbery those two committed together) and that, in any event, Lambert suffered no prejudice because "Jackson already had been "extensively impeached at trial." The Pennsylvania Supreme Court agreed and affirmed. Lambert then filed a petition in federal court seeking *habeas corpus* relief under 28 USC § 2254 based on his claim that the state violated *Brady*. The district court denied the petition, but the Third Circuit reversed, holding "that it was 'patently unreasonable' for the Pennsylvania Supreme Court to presume that whenever a witness is impeached in one manner, any other impeachment evidence would be immaterial [because the new evidence] would have opened an entirely new line of impeachment given that the prosecutor at trial had relied on the fact that Jackson had consistently named Lambert as the third participant in the robbery." *Held*: Vacated and remanded. [1] 28 USC § 2254(d)(1) "precludes a federal court from granting a writ of habeas corpus to a state prisoner unless the state court's adjudication of his claim 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" The federal court "must determine what arguments or theories supported the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." [2] Although the state court's ruling was based on alternative grounds—*viz.*, the "named as" reference was too ambiguous, in context, to be material under *Brady* and that, in any event, Lambert was not prejudiced—but the Third Circuit's decision addressed only the second ground. The Third Circuit failed to address the state court's ruling that the reference to Woodlock was ambiguous and any connection to the robbery speculative. [3] "That ruling—on which we do not now opine—may well be reasonable, given that the activity sheet did not explicitly link Woodlock to the Prince's Lounge robbery, Jackson had committed a dozen other such robberies, Jackson was being held on several charges when the activity sheet was prepared, Woodlock's name appeared nowhere else in the Prince's Lounge files, and the two witnesses from the Prince's Lounge robbery who were shown Woodlock's photo did *not* identify him as involved in that crime." [4] "Any retrial here would take place *three decades* after the crime, posing the most daunting difficulties for the prosecution. That burden should not be imposed unless *each* ground supporting the state-court decision is examined and found to be unreasonable under AEDPA. ... The judgment of the Court of Appeals for the Third Circuit is vacated, and the case is remanded for proceedings consistent with this opinion."

Bobby, Warden v. Mitts, 563 US __, 131 S Ct 1762, 179 L Ed 2d 819 (2011) (*per curiam*). Petitioner was convicted in Ohio state court of two counts of capital murder. During the penalty-phase proceeding, the court instructed the jurors, in accordance with state law, that they first "must determine beyond a reasonable doubt whether the aggravating circumstances," which the defendant was found guilty of committing in the separate counts, "are sufficient to outweigh the mitigating factors you find are present in this case," and if the jurors so found, "then you must recommend to the Court that the sentence of death be imposed on him." The court also instructed the jurors that if they did not so find, then they could consider the various "life sentence" options that were available. The jurors imposed a death sentence. The judgment was affirmed by the state courts, and petitioner filed a petition in federal court seeking *habeas corpus* relief. The Sixth Circuit eventually held that the quoted instructions were "acquittal first" instructions that violated the rule announced in *Beck v. Alabama*, 447 US 625 (1980), and it vacated petitioner's death sentence. *Held*: Reversed. "The instructions here were surely not invalid under our decision in *Beck*." That decision—which held that it was error in a capital-murder prosecution, not to allow the jury to consider a lesser-included

offense—does not apply in the penalty-phase proceedings. “In *California v. Ramos*, 463 U S 992 (1983), we rejected an argument that *Beck* prohibited an instruction to ‘a capital sentencing jury regarding the Governor’s power to commute a sentence of life without possibility of parole.’ In so doing, we noted the fundamental difference between the nature of the guilt/innocence determination at issue in *Beck* and the nature of the life/death choice at the penalty phase. In light of that critical distinction, we observed that the concern of *Beck* regarding the risk of an unwarranted conviction is simply not directly translatable to the deliberative process in which the capital jury engages in determining the appropriate penalty.” The decisions of the state courts were not contrary to “clearly established Federal law” within the meaning of AEDPA.

Cullen, Acting Warden v. Pinholster, 563 US ___, 131 S Ct 1388, 179 L Ed 2d 557 (2011).

Petitioner and two accomplices broke into a house in the middle of the night and brutally beat and stabbed to death two men who happened to interrupt the burglary. A jury convicted petitioner of first-degree murder, and he was sentenced to death. At the penalty phase, the prosecution produced eight witnesses, who testified about petitioner’s history of threatening and violent behavior. Petitioner’s trial counsel, who unsuccessfully sought to exclude the aggravating evidence based on a defect in notice, called only petitioner’s mother; counsel did not call a psychiatrist, though they had consulted with Dr. Stalberg, who had diagnosed petitioner with antisocial personality disorder. Petitioner was sentenced to death. He twice sought *habeas corpus* relief in the California Supreme Court, alleging, *inter alia*, that his trial counsel had failed to adequately investigate and present mitigating evidence during the penalty phase, and he presented additional evidence to support this claim: school, medical, and legal records; and declarations from family members, one of his trial attorneys, and a psychiatrist who diagnosed him with bipolar mood disorder and seizure disorders, and who criticized Dr. Stalberg’s report. The state supreme court unanimously and summarily denied the claim on the merits. Subsequently, a federal district court held an evidentiary hearing and granted petitioner federal *habeas corpus* relief under 28 USC § 2254. Sitting *en banc* and over a strong dissent, the Ninth Circuit considered the new evidence presented in the district court and affirmed. *Held*: Reversed. [1] On the record before the state court, petitioner was not entitled to *habeas corpus* relief. To satisfy the “unreasonable application” prong in § 2254(d)(1), petitioner had to show that “there was no reasonable basis” for the state court’s summary decision based on *Strickland v. Washington*, 466 US 668 (1984), the clearly established federal law. To overcome the strong presumption that counsel has acted competently, a petitioner must show that counsel failed to act “reasonably considering all the circumstances,” and must prove the “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Review here is thus “doubly deferential.” The state-court record shows that his counsel acted strategically to get the prosecution’s aggravation witnesses excluded for lack of notice, and if that failed, to put on his mother as a mitigation witness. The record also shows that they had an unsympathetic client who had boasted about his criminal history during the guilt phase, leaving them with limited mitigation strategies. In addition, when Dr. Stalberg concluded that petitioner had no significant mental disorder or defect, he was aware of his medical and social history. “Given these impediments, it would have been a reasonable penalty-phase strategy to focus on evoking sympathy for petitioner’s mother.” [2] The Ninth Circuit misapplied *Strickland* when it drew from the Court’s recent cases a “constitutional duty to investigate” and a principle that it was *prima facie* ineffective for counsel to abandon an investigation based on rudimentary knowledge of petitioner’s background. The court “overlooked the constitutionally protected independence of counsel and ... the wide latitude counsel must have in making tactical decisions. Beyond the general requirement of reasonableness, specific guidelines are not appropriate. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions. *Strickland* itself rejected the notion that the same investigation will be required in every case.” Moreover, “*Strickland* specifically commands that a court must indulge the strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment. The Court of Appeals was required not simply to ‘give [the] attorneys the benefit of the doubt,’ but to affirmatively entertain the range of possible reasons Pinholster’s counsel may have had for proceeding as they did.” [3] “There is no reasonable probability that the additional evidence [petitioner] presented in his state habeas proceedings would have changed the verdict.” Given what little additional mitigating evidence petitioner presented in the state case, the Court could not say that the state court’s determination was unreasonable. [4] In *Williams v. Taylor*, 529 US 362 (2000), and *Rompilla v. Beard*, 545 US 374 (2005), the Court did not

apply AEDPA deference to the question of prejudice. Consequently, they lack the important “doubly deferential” standard of *Strickland* and AEDPA, and “offer no guidance with respect to whether a state court has *unreasonably* determined that prejudice is lacking.”

Thaler v. Haynes, 559 US ___, 130 S Ct 1171, 175 L Ed 2d 1003 (2010) (*per curiam*). Petitioner was charged with capital murder for killing a police officer. During *voir dire*, one judge presided over individual questioning but a second judge was presiding when the parties exercised peremptory challenges. When the prosecutor used a challenge against a prospective juror who was black, defense counsel asserted a *Batson* objection. The judge accepted the prosecutor’s demeanor-based justification as race-neutral and overruled the objection. Petitioner was convicted and sentenced to death. On direct review, the state appellate courts rejected petitioner’s argument that no deference can be granted to a trial judge’s ruling on a *Batson* objection when the judge did not personally observe the *voir dire*, and it affirmed that ruling. In petitioner’s subsequent *habeas corpus* proceeding, the Fifth Circuit vacated the conviction, holding that the state court’s ruling was not entitled to deference under AEDPA “because the state courts engaged in pure appellate fact-finding for an issue that turns entirely on demeanor.” *Held*: Reversed and remanded. [1] Neither of the Court’s previous decisions on *Batson* objections held or necessarily implied “that a demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalls the relevant aspect of the juror’s demeanor.” *Id.* at 1174. [2] Because “no decision of this Court clearly establishes the categorical rule on which the Court of Appeals appears to have relied,” that court erred under § 2254(d)(1) when it ruled that the state court’s ruling violated *Batson*. The Court remanded for reconsideration applying the AEDPA deference standard. *Id.* at 1175.

Smith v. Spisak, 558 US ___, 130 S Ct 676, 175 L Ed 2d 595 (2010). Petitioner was convicted of multiple murders and attempted murders, and the jury sentenced him to death. The Ohio courts affirmed his convictions and sentence on direct and collateral review, rejecting his claims that (1) the penalty-phase instructions violated the rules in *Mills v. Maryland*, 486 US 367 (1988), and *Beck v. Alabama*, 447 US 625 (1980), and (2) his trial counsel provided ineffective assistance during his closing argument. In subsequent review in federal court, the Sixth Circuit agreed with both of those claims and granted *habeas corpus* relief. *Held*: Reversed and remanded. [1] Unlike the instructions in *Mills*, the instructions in this case, reasonably construed, did not create “a substantial possibility that reasonable jurors” would have thought that they had to unanimously find a mitigating circumstance before they could consider it in the weighing process. Consequently, the state court’s ruling was not contrary to *Mills* within the meaning of § 2254(d)(1). 130 S Ct at 684. [2] The Sixth Circuit’s reliance on *Beck* also violated § 2254(d)(1) because no previous decision of the Court had extended *Beck* to the capital-sentencing process. *Id.*

Note: In his concurring opinion, Justice Stevens would have held that the Ohio capital-sentencing statutory scheme, which requires the jury to “acquit” unanimously on the death sentence before considering life-sentence options, constitutes an impermissible acquittal-first scheme that violates *Beck*. But he would have held that that error was harmless in this case.

Porter v. McCollum, 558 US ___, 130 S Ct 447, 175 L Ed 2d 398 (2009) (*per curiam*). Petitioner, while intoxicated, broke into the residence of Williams, his former girlfriend, and shot and killed her and her current boyfriend. He eventually pleaded guilty to two counts of capital murder. In the penalty phase, his trial counsel, who had not previously handled a capital case and had done virtually no background investigation, called only one witness and presented almost no mitigating evidence. The jury recommended death on both convictions, and the court found no mitigating circumstances and sentenced him to death on his conviction for murdering Williams. In his subsequent state post-conviction proceeding, petitioner presented extensive evidence of “his abusive childhood, his heroic military service [during active combat in Korea] and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity.” The post-conviction court rejected his claims of ineffective assistance of counsel by finding that he was not prejudiced, and the Florida Supreme Court, in a split decision, affirmed on that basis. Petitioner then filed a § 2254 petition, and the district court granted *habeas corpus* relief, ruling that petitioner’s counsel provided ineffective assistance and that he suffered prejudice as a result. The Eleventh Circuit reversed. *Held*: Reversed and remanded. [1] Petitioner’s trial counsel failed to provide

effective assistance by not conducting an adequate background investigation. *Id.* at 453. [2] The state courts unreasonably applied *Strickland* by finding that petitioner did not suffer prejudice. To assess whether there is a reasonable possibility that he would have received a different sentence, “we consider the totality of the available mitigation evidence adduced in the habeas proceeding and reweigh it against the evidence in aggravation.” The state courts, in particular, “unreasonably discounted the evidence of petitioner’s childhood abuse and military service.” *Id.* at 455.

Panetti v. Quarterman, 551 US 930, 127 S Ct 2842, 168 L Ed 2d 662 (2007). Petitioner was convicted of capital murder for murdering his in-laws, and he was sentenced to death. Although he suffers from various mental disorders, he was found competent to stand trial and represent himself. The state courts affirmed the judgment, and his petition for *habeas corpus* relief (which did not include a *Ford v. Wainwright* claim) was denied. When the state set an execution date, petitioner filed a motion in state court claiming he is exempt from execution because he is mentally incompetent under the *Ford* standard. The state court denied his claim, and he filed a successive petition for *habeas corpus* in federal court. The district court denied his petition. *Held*: Reversed and remanded. [1] Petitioner’s *Ford*-based petition is not a successive petition subject to 28 USC § 2244(b)(2). *Id.* at 947. [2] Deference under AEDPA is not warranted because the state court failed to provide the minimum procedures required by *Ford* when determining his competence. *Id.* at 945. [3] The test applied by the court of appeals was “too restrictive to afford [petitioner] the protections granted by the Eighth Amendment.” Although petitioner knew that he had been sentenced to death for murdering his in-laws, his mental disorders allegedly caused him to believe he was being executed to stop him from preaching. *Ford* requires that the inmate must “comprehend” or be aware of, at least, the reasons for his execution. The Court remanded for reconsideration. *Id.* 956-57.

Uttecht v. Brown, 551 US 1, 127 S Ct 2218, 167 L Ed 2d 1014 (2007). Petitioner was convicted of capital murder and sentenced to death. The state courts affirmed the judgment. In his *habeas corpus* petition, petitioner alleged that the trial court improperly excluded for cause several prospective jurors for expressing opposition to the death penalty. The district court denied the petition, but Ninth Circuit reversed, agreeing with respect to one juror, even though defense counsel had not objected to the prosecutor’s challenge to that juror. *Held*: Reversed, reinstating district court’s judgment. [1] The Washington Supreme Court’s opinion discloses that it correctly identified the applicable rule and applied an abuse-of-discretion standard—“there is no requirement . . . that a state appellate court make particular reference to the excusal of each juror.” *Id.* at 17. [2] “From our own review of the state trial court’s ruling, we conclude that the trial court acted well within its discretion in granting the State’s motion to excuse Juror Z.” *Id.* at 17. Even though “there is no independent federal requirement that a defendant in state court object to the prosecution’s challenge,” and Washington law did not require a specific objection, the federal court may “take into account voluntary acquiescence to, or confirmation of, a juror’s removal.” *Id.* at 18. A failure to object deprives the trial court of an opportunity to avoid the error or explain its ruling and deprives a reviewing court of an adequate record. Moreover, it could have been a tactical decision. *Id.* at 18-9.

Abdul-Kabir v. Quarterman, 550 US 233, 127 S Ct 1654, 167 L Ed 2d 585 (2007). Petitioner was tried and sentenced to death before *Penry I*, and the state courts affirmed the judgment despite his claim that the penalty-phase questions did not all for adequate consideration of the his mitigating evidence (unhappy childhood and impulse-control disorder). The Fifth Circuit rejected his petition for *habeas corpus*, and the Supreme Court remanded for reconsideration in light of *Tennard v. Dretke*, 542 US 274 (2004). On remand, the Fifth Circuit, applying AEDPA, again denied his petition, concluding that when the Texas courts affirmed his sentence in 1999 the law was unsettled whether the defendant must establish a nexus between his mitigating evidence and his criminal conduct, which petitioner had failed to show. *Held*: Reversed. Under AEDPA, the essential question is whether the rule announced in that case was “clearly established Federal law” insofar as its application to petitioner’s mitigating evidence at the time the state courts finally affirmed the judgment in 1999. *Id.* at 246. Piecing together the Court’s seemingly conflicting jurisprudence at that time, the majority concluded that given the nature of petitioner’s mitigating evidence and the

instructions given in the penalty phase, it was clearly established in 1999 that the death sentence violates the rule in *Penry I*. *Id.* 257-58.

Note: In an entertaining dissent, Chief Justice Roberts commented: “We give ourselves far too much credit in claiming that our sharply divided, ebbing and flowing decisions in this area gave rise to ‘clearly established’ federal law. . . . When the state courts considered these cases, our precedents did not provide them with ‘clearly established’ law, but instead a dog’s breakfast of divided, conflicting, and ever-changing analyses.” *Id.* at 266-67.

See also Brewer v. Quarterman, 550 US 286, 127 S Ct 1706, 167 L Ed 2d 622 (2007) (similar; mitigating evidence: depression, abusive father, substance abuse).

Brown v. Payton, 544 US 133, 125 S Ct 1432, 161 L Ed 2d 334 (2005). In petitioner’s federal *habeas corpus* challenge to his death sentence, the Ninth Circuit misapplied AEDPA’s deferential review standard, 28 USC § 2254(d)(1), when it ruled that the California Supreme Court violated federal law when it held, applying *Boyde v. California*, that there was no reasonable likelihood that the prosecutor’s penalty-phase argument and the trial court’s instructions misled the jurors to believe that they were obliged to disregard petitioner’s mitigating evidence. *Id.* at 143.

Bell v. Cone, 543 US 447, 125 S Ct 847, 160 L Ed 2d 881 (2005) (*per curiam*): Petitioner was convicted of aggravated murder and was sentenced to death on a finding that the murder “was especially heinous, atrocious, or cruel.” The state supreme court affirmed the judgment on direct appeal, concluding that the evidence supported that factor. Petitioner eventually filed a § 2254 petition for *habeas corpus* relief, and the Sixth Circuit granted relief on the ground that the “especially heinous” factor is unconstitutionally vague in violation of the Eighth Amendment. *Held:* Reversed. In determining whether an aggravating factor is unconstitutionally vague, the federal court must attempt to determine whether the state courts have further defined the vague terms in a manner that provides sufficient guidance to the sentencer. Because the state supreme court previously had adopted a constitutionally sufficient narrowing construction of the factor, the circuit court could not presume that it had not applied that narrowed construction in this case. “Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.” *Id.* at 455-56.

Holland v. Jackson, 542 US 649, 124 S Ct 2736, 159 L Ed 2d 683 (2004) (*per curiam*). Petitioner was convicted of murder based on the testimony of Hughes, and his conviction was affirmed on direct appeal and in a subsequent state post-conviction proceeding. Seven years after the conviction, petitioner filed a motion for new post-conviction trial based on an allegedly newly discovered witness. The state court denied the motion, ruling (a) that he failed to establish an adequate excuse for failing to present that evidence at the prior trial and (b) that, in any event, he failed to establish that his trial counsel would have elicited favorable evidence from the new witness. The Sixth Circuit granted petitioner *habeas corpus* relief, concluding that the state court unreasonably applied *Strickland* because the newly proffered evidence would have undermined the credibility of Hughes. *Held:* Reversed and remanded. The Sixth Circuit erred in granting relief on the ground that the state court misapplied the *Strickland* standard by applying a preponderance-of-the-evidence standard. The state court correctly recited the “reasonable probability” standard from *Strickland* and properly used “preponderance” in relation to petitioner’s state-law burden of proof on factual issues. A state court’s use of shorthand formulations does not provide a basis for relief. *Id.* at 654-55.

Mitchell v. Esparza, 540 US 12, 124 S Ct 7, 157 L Ed 2d 263 (2003) (*per curiam*). Acting alone, petitioner robbed a store and murdered a clerk. He was charged *inter alia* with aggravated felony murder, was tried, convicted on that charge, and was sentenced to death. He petitioned for post-conviction relief on the ground that the indictment was insufficient to charge capital murder because that count failed to allege and the state thus failed to prove, as required, that he was the “principal offender.” The court rejected that claim as harmless, because he was the only actor, and that ruling was affirmed on appeal. In a § 2254 *habeas corpus* proceeding, the Sixth Circuit vacated the death sentence, concluding the failure to allege the “principal offender” language cannot be harmless error under the Eighth Amendment because that allegation was necessary to render him eligible for the death penalty. *Held:* Reversed. [1] “In noncapital cases, we

have held that the trial court’s failure to instruct the jury on all of the statutory elements of an offense is subject to harmless-error analysis. ... We cannot say that because the violation occurred in the context of capital sentencing proceeding that our precedent requires the opposite result.” Consequently, the Sixth Circuit “exceeded its authority under § 2254(d)(1)” because “a federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous.” *Id.* at 16-18. [2] Because petitioner was the only one charged in the indictment and the evidence at trial established that he was the only assailant, the state court properly determined that the failure to allege and prove the “principal offender” factor is harmless. *Id.* at 18-19.

Woodford v. Visciotti, 537 US 19, 123 S Ct 357, 154 L Ed 2d 279 (2002) (*per curiam*). Petitioner shot and killed one man and severely wounded another during a robbery; he received a death sentence. The California Supreme Court determined that petitioner’s counsel had performed deficiently, but that petitioner had not suffered prejudice; the federal district court disagreed and granted a writ of *habeas corpus*. The Ninth Circuit Court of Appeals concluded that the California Supreme Court decision ran afoul of both the “contrary to” and the “unreasonable application” conditions of 28 USC § 2254(d)(1), and it affirmed the district court’s grant of relief. *Held*: [1] *Strickland v. Washington*, 466 US 668 (1984), held that to prove prejudice the defendant must establish a *reasonable probability* that, but for counsel’s unprofessional errors, the result of the proceeding would have been different; it specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered. The California Supreme Court correctly applied that test, despite its occasional use in its opinion of the term “probable,” rather than “reasonably probable.” *Id.* at 22-25. [2] Under the “unreasonable application” clause in § 2254(d), a federal court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied *Strickland* incorrectly. Rather, it is the applicant’s burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. “An *unreasonable* application of federal law is different from an *incorrect* application of federal law.” *Id.* at 24-25.

(d) AEDPA limitations—“unreasonable determination of the facts” (§ 2254(d)(1))

Wilson, Superintendent v. Corcoran, 562 US ___, 131 S Ct 13, 178 L Ed 2d 276 (2010) (*per curiam*). Defendant was convicted by a jury of murdering four people and was sentenced to death by a judge after weighing aggravating circumstances. The Indiana Supreme Court remanded for reconsideration, because the sentencing judge’s remarks on the record could be construed that he had considered inappropriate factors. On remand, the judge clarified his remarks and reimposed a death sentence. The state supreme court accepted his clarification and affirmed. Eventually, the Seventh Circuit reversed, concluding that the state supreme court had made an “unreasonable determination of the facts,” 28 USC § 2254(d)(2), when it accepted the trial court’s representation that it did not rely on those factors as aggravating circumstances. *Held*: Reversed. [1] Section 2254(d)(2) “allows habeas petitioners to avoid the bar to habeas relief imposed with respect to federal claims adjudicated on the merits in state court by showing that the state court’s decision was ‘based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’ It does not repeal the command of § 2254(a) that habeas relief may be afforded to a state prisoner ‘only on the ground’ that his custody violates federal law.” [2] “It is not enough to note that a habeas petitioner *asserts* the existence of a constitutional violation; unless the federal court agrees with that assertion, it may not grant relief.” Because the Seventh Circuit did not find that the state court violated federal law, its disagreement with the state court’s factual finding provides no basis for relief.

Jefferson v. Upton, 560 US ___, 130 S Ct 2217, 176 L Ed 2d 1032 (2010) (*per curiam*). Petitioner was sentenced to death for murdering a coworker. Petitioner sought post-conviction relief in state court, arguing that his lawyers were constitutionally inadequate because they did not investigate and present as mitigating evidence that he suffered a traumatic head injury as a child. His trial counsel explained that they did not pursue that issue because their psychiatrist expert opined that it would be “a waste of time.” The judge denied the petition and asked the state attorney *ex parte* to draft the opinion of the court. The court adopted verbatim that draft opinion, finding that counsel’s decision was “reasonable” (albeit citing testimony

that had not actually been received). The Georgia Supreme Court affirmed the judgment. Petitioner next sought federal *habeas corpus* relief and argued that the court should not grant any deference to the findings of the state court. The district court granted petitioner relief, despite accepting the state court's factual findings. The Eleventh Circuit reversed, holding the findings were binding per § 2254(d)(8). *Held*: Vacated and remanded. Under federal law before enactment of AEDPA, the Court decided whether to give deference to the state court's fact finding by determining if any of eight exceptions later enumerated into § 2254(d) apply. When petitioner suggested that other provisions enumerated in § 2254(d) were at issue, § 2254(d)(8) is not the only relevant statutory exception. Petitioner implicitly argued the state court's process was deficient, and hence not entitled to deference per § 2254(d)(2) and (6), by arguing that the federal courts "should harbor serious doubts about" the "findings of fact and credibility determinations" made by the state court because those findings were drafted by the state. The Eleventh Circuit thus erred by considering only § 2254(d)(8). The Court remanded for consideration of the other possible exceptions.

Notes: The majority opinion expressed no opinion as to whether petitioner's Sixth Amendment rights were violated if the state court's factual findings to be true. The Court also noted that it has not yet considered whether a trial court's "verbatim adoption of findings of fact prepared by the prevailing party" is permissible where, as in this case, "a judge solicits the proposed findings *ex parte*, (2) does not provide the opposing party an opportunity to criticize the findings or to submit his own, and (3) adopts findings that contain internal evidence suggesting that the court may not have read them."

Wood v. Allen, 558 US ___, 130 S Ct 841, 175 L Ed 2d 738 (2010). Petitioner was convicted of murder and was sentenced to death. In his state post-conviction proceeding, he alleged that his trial counsel provided ineffective assistance by not developing and presenting evidence that he is mentally retarded. The court affirmed the death sentence, finding that petitioner failed to prove that he is mentally retarded, that his counsel made a strategic decision not to present that evidence, and that he failed to prove prejudice. The Alabama appellate courts affirmed. Petitioner then filed a § 2254 petition, and the district court granted *habeas corpus* relief, concluding that the state court's finding that it was a strategic decision was an unreasonable determination of the facts within the meaning of § 2254(d)(2). The Eleventh Circuit reversed, ruling that petitioner failed to carry the "clear and convincing evidence" standard of proof required by § 2254(e)(1). *Held*: Affirmed. It is not necessary to resolve whether the more deferential standard in § 2254(e)(1) applies in this context because "under § 2254(d)(2), the state court's finding that [petitioner's] counsel made a strategic decision not to pursue or present evidence of [his] mental deficiencies was not an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding." *Id.* at 851. "[A] state court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Id.* at 849.

Note: The majority opinion expressly did not resolve whether the strategic decision was a reasonable one under *Strickland*, but it did note that presentation of that evidence might have opened the door to admission in rebuttal of damaging prior-crimes evidence that had been excluded.

Schriro v. Landrigan, 550 US 465, 127 S Ct 1933, 167 L Ed 2d 836 (2007). After a long history of violent crime, including a previous murder, petitioner escaped from prison and murdered a man during a burglary. He was found guilty of capital murder by a jury. At sentencing (before the court), petitioner's counsel attempted to present mitigating evidence through petitioner's ex-wife and birth mother but petitioner refused to allow them to testify. In a direct colloquy, petitioner insisted that he did not want any mitigating evidence to be presented and taunted the court to impose a death sentence: "just bring it on." The court did. In his state post-conviction proceeding, petitioner alleged that his counsel should have investigated and presented mitigating evidence despite his refusal to cooperate. The court rejected that claim, and the judgment was affirmed on appeal. Petitioner repeated that claim in his *habeas corpus* petition. The district court refused to grant an evidentiary hearing and dismissed his petition. The Ninth Circuit reversed. *Held*: Reversed, affirming district court. [1] AEDPA continues the rule that the decision to grant an evidentiary hearing in a *habeas corpus* proceeding is left to the discretion of the district court. Under AEDPA, the state court's factual findings are presumed correct unless the petitioner rebuts that by "clear and convincing evidence," 28 USC § 2254(e)(1), and the district court may not reverse the state-court judgment unless it "was based on an unreasonable determination of the facts," § 2254(d)(2). A district court "must

take into account those standards in deciding whether an evidentiary hearing is appropriate,” and “if the record refused the petitioner’s factual allegations or otherwise precludes *habeas corpus* relief, a district court is not required to hold an evidentiary hearing.” *Id.* 473-74. [2] The state court finding that petitioner refused to allow his counsel to present mitigating evidence was a reasonable determination of the facts. Moreover, the court was entitled to conclude that petitioner would have prevented his counsel from presenting whatever mitigating evidence he might have uncovered, and hence that petitioner suffered no prejudice. Thus, the court did not abuse its discretion in refusing to grant an evidentiary hearing. *Id.* at 477. [3] This case is unlike *Wiggins v. Smith*, 539 US 410 (2003), and *Rompilla v. Beard*, 545 US 374 (2005), because here petitioner directly interfered with his counsel’s attempt to present mitigating evidence at the sentencing hearing. *Id.* at 478. [4] Petitioner’s claim that the record fails to show that his waiver was “informed and knowing” fails: (a) “We have never imposed an ‘informed and knowing’ requirement upon a defendant’s decision not to present evidence” and “we have never required a specific colloquy to ensure that a defendant knowingly and intelligently refused to present mitigating evidence.”; (b) that claim is procedurally defaulted; and (c) the record clearly shows that defendant knew what he was doing. *Id.* at 479-80. [5] In any event, petitioner proffered new evidence adds nothing beyond what he had thwarted his counsel from presenting at the sentencing hearing. *Id.* at 480.

Bradshaw v. Richey, 546 US 74, 126 S Ct 602, 163 L Ed 2d 407 (2005) (*per curiam*). Petitioner set fire to an apartment building with the intent to kill his ex-girlfriend and her new boyfriend; they escaped but a 2-year-old child of their neighbor died. Petitioner was convicted of arson and aggravated murder and was sentenced to death. His convictions and sentence were affirmed in the state court on direct appeal and in post-conviction, the district court denied petitioner’s § 2254 petition, but the Sixth Circuit granted relief on two grounds: (a) under state law, transferred intent was not a valid basis to support petitioner’s conviction for intentional murder and sentence of death; and (b) in any event, his trial counsel provided ineffective assistance *vis-à-vis* the forensic evidence establishing arson. *Held*: Reversed and remanded. [1] “[A] state court’s interpretation of state law, including one announced on direct appeal of the challenged conviction, binds the federal court sitting in *habeas corpus*.” *Id.* at 76. [2] “[T]he Sixth Circuit erred in its adjudication of [petitioner’s *Strickland* claim] by relying on evidence that was not properly presented to the state *habeas* courts without first determining (1) whether [petitioner] was at fault for failing to develop the factual bases for his claims in state court, or (2) whether [petitioner] satisfied the criteria established by 28 USC § 2254(e)(2). Similarly, the Sixth Circuit erred by disregarding the state *habeas* courts’ conclusion that the forensic expert whom [petitioner’s] trial counsel hired was a ‘properly qualified expert’ without analyzing whether the state court’s factual finding had been rebutted by clear and convincing evidence [under] 28 USC § 2254(e)(1). In addition, . . . the Sixth Circuit erred in relying on certain grounds that were apparent from the trial record but not raised on direct appeal . . . without first determining whether [petitioner’s] procedural default of these subclaims could be excused by a showing of cause and prejudice or by the need to avoid a miscarriage of justice.” *Id.* at 79.

8. Claims of Ineffective Assistance of Counsel

Cullen, Acting Warden v. Pinholster, 563 US ___, 131 S Ct 1388, 179 L Ed 2d 557 (2011). Petitioner and two accomplices broke into a house in the middle of the night and brutally beat and stabbed to death two men who happened to interrupt the burglary. A jury convicted petitioner of first-degree murder, and he was sentenced to death. At the penalty phase, the prosecution produced eight witnesses, who testified about petitioner’s history of threatening and violent behavior. Petitioner’s trial counsel, who unsuccessfully sought to exclude the aggravating evidence based on a defect in notice, called only petitioner’s mother; counsel did not call a psychiatrist, though they had consulted with Dr. Stalberg, who had diagnosed petitioner with antisocial personality disorder. Petitioner was sentenced to death. He twice sought *habeas corpus* relief in the California Supreme Court, alleging, *inter alia*, that his trial counsel had failed to adequately investigate and present mitigating evidence during the penalty phase, and he presented additional evidence to support this claim: school, medical, and legal records; and declarations from family members, one of his trial attorneys, and a psychiatrist who diagnosed him with bipolar mood disorder and seizure disorders, and who criticized Dr. Stalberg’s report. The state supreme court unanimously and summarily denied the claim on the

merits. Subsequently, a federal district court held an evidentiary hearing and granted petitioner federal *habeas corpus* relief under 28 USC § 2254. Sitting *en banc* and over a strong dissent, the Ninth Circuit considered the new evidence presented in the district court and affirmed. *Held*: Reversed. [1] The district court erred in ruling that an evidentiary hearing was not barred by § 2254(e)(2). [2] Remand for a properly limited review is inappropriate here, because the Ninth Circuit ruled, in the alternative, that petitioner was entitled to *habeas corpus* relief based on the state-court record alone. [3] On the record before the state court, petitioner was not entitled to *habeas corpus* relief. To satisfy the “unreasonable application” prong in § 2254(d)(1), petitioner had to show that “there was no reasonable basis” for the state court’s summary decision based on *Strickland v. Washington*, 466 US 668 (1984), the clearly established federal law. To overcome the strong presumption that counsel has acted competently, a petitioner must show that counsel failed to act “reasonably considering all the circumstances,” and must prove the “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Review here is thus “doubly deferential.” The state-court record shows that his counsel acted strategically to get the prosecution’s aggravation witnesses excluded for lack of notice, and if that failed, to put on his mother as a mitigation witness. The record also shows that they had an unsympathetic client who had boasted about his criminal history during the guilt phase, leaving them with limited mitigation strategies. In addition, when Dr. Stalberg concluded that petitioner had no significant mental disorder or defect, he was aware of his medical and social history. “Given these impediments, it would have been a reasonable penalty-phase strategy to focus on evoking sympathy for petitioner’s mother.” [5] The Ninth Circuit misapplied *Strickland* when it drew from the Court’s recent cases a “constitutional duty to investigate” and a principle that it was *prima facie* ineffective for counsel to abandon an investigation based on rudimentary knowledge of petitioner’s background. The court “overlooked the constitutionally protected independence of counsel and ... the wide latitude counsel must have in making tactical decisions. Beyond the general requirement of reasonableness, specific guidelines are not appropriate. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions. *Strickland* itself rejected the notion that the same investigation will be required in every case.” Moreover, “*Strickland* specifically commands that a court must indulge the strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment. The Court of Appeals was required not simply to ‘give [the] attorneys the benefit of the doubt,’ but to affirmatively entertain the range of possible reasons Pinholster’s counsel may have had for proceeding as they did.” [6] Even if his trial counsel had performed deficiently, petitioner also failed to show that the state court must have unreasonably concluded that he was not prejudiced. To establish prejudice, the aggravating evidence is reweighed “against the totality of available mitigating evidence.” Here, the state presented extensive aggravating evidence at both the guilt and penalty phases, and the mitigating evidence consisted primarily of the penalty-phase testimony of petitioner’s mother and guilt-phase testimony given by his brother. After considering the evidence, the jury returned a sentence of death, which the state trial court found supported overwhelmingly by the weight of the evidence. [7] “There is no reasonable probability that the additional evidence [petitioner] presented in his state habeas proceedings would have changed the verdict. The ‘new’ evidence largely duplicated the mitigation evidence [of his mother and brother] at trial. ... To the extent that there were new factual allegations or evidence, much of it is of questionable mitigating value.” Testimony by petitioner’s new expert would have opened the door to rebuttal by a state expert; and new evidence relating to petitioner’s substance abuse, mental illness, and criminal problems “is also by no means clearly mitigating, as the jury might have concluded that [he] was simply beyond rehabilitation.” The remaining new material in the state *habeas corpus* record is sparse. Given what little additional mitigating evidence petitioner presented in the state case, the Court could not say that the state court’s determination was unreasonable. [6] In *Williams v. Taylor*, 529 US 362 (2000), and *Rompilla v. Beard*, 545 US 374 (2005), the Court did not apply AEDPA deference to the question of prejudice. Consequently, they lack the important “doubly deferential” standard of *Strickland* and AEDPA, and “offer no guidance with respect to whether a state court has *unreasonably* determined that prejudice is lacking.”

Sears v. Upton, 561 US ___, 130 S Ct 3259, 177 L Ed 2d 1025 (2010) (*per curiam*). Petitioner was convicted of capital murder and was sentenced to death in Georgia based on his role in a robbery/kidnapping that started there but culminated in the victim’s murder in Kentucky. In the penalty phase, his counsel

“presented evidence describing his childhood as stable, loving, and essentially without incident” in a calculated attempt “to portray the adverse impact of his execution on family and loved ones.” In his state post-conviction proceeding, he presented evidence of a troubled childhood, including abusive parents and possible sexual abuse, and that he had suffered “significant frontal lobe abnormalities” that caused mental and emotional disabilities. The state court found that trial counsel’s investigation was inadequate for failing to have discovered that evidence, but it concluded that petitioner was not sufficiently prejudiced to warrant relief because his trial counsel had presented a substantial mitigation defense. The Georgia Supreme Court summarily affirmed. *Held*: Reversed and remanded for reconsideration (in a 5-4 decision). [1] Even if trial counsel’s decision was reasonable, that “does not obviate the need to analyze whether his failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced” petitioner. [2] The state court “failed to apply the proper prejudice inquiry”: the Court never has held “that counsel’s effort to present *some* mitigation effort should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry required precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below.” The Court remanded for reconsideration of the prejudice ruling.

Note: Justice Scalia’s dissent argued that the state court *had* engaged in the proper prejudice analysis by asking “whether the jury’s mind would probably have changed ... by substituting petitioner’s new mitigation theory for the reasonable mitigation theory that was presented [by trial counsel] and rejected.”

Wood v. Allen, 558 US ___, 130 S Ct 841, 175 L Ed 2d 738 (2010). Petitioner was convicted of murder and was sentenced to death. In his state post-conviction proceeding, he alleged that his trial counsel provided ineffective assistance by not developing and presenting evidence that he is mentally retarded. The court affirmed the death sentence, finding that petitioner failed to prove that he is mentally retarded, that his counsel made a strategic decision not to present that evidence, and that he failed to prove prejudice. The Alabama appellate courts affirmed. Petitioner then filed a § 2254 petition, and the district court granted *habeas corpus* relief, concluding that the state court’s finding that it was a strategic decision was an unreasonable determination of the facts within the meaning of § 2254(d)(2). The Eleventh Circuit reversed, ruling that petitioner failed to carry the “clear and convincing evidence” standard of proof required by § 2254(e)(1). *Held*: Affirmed. It is not necessary to resolve whether the more deferential standard in § 2254(e)(1) applies in this context because “under § 2254(d)(2), the state court’s finding that [petitioner’s] counsel made a strategic decision not to pursue or present evidence of [his] mental deficiencies was not an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding.” *Id.* at 851. “[A] state court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.” *Id.* at 849.

Note: The majority opinion expressly did not resolve whether the strategic decision was a reasonable one under *Strickland*, but it did note that presentation of that evidence might have opened the door to admission in rebuttal of damaging prior-crimes evidence that had been excluded.

Smith v. Spisak, 558 US ___, 130 S Ct 676, 175 L Ed 2d 595 (2010). Petitioner was convicted of multiple murders and attempted murders, and the jury sentenced him to death. The Ohio courts affirmed his convictions and sentence on direct and collateral review, rejecting his claim that his trial counsel provided ineffective assistance during his closing argument. In subsequent review in federal court, the Sixth Circuit agreed and granted *habeas corpus* relief. *Held*: Reversed and remanded. Given the compelling facts, even if trial counsel’s closing argument was inadequate for over-emphasizing negative factors and under-emphasizing or ignoring possible positive factors, “we do not find that the assumed deficiencies ... raise ‘a reasonable probability that,’ but for the deficient closing, ‘the result of the proceeding would have been different.’” *Id.* at 687. Consequently, the state court’s ruling was not contrary to *Strickland* within the meaning of § 2254(d)(1). *Id.*

Porter v. McCollum, 558 US ___, 130 S Ct 447, 175 L Ed 2d 398 (2009) (*per curiam*). Petitioner, while intoxicated, broke into the residence of Williams, his former girlfriend, and shot and killed her and her current boyfriend. He eventually pleaded guilty to two counts of capital murder. In the penalty phase, his trial counsel, who had not previously handled a capital case and had done virtually no background

investigation, called only one witness and presented almost no mitigating evidence. The jury recommended death on both convictions, and the court found no mitigating circumstances and sentenced him to death on his conviction for murdering Williams. In his subsequent state post-conviction proceeding, petitioner presented extensive evidence of “his abusive childhood, his heroic military service [during active combat in Korea] and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity.” The post-conviction court rejected his claims of ineffective assistance of counsel by finding that he was not prejudiced, and the Florida Supreme Court, in a split decision, affirmed on that basis. Petitioner then filed a § 2254 petition, and the district court granted *habeas corpus* relief, ruling that petitioner’s counsel provided ineffective assistance and that he suffered prejudice as a result. The Eleventh Circuit reversed. *Held*: Reversed and remanded. [1] Petitioner’s trial counsel failed to provide effective assistance by not conducting an adequate background investigation. Although “counsel described petitioner as fatalistic and uncooperative,” petitioner did not forbid him from investigating and the military-service, medical, mental-health, and educational records were available to him. *Id.* at 453. [2] The state courts unreasonably applied *Strickland* by finding that petitioner did not suffer prejudice. To assess whether there is a reasonable possibility that he would have received a different sentence, “we consider the totality of the available mitigation evidence adduced in the habeas proceeding and reweigh it against the evidence in aggravation.” The state courts, in particular, “unreasonably discounted the evidence of petitioner’s childhood abuse and military service.” *Id.* at 455.

Wong v. Belmontes, 558 US ___, 130 S Ct 383, 175 L Ed 2d 328 (2009) (*per curiam*). Based on crimes he committed in 1981, petitioner was convicted of murder and was sentenced to death. During the penalty phase, petitioner’s trial counsel successfully kept out evidence that petitioner previously had committed an unrelated murder. The California courts affirmed his convictions and death sentence. Petitioner then filed a § 2254 petition. The district court denied his petition, finding that his trial counsel failed to provide constitutionally effective assistance by not presenting additional mitigating evidence during the penalty phase but that he did not prove that he suffered prejudice. The Ninth Circuit reversed, ruling that petitioner was prejudiced. *Held*: Reversed and remanded. [1] “In evaluating [whether petitioner suffered prejudice], it is necessary to consider *all* the relevant evidence that the jury would have had before it if [petitioner’s counsel] had pursued the different path—not just the mitigation evidence [counsel] could have presented, but also [evidence of petitioner’s previous murder] that almost certainly would have come in with it.” Some of the additional mitigating evidence would have been merely cumulative and the rest would have triggered admission of the aggravating evidence of his other murder. *Id.* at 386. [2] The additional testimony from petitioner’s new expert did not establish prejudice because, “The jury simply did not need expert testimony to understand the ‘humanizing’ evidence; it could use its common sense or own sense of mercy.” Moreover, such testimony also may have triggered admission of the aggravating evidence. *Id.* at 388. [3] In evaluating prejudice, the Ninth Circuit erroneously disregarded the state court’s finding that petitioner “was convicted on extremely strong evidence that he committed an intentional murder of extraordinary brutality.” *Id.* at 390. [4] The Ninth Circuit applied an incorrect standard: “*Strickland* does not require the State to ‘rule out’ a sentence of life in prison to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a ‘reasonable probability’ that the result would have been different.” Petitioner did not carry that burden. *Id.* at 390-91.

Bobby v. Van Hook, 558 US ___, 130 S Ct 13, 175 L Ed 2d 255 (2009) (*per curiam*). In 1986, petitioner was convicted of murder and was sentenced to death. The Ohio courts affirmed his convictions and death sentence. Petitioner then filed a § 2254 petition in which he contended *inter alia* that his trial counsel provided ineffective assistance in the penalty phase. The district court denied all of his claims but the Sixth Circuit, relying on the 2003 version of the ABA’s “guidelines” for capital-defense counsel, ruled that petitioner’s trial counsel failed to provide constitutionally effective assistance. *Held*: Reversed and remanded. [1] “Judging counsel’s conduct in the 1980s on the basis of these 2003 Guidelines—without even pausing to consider whether they reflected the prevailing professional practice at the time of trial—was error.” Under *Strickland*, ABA standards “are ‘only guides’ to what reasonableness means, not its definition.” *Id.* at 17. [2] Petitioner did not prove that his trial counsel did not provide effective assistance by not investigating further. The additional evidence, from more-distant relatives, was merely cumulative;

the state courts found that the additional testimony “would have added nothing of value” and that petitioner “has not shown why the minor additional details ... would have made any difference.” *Id.* 19-20.

Schriro v. Landrigan, 550 US 465, 127 S Ct 1933, 167 L Ed 2d 836 (2007). After a long history of violent crime, including a previous murder, petitioner escaped from prison and murdered a man during a burglary. He was found guilty of capital murder by a jury. At sentencing (before the court), petitioner’s counsel attempted to present mitigating evidence through petitioner’s ex-wife and birth mother but petitioner refused to allow them to testify. In a direct colloquy, petitioner insisted that he did not want any mitigating evidence to be presented and taunted the court to impose a death sentence: “just bring it on.” The court did. In his state post-conviction proceeding, petitioner alleged that his counsel should have investigated and presented mitigating evidence despite his refusal to cooperate. The court rejected that claim, and the judgment was affirmed on appeal. Petitioner repeated that claim in his *habeas corpus* petition. The district court refused to grant an evidentiary hearing and dismissed his petition. The Ninth Circuit reversed. **Held:** Reversed, affirming district court. [1] The state court’s finding that petitioner refused to allow his counsel to present mitigating evidence was a reasonable determination of the facts. Moreover, the court was entitled to conclude that petitioner would have prevented his counsel from presenting whatever mitigating evidence he might have uncovered, and hence that petitioner suffered no prejudice. [2] This case is unlike *Wiggins v. Smith*, 539 US 410 (2003), and *Rompilla v. Beard*, 545 US 374 (2005), because here petitioner directly interfered with his counsel’s attempt to present mitigating evidence at the sentencing hearing. *Id.* at 478. [3] Petitioner’s claim that the record fails to show that his waiver was “informed and knowing” fails: (a) “We have never imposed an ‘informed and knowing’ requirement upon a defendant’s decision not to present evidence” and “we have never required a specific colloquy to ensure that a defendant knowingly and intelligently refused to present mitigating evidence.”; (b) that claim is procedurally defaulted; and (c) the record clearly shows that defendant knew what he was doing. *Id.* at 479-80. [4] In any event, petitioner proffered new evidence adds nothing beyond what he had thwarted his counsel from presenting at the sentencing hearing. *Id.* at 480.

Rompilla v. Beard, 545 US 374, 125 S Ct 2456, 162 L Ed 2d 360 (2005). [1] In a 5-4 decision, the Court held that even though petitioner and his family members had suggested to his counsel that no mitigating evidence was available, counsel were obliged to make reasonable efforts to obtain and review material that they knew the prosecution likely would rely on as evidence of aggravation at the penalty phase of trial. The Court concluded that defense counsel provided constitutionally ineffective assistance by failing to examine the state’s file on his prior convictions for rape and assault, given that they knew the prosecution intended to use these prior crimes to show his violent character, which, they would argue, merited the death penalty. *Id.* at 389-90. [2] On *de novo* review of the record, the Court concluded that counsel’s lapse was prejudicial because the file contained information that potentially would have led counsel to significant mitigation evidence that no other source had opened up. *Id.* 390-3.

Florida v. Nixon, 543 US 175, 125 S Ct 551, 160 L Ed 2d 565 (2004): Faced with a complete confession and overwhelming evidence of defendant’s guilt of a brutal double murder, defense counsel decided not to contest the charges of aggravated murder at the guilt phase and instead keyed only on attempting to avoid a death sentence at the penalty phase. When he advised defendant of his decision and sought his view, defendant did not respond much less object. Defendant was convicted and sentenced to death. The Florida Supreme Court reversed, concluding that the absence of any evidence that the defendant personally and affirmatively agreed to waive putting on any defense to the charges rendered the conviction invalid under *United States v. Cronin*, 466 US 648 (1984). **Held:** Reversed. Although a defense counsel “undoubtedly has a duty to consult with the client regarding ‘important decisions,’ including questions of overarching defense strategy,” that obligation “does not require counsel to obtain defendant’s consent to ‘every tactical decision.’” Counsel “must both consult with the defendant and obtain consent” for some decisions, including the decision to plead guilty, but counsel was not required to obtain defendant’s express consent to the decision not to contest the charges, because putting on no defense while requiring the state to prove the charges is not equivalent to a guilty plea. Under the circumstances, defense counsel’s considered decision after consultation with defendant was reasonable under the *Strickland v. Washington* standard and

did not constitute a complete abandonment of counsel, which creates a presumption of prejudice, within the meaning of *Cronic*. *Id.* at 187-89, 191-93.

Holland v. Jackson, 542 US 649, 124 S Ct 2736, 159 L Ed 2d 683 (2004) (*per curiam*). Petitioner was convicted of murder based on the testimony of Hughes, and his conviction was affirmed on direct appeal and in a subsequent state post-conviction proceeding. Seven years after the conviction, petitioner filed a motion for new post-conviction trial based on an allegedly newly discovered witness. The state court denied the motion, ruling (a) that he failed to establish an adequate excuse for failing to present that evidence at the prior trial and (b) that, in any event, he failed to establish that his trial counsel would have elicited favorable evidence from the new witness. The Sixth Circuit granted petitioner *habeas corpus* relief, concluding that the state court unreasonably applied *Strickland* because the newly proffered evidence would have undermined the credibility of Hughes. *Held*: Reversed and remanded. [1] The state court denied the petition on alternative grounds, and the first ground (procedural default) is an independent and adequate state-law ground to affirm. *Id.* at 652. [2] The Sixth Circuit erred in granting relief on the ground that the state court misapplied the *Strickland* standard by applying a preponderance-of-the-evidence standard. The state court correctly recited the “reasonable probability” standard from *Strickland* and properly used “preponderance” in relation to petitioner’s state-law burden of proof on factual issues. A state court’s use of shorthand formulations does not provide a basis for relief. *Id.* at 654-55.

Wiggins v. Smith, 539 US 510, 123 S Ct 2527, 156 L Ed 2d 471 (2003). Petitioner was convicted of capital murder by a Maryland judge and subsequently elected to be sentenced by a jury. At sentencing, defense counsel told the jury in her opening statement that they would hear, among other things, about petitioner’s difficult life, but such evidence was never introduced. Before closing arguments and outside the presence of the jury, counsel made a proffer to the court, detailing the mitigation case counsel would have presented if the court had allowed a bifurcated proceeding. Counsel never mentioned petitioner’s life history or family background. The jury sentenced petitioner to death, and the state courts affirmed. *Held*: The performance of petitioner’s attorneys at sentencing violated his Sixth Amendment right to effective assistance of counsel. In evaluating petitioner’s claim, the Court’s principal concern was not whether counsel should have presented a mitigation case, but whether the *investigation* supporting their decision not to introduce mitigating evidence of petitioner’s background was itself *reasonable*. The Court thus conducted an objective review of their performance, measured for reasonableness under prevailing professional norms, including a context-dependent consideration of the challenged conduct as seen from counsel’s perspective at the time of that conduct. Here, counsel did not conduct a reasonable investigation. Moreover, counsel’s failures prejudiced petitioner’s defense. Had the jury been able to place petitioner’s “excruciating” life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. Thus, the available mitigating evidence, taken as a whole, might well have influenced the jury’s appraisal of his moral culpability. *Id.* at 534, 536.

Woodford v. Visciotti, 537 US 19, 123 S Ct 357, 154 L Ed 2d 279 (2002) (*per curiam*). Petitioner shot and killed one man and severely wounded another during a robbery; he received a death sentence. The California Supreme Court determined that petitioner’s counsel had performed deficiently, but that he had not suffered prejudice; the federal district court disagreed and granted a writ of *habeas corpus*. The Ninth Circuit concluded that the California Supreme Court decision ran afoul of both the “contrary to” and the “unreasonable application” conditions of 28 USC § 2254(d)(1), and it affirmed the district court’s grant of relief. *Held*: [1] *Strickland v. Washington*, 466 US 668 (1984), held that to prove prejudice the defendant must establish a *reasonable probability* that, but for counsel’s unprofessional errors, the result of the proceeding would have been different; it specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered. The California Supreme Court correctly applied that test, despite its occasional use in its opinion of the term “probable,” rather than “reasonably probable.” *Id.* at 22-25. [2] Under the “unreasonable application” clause in § 2254(d), a federal court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied *Strickland* incorrectly. Rather, it is the applicant’s burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. “An *unreasonable*

application of federal law is different from an *incorrect* application of federal law.” *Id.* at 24-25.

9. Claims of “Actual Innocence”

House v. Bell, 547 US 518, 126 S Ct 2064, 165 L Ed 2d 1 (2006). In 1985, petitioner’s neighbor was found dead, having been beaten and perhaps sexually assaulted. Based on circumstantial evidence connecting petitioner to the crime, he was convicted of the murder and was sentenced to death. The conviction and sentence was affirmed on direct appeal, and in 1990 petitioner unsuccessfully sought post-conviction relief. Years later, based on newly obtained DNA evidence and witness statements that suggested that the victim’s husband was actual murderer, petitioner filed a second petition for post-conviction relief asserting new inadequate-assistance claims. After the state court held the petition was barred, petitioner filed a § 2254 petition asserting the procedurally defaulted claims and sought to obtain relief from his default under the *Schlup v. Delo* “actual innocence” exception. *Held*: Remanded for hearing on those claims. [1] Under *Schlup*, “although to be credible a gateway claim requires new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial, the *habeas* court’s analysis is not limited to such evidence. . . . The court’s function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.” *Id.* at 537. [2] “[T]he *Schlup* standard does not require absolute certainty about the petitioner’s guilt or innocence. A petitioner’s burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt.” *Id.* at 538. [3] The strict standards in AEDPA that govern successive § 2254 petitions and new evidentiary hearings (§ 2244(b)(2)(B); § 2254(e)(2)) do not apply to a *Schlup* claim asserted in a first petition. *Id.* at 539. [4] Although “this is not a case of conclusive exoneration, . . . this is the rare case where—had the jury heard all the conflicting evidence—is it more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.” *Id.* 553-54. Consequently, he “may proceed on remand with procedurally defaulted constitutional claims.” *Id.* at 555. [5] The Court’s decision in *Herrera v. Collins*, which left open the possibility of a freestanding actual-innocence claim, implied that any such claim “requires more convincing proof of innocence than *Schlup*.” Because petitioner’s evidence does not meet that higher standard, it is unnecessary to consider whether such a freestanding claim is available. *Id.* at 555.

10. Reconsideration / Stay / Remand

Ryan, Director v. Gonzales, 568 US __, 133 S Ct 696, __ L Ed 2d __ (2013). In the *Gonzales* case, the petitioner was convicted of murder, robbery, and burglary in Arizona, the court imposed a death sentence, and the judgment was affirmed. Gonzales then filed a § 2254 petition for *habeas corpus* relief in federal court. His appointed counsel moved for a stay, alleging that he had become incompetent, but the district court denied the motion, ruling that even if he is incompetent the claims could be fairly litigated without his participation. The Ninth Circuit issued a stay, ruling that Gonzales is entitled to a determination of competency under 18 USC § 3599. Meanwhile, in the *Carter* case, the petitioner was convicted of aggravated murder, robbery, and rape in Ohio, he was sentenced to death, and the judgment was affirmed. Carter then filed a § 2254 petition in federal court. His appointed counsel moved for a stay on the ground that he was incompetent. The district court found him to be incompetent, found that his counsel needed his assistance to prosecute the proceeding, and dismissed the petition without prejudice and prospectively tolled the statute of limitations. The Sixth Circuit affirmed, basing its decision on 18 USC § 4241. *Held*: Reversed and remanded. [1] The petitioner’s statutory right to counsel in a *habeas corpus* proceeding does not necessarily imply that he has a right to stay the proceedings if he is not competent. [2] “We are not persuaded by the Ninth Circuit’s assertion that a *habeas* petitioner’s mental incompetency could ‘eviscerate the statutory right to counsel’ in federal *habeas* proceedings. Given the backward-looking, record-based nature of most federal *habeas* proceedings, counsel can generally provide effective representation to a *habeas* petitioner regardless of the petitioner’s competence. [3] Neither § 3599 nor § 4241 provides a basis to stay a *habeas corpus* proceeding on the ground that the petitioner is not competent. [4] Although a district court may have inherent authority to stay a *habeas corpus* proceeding, in neither case did the record show that the

petitioner's assistance was necessary for fair adjudication of the claims. Consequently, these claims do not warrant a stay.

Corcoran v. Levenhagen, 558 US ___, 130 S Ct 8, 175 L Ed 2d 1 (2009) (*per curiam*). Petitioner was convicted of murder and was sentenced to death. The Indiana state courts affirmed his convictions and death sentence. Petitioner then filed a § 2254 petition in which he asserted multiple claims. The district court granted *habeas corpus* relief, ruling that the death sentence was obtained in violation of the Sixth Amendment. The court remanded the case to the state courts to resentence petitioner to a sentence other than death; the court then disregarded all of his other claims as moot. The Seventh Circuit reversed on the Sixth Amendment claim and remanded with directions to dismiss the writ. *Held*: Reversed and remanded because “the Seventh Circuit erred in disposing of [petitioner’s] other claims without explanation of any sort. The Seventh Circuit should have permitted the District Court to consider [petitioner’s] unresolved challenges to his death sentence on remand, or should have itself explained why such consideration was unnecessary.”

Roper v. Weaver, 550 US 598, 127 S Ct 2022, 167 L Ed 2d 836 (2007) (*per curiam*). Petitioner was convicted of capital murder and sentenced to death. After the state post-conviction court denied his petition and the Missouri Supreme Court denied review, he filed a *habeas corpus* petition complaining of an improper closing argument by the prosecutor, an argument that was similar to one that resulted in *habeas corpus* relief in two other cases. When petitioner advised that he wanted to petition for certiorari from the state supreme court’s ruling, the district court required him to dismiss his *habeas corpus* petition if he chose to do that. He elected to dismiss. After the Supreme Court denied his cert petition, he refiled his *habeas corpus* petition, which occurred after AEDPA’s effective date. The Eighth Circuit eventually granted relief consistent with previous two cases. The Supreme Court granted review to consider whether that relief was proper under AEDPA. *Held*: Petition for cert dismissed as improvidently granted. The district court erred when it forced petitioner to choose between pursuing his original petition and petitioning for cert from the state supreme court’s decision. *Id.* at 601. *See Lawrence v. Florida*, *above*. Because it was not clear, as a result, whether the AEDPA issue was presented, and because two similarly situated petitioners already had obtained relief on the same claim, the Court exercised its discretion to dismiss the petition. *Id.* 601-02.

Hill v. McDonough, 547 US 573, 126 S Ct 2096, 165 L Ed 2d 44 (2006). Petitioner, a death-row inmate, filed suit under 28 USC § 1983 to enjoin the lethal-injection procedure, contending that it might cause him severe pain in violation of the Eighth Amendment. The district court construed the suit as one for *habeas corpus* relief and dismissed it based on the successive-petition bar in 28 USC § 2244. *Held*: Reversed and remanded. [1] “Challenges to the lawfulness of any confinement or to particulars affecting its duration are the province of *habeas corpus*. An inmate’s challenge to the circumstances of his confinement, however, may be brought under § 1983.” *Id.* at 579. Because petitioner’s “action, if successful, would not necessarily prevent the State from executing him by lethal injection” but merely alter the method by which that is done, “a grant of injunctive relief could not be seen as barring the execution of [his] sentence.” Thus, a § 1983 action is proper. *Id.* at 580-81. [2] “Filing an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course. Both the State and the victims of crime have an important interest in the timely enforcement of a sentence. ... Inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all the requirements for a stay, including a showing of a significant possibility of success on the merits. A court considering a stay must also apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” *Id.* at 583-84.

Schiro v. Smith, 546 US 6, 126 S Ct 7, 163 L Ed 2d 6 (2005) (*per curiam*). Petitioner was convicted of capital murder and sentenced to death. His conviction and sentence was affirmed on direct appeal and in a state post-conviction proceeding, and the district court denied his § 2254 petition. During the course of an appeal in the Ninth Circuit, the Court issued its opinion in *Atkins v. Virginia*, 536 US 304 (2002). Thereafter, petitioner raised for the first time a claim that he is mentally retarded and hence cannot be executed under *Atkins*. The Ninth Circuit suspended further proceedings in that case and directed petitioner to file a proceeding in state court to litigate that claim and further ordered that that issue “must be determined ... by a

jury unless the right to a jury is waived by the parties.” *Held*: Reversed and remanded. “The Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve [petitioner’s] mental retardation claim. *Atkins* stated in clear terms that we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences. States, including Arizona, have responded to that challenge by adopting their own measures for adjudicating claims of mental retardation. While those measures might, in their application, be subject to constitutional challenge, Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit preemptively imposed its jury trial condition. Because the Court of Appeals exceeded its limited authority on *habeas* review, the judgment below is vacated[.]” *Id.* at 9.

Bell v. Thompson, 545 US 794, 125 S Ct 2825, 162 L Ed 2d 693 (2005). The Sixth Circuit affirmed the denial of petitioner’s § 2254 *habeas corpus* petition but stayed issuance of the mandate pending his petition for *certiorari*. After the Court denied his petition, the Sixth Circuit did not issue a mandate, but the state commenced proceedings to execute petitioner. Five months later, the Sixth Circuit *sua sponte* issued an amended opinion granting relief and remanding the case to the district court for further proceedings. *Held*: Reversed. In a 5-4 decision, the Court held that the panel abused its discretion when it withheld its mandate for more than five months without entering a formal order, then reconsidered its decision rejecting the petition vacated the district court judgment, and ordered the district court to hold an evidentiary hearing. Even if FRCP 41 authorizes a stay of a mandate following a denial of *certiorari* in some cases, the Sixth Circuit abused its discretion here given the length of time between the denial of *certiorari* and the issuance of the amended opinion, the failure of the court to give notice to the parties that it was reconsidering its earlier opinion, the considerable time and resources expended by the state judicial system in reliance on the mistaken impression that the case was final, and the finality and comity concerns inherent in federal *habeas corpus* proceedings. *Id.* at 804-13.

Calderon v. Thompson, 523 US 538, 118 S Ct 1489, 140 L Ed 2d 728 (1998). Thompson was convicted of rape and murder in 1983 and sentenced to death in a California state court. Two days before his scheduled August 1997 execution, the Ninth Circuit decided to recall its earlier mandate *sua sponte* because procedural misunderstandings within the court had affected the issuance of the mandate. In this federal *habeas corpus* case, the Court held that the Ninth Circuit abused its discretion by recalling its mandate that had earlier denied a prisoner relief because procedural screw-ups at the court prevented it from calling for *en banc* review before the mandate issued. Given the significant limits on the discretion of the federal courts to grant *habeas corpus* relief and the interest in finality of convictions, the Court held that a court of appeals gravely abuses its discretion when it recalls its earlier mandate unless it acts to avoid a miscarriage of justice as defined by the Supreme Court’s jurisprudence.

11. Application of *Teague v. Lane* Rule

Schriro v. Summerlin, 542 US 348, 124 S Ct 2519, 159 L Ed 2d 442 (2004). After petitioner’s murder conviction and death sentence were affirmed on appeal, the U.S. Supreme Court decided *Ring v. Arizona*, 536 US 584 (2002), in which it invalidated capital-sentencing schemes that allowed judges to find the facts that are necessary to imposition of a death sentence. Relying on *Teague v. Lane*, 489 US 288 (1989), petitioner argued that *Ring* should be applied retroactively to invalidate his sentence. *Held*: The rule in *Ring* does not apply to petitioner’s case. [1] The rule in *Ring* is a procedural rule, not a substantive rule, because it merely altered the method of determining the appropriate sentence. *Id.* at 353. [2] *Ring* did not announce a watershed rule of criminal procedure because it cannot be said that judicial factfinding seriously diminishes the accuracy or reliability of the determination. *Id.* at 355.

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