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An Introduction to Federal Habeas Corpus Practice and Procedure

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AN INTRODUCTION TO FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE*

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I. INTRODUCTION AND OVERVIEW

For many prisoners, federal habeas corpus stands as the last opportunity to challenge the constitutionality of their convictions or sentences.[1] Simply navigating through the procedural maze of habeas practice, however, is a formidable task for inmates proceeding *pro se* and prisoners represented by

1. For truly exceptional cases, state habeas corpus may be available. *See* Butler v. State, 302 S.C. 466, 397 S.E.2d 87, *cert. denied*, 498 U.S. 972 (1990). For a discussion of state habeas corpus practice and procedure, see John H. Blume, *An Introduction to Post-Conviction Remedies, Practice and Procedure in South Carolina*, 45 S.C. L. REV. 235, 262 (1994).

counsel.[2] Tragically, those who have had a fundamentally unfair trial, and even those who are innocent, may easily stumble.[3]

Since 1867, habeas corpus, or the Great Writ, has been available to state prisoners "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[4] The modern era of federal habeas corpus, however, did not begin until the Supreme Court's decision in *Brown v. Allen*.[5] In *Brown*, the Court held that the violation of a constitutional right is cognizable in federal habeas and that federal courts may independently review state court adjudications of federal questions, even if the state court's treatment of those legal claims was full and fair.[6] Moreover, the Court recognized that a federal habeas court must, under "unusual circumstances," hold a hearing to address questions of fact.[7]

The potential scope of habeas corpus is vast. At its root is the principle that "if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. . . . Vindication of due process is precisely its historic office."[8] However, despite the expansive tone of much of the language describing habeas corpus, its effective reach has been curtailed, especially in recent years.[9] Motivated by concerns for the finality of convictions[10] and federal-

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2. One procedural obstacle should be stressed at the outset. Prisoners must present all of their federal constitutional claims to the state court; that is, prisoners must "exhaust" available state remedies. *See* discussion *infra* part III. Claims requiring factual development beyond the trial record such as ineffective assistance of counsel, suppression of material exculpatory evidence, or the knowing use of perjured testimony, must be presented in state post-conviction proceedings. Familiarity with the post-conviction procedures described in Blume, *supra* note 1, is essential.

3. *See* Schlup v. Delo, 115 S. Ct. 851 (1995); Herrera v. Collins, 113 S. Ct. 853 (1993).

4. The Judiciary Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385. The Constitution preserves the "privilege of the writ of habeas corpus." U.S. Const. art. I, § 9, cl. 2.

5. 344 U.S. 443 (1953) (overruling Frank v. Magnum, 237 U.S. 309 (1915)); *see also* LARRY W. YACKLE, POST-CONVICTION REMEDIES §§ 19-20 (1981) (discussing the history of habeas corpus and the significance of *Brown*).

6. *Brown*, 344 U.S. at 458.

7. *Id.* at 463. The Court elaborated on the circumstances under which a federal court must hold an evidentiary hearing in Townsend v. Sain, 372 U.S. 293 (1963), and later in Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1717 (1992) (overruling *Townsend* on the issue of whether an evidentiary hearing is required when a petitioner deliberately bypasses state procedures).

8. Fay v. Noia, 372 U.S. 391, 402 (1963), *overruled on other grounds by* Coleman v. Thompson, 501 U.S. 722 (1991); *see also Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 132 (1866) (Chase, C.J.) ("The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice.").

9. Detailed discussion of the evolution in the Court's habeas jurisprudence over the last two decades is beyond the scope of this article. For more information, see JAMES S. LIEBMAN & RANDY HERTZ, HABEAS CORPUS PRACTICE AND PROCEDURE (2d ed. 1994); YACKLE, *supra* note

ism,[11] the Court has erected "a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights."[12] The Court has even downplayed the role of habeas corpus itself.[13] Congress may act to restrict habeas even further.[14]

To assist state inmates who confront the difficult task of a federal court challenge to the legality of their detention, we first outline the elementary steps in habeas corpus procedure,[15] addressing basic concerns such as who may file a petition, what must be included in the petition, the form of the petition, the State's duty to file an answer, practice before a magistrate, and the logistics of appealing an adverse decision.[16] Next, we outline the State's possible defenses, including exhaustion of state remedies, procedural default, and nonretroactivity, which may preclude a federal court from examining the merits of a petition.[17] We then examine doctrines that affect the way a federal court treats the merits of claims presented in the petition. In that context we discuss when a federal court will defer to fact-finding of state courts, when a federal court must hold an evidentiary hearing, and the standard for determining whether a constitutional error is harmless.[18] Finally, we address the special concerns of death-sentenced inmates who seek a stay of execution pending consideration of their habeas petitions.[19]

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10. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (Powell, J., concurring) ("No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen.").

11. *See* Coleman v. Thompson, 501 U.S. at 748 ("'[F]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'") (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982)).

12. *Id.* at 759 (Blackmun, J., dissenting); *see also* Smith v. Murray, 477 U.S. 527, 541 (1986) (Stevens, J., dissenting) ("I fear that the Court has lost its way in a procedural maze of its own creation . . . .").

13. *See* Barefoot v. Estelle, 463 U.S. 880, 887 (1983) ("The role of federal habeas proceedings . . . is secondary and limited.").

14. *See* Effective Death Penalty Act of 1995, H.R. 729, 104th Cong., 1st Sess. (1995) (placing stricter limits on the time for filing and on the number of habeas appeals allowed).

15. This article provides only an overview of various doctrines. Several treatises provide a thorough examination of relevant issues. In preparing this article and in litigating capital habeas corpus cases, we have consulted the following: LIEBMAN & HERTZ, *supra* note 9; YACKLE, *supra* note 5; and IRA P. ROBBINS, HABEAS CORPUS CHECKLISTS (1993).

16. *See* discussion *infra* part II.

17. *See* discussion *infra* part III.

18. *See* discussion *infra* part IV.

19. *See* discussion *infra* part V.

While much of this article will discuss specific federal habeas corpus doctrines, it is nevertheless important from the outset to touch on the challenge of habeas advocacy. Habeas corpus is *not* like a direct appeal, in which one presents the relevant facts and legal arguments in a well-written brief and relies upon the merits of the issues to carry the day. A different mind-set is required. Even though many grounds for relief will be entitled to de novo review and plenary consideration, federal judges may be predisposed to deny relief for a variety of reasons, including concerns about federalism and the finality of convictions. Therefore, the state court's resolution of constitutional claims may be received in federal court with a practical, if not legal, presumption of correctness.

A federal habeas corpus litigator must articulate, through the interdependence of the circumstances of the case and the legal grounds for relief, coherent reasons why the writ must be granted. While an understanding of complex habeas corpus principles is important, it is perhaps secondary to the art of meaningful habeas corpus advocacy. The practitioner must convince the court that the inmate is a human being, not a remorseless criminal; that the inmate was denied a fundamentally fair trial and is not merely raising technical issues; and finally, that the inmate, rather than refusing to accept responsibility for misdeeds, did not receive basic justice in the state court.

II. BASIC HABEAS CORPUS PROCEDURE

A. Who May File a Petition for a Writ of Habeas Corpus

1. The Petitioner Must Be "In Custody"

The writ of habeas corpus does not extend to state prisoners unless they are "in custody in violation of the Constitution or laws or treaties of the United States."[20] This does not mean, however, that someone must be in physical custody to petition for the writ. Other restraints on liberty, such as parole or probation, place someone "in custody" within the meaning of the habeas statute.[21] A person is also considered in custody if he "may be subject to such custody in the future."[22] Thus, a petitioner who is released on his own recognizance pending the execution of a sentence is considered to be in custody.[23] At the same time, one is not in custody if her sentence has

20. 28 U.S.C. § 2254(a) (1988).

21. *See* Jones v. Cunningham, 371 U.S. 236, 243 (1963).

22. RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS following 28 U.S.C. § 2254 [hereinafter HABEAS RULES], Rule 2(b).

23. *See* Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 300 (1984); Hensley v. Mun. Court, 411 U.S. 345, 351 (1973).

fully expired at the time of the filing of the petition.[24] If, however, an inmate is serving consecutive sentences, and the first sentence would have expired, he may nevertheless challenge the constitutionality of the first conviction.[25] "[C]ustody for habeas purposes is defined not by any one particular sentence but by the aggregate of the sentences."[26] Likewise, a petitioner may attack a prior conviction used to enhance his punishment.[27]

2. The Prisoner Must Be Held in Violation of Federal Law

Besides being in custody, an inmate must allege an improper conviction or sentence that is "in violation of the Constitution or laws or treaties of the United States."[28] Only a violation of a federal constitutional guarantee is cognizable in federal habeas, with several exceptions.[29] In general, a petitioner may not raise issues of state law unless the petitioner has been deprived of a fundamentally fair trial.[30] A federal habeas court "will not question the evidentiary or procedural rulings of the state court unless [the petitioner] can show that, because of the court's actions, his trial, as a whole, was rendered fundamentally unfair."[31] On the other hand, state procedural guidelines using "explicitly mandatory language" may create a protected liberty interest.[32] Consequently, arbitrary deprivations of such rights guaranteed by state law may amount to a violation of due process.[33]

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24. *See, e.g.,* Maleng v. Cook, 490 U.S. 488, 492 (1989) (noting that collateral consequences of an initial conviction, for which the sentence has expired, do not constitute "custody" for habeas purposes).

25. Garlotte v. Fordice, 115 S. Ct. 1948 (1995).

26. Bernard v. Garraghty, 934 F.2d 52, 54 (4th Cir. 1991); *see also* Peyton v. Rowe, 391 U.S. 54, 64 (1968) ("custody comprehends respondents' status for the entire duration of their imprisonment. . . . for the aggregate of . . . sentences").

27. Herbst v. Scott, 42 F.3d 902, 905 (5th Cir.), *cert. denied*, 115 S. Ct. 2590 (1995); Brock v. Weston, 31 F.3d 887, 890 (9th Cir. 1994).

28. 28 U.S.C. §§ 2241(c)(3), 2254(a) (1988).

29. *See* Rose v. Hodges, 423 U.S. 19 (1975) (per curiam).

30. *See* Estelle v. McGuire, 112 S. Ct. 475 (1991); Ashford v. Edwards, 780 F.2d 405, 407 (4th Cir. 1985); Barfield v. Harris, 719 F.2d 58, 61 (4th Cir. 1983), *cert. denied,* 467 U.S. 1210 (1984).

31. Tapia v. Tansy, 926 F.2d 1554, 1557 (10th Cir.), *cert. denied*, 502 U.S. 835 (1991); *see also* Moran v. Godinez, 40 F.3d 1567, 1574 (9th Cir. 1994) (finding that although a state post-conviction court violated Nevada law by placing the burden of proving incompetency on the inmate, this placement of the burden did not amount to a violation of a substantive federal right because the state provided an adequate procedure to evaluate competency).

32. Hewitt v. Helms, 459 U.S. 460, 472 (1983).

33. *See* Hicks v. Oklahoma, 447 U.S. 343 (1980) (stating that due process is violated if a defendant is arbitrarily denied a right guaranteed under state law); Harris *ex. rel.* Ramseyer v. Blodgett, 853 F. Supp. 1239, 1291 (W.D. Wash. 1994) (finding the state court's failure to conduct an adequate statutorily mandated proportionality review of petitioner's death sentence

Although all claims must address violations of federal law, not all federal claims are cognizable in habeas corpus proceedings. As a general rule, a habeas petitioner cannot raise a suppression issue grounded in the Fourth Amendment unless the state courts failed to provide him with a full and fair opportunity to present his claim.[34] The Supreme Court has declined to extend the *Stone v. Powell* bar to other federal claims.[35]

B. Basic Pleading and Filing Requirements in Habeas Proceedings

Federal habeas corpus is a civil proceeding governed by the Federal Rules of Civil Procedure and the Rules Governing Section 2254 Cases in the United States District Courts.[36] Nevertheless, critical differences exist between habeas cases and other civil actions.

1. Contents of the Petition

Unlike other types of civil actions, habeas cases require fact pleading as opposed to notice pleading.[37] This, however, does not mean that petitioners must enumerate all facts and legal theories that support their claims. Instead, petitioners must specify grounds for relief and set forth in summary fashion the facts supporting each ground for relief.[38] Indeed, many facts will not become apparent until after the court has authorized discovery[39] and held an evidentiary hearing.[40] The petition must allege federal constitutional violations, and a petitioner should be careful to plead the entire constitutional

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violated due process), *aff'd*, 64 F.3d 1432 (9th Cir. 1995).

34. Stone v. Powell, 428 U.S. 465 (1976). *But cf.* Kimmelman v. Morrison, 477 U.S. 365, 382-83 (1986) (holding that the petitioner can raise the issue of ineffective assistance of counsel in habeas corpus for counsel's failure to raise a meritorious Fourth Amendment claim).

35. *See* Withrow v. Williams, 113 S. Ct. 1745 (1993) (declining to extend *Stone* to claims based on Miranda v. Arizona, 384 U.S. 436 (1966)); Jackson v. Virginia, 443 U.S. 307, 321-22 (1979) (rejecting the extension of *Stone* to claims of insufficiency of the evidence); Rose v. Mitchell, 443 U.S. 545 (1979) (declining to extend *Stone* to claims of racial discrimination in the selection of grand jurors).

36. *See* HABEAS RULES, *supra* note 22, Rule 11. Rules of Civil Procedure may be applied to the extent that they are not inconsistent with habeas corpus rules. Blackledge v. Allison, 431 U.S. 63 (1977).

37. *See* Hill v. Lockhart, 474 U.S. 52, 60 (1985) (denying hearing because petitioner failed to allege that counsel's ineffectiveness prejudiced him). *Compare* HABEAS RULES, *supra* note 22, Rule 4 (requiring petition to show entitlement to relief) *with* FED. R. CIV. P. 8 (requiring a short and plain statement that petitioner is entitled to relief).

38. Jones v. Jerrison, 20 F.3d 849, 853 (8th Cir. 1994); *see also Blackledge*, 431 U.S. at 75 n.7 (requiring that petition simply "state facts that point to a 'real possibility of [c]onstitutional error'").

39. *See* HABEAS RULES, *supra* note 22, Rule 6.

40. *See* HABEAS RULES, *supra* note 22, Rule 8.

violation. Also, the claims in the petition must first have been presented to the state courts.[41] The petition may be amended, as of right, prior to the filing of a responsive pleading.[42] Thereafter, amendment is permitted by leave of court, which is to be "freely given when justice so requires."[43]

2. Form of the Petition

The petition must be "in substantially the form annexed to [the] rules."[44] The petitioner must supply the procedural history of the case, the grounds raised in state court, the grounds for relief in the federal petition, and the names of counsel who represented the petitioner in state court. The state officer having custody of the petitioner, for example, the warden of the prison or the commissioner of the Department of Corrections, should be named as the respondent.[45]

3. Logistics of Filing the Petition

Because only one federal district exists in South Carolina, a petition may be filed in any of the federal courts or divisions in the state. Local Fourth Circuit Rules require that a statement be filed with the clerk of the court of appeals whenever a petition for writ of habeas corpus is filed involving a death-sentenced inmate.[46] The statement, which is in the Rules, requests certain procedural information regarding the history of the case. If the petitioner is indigent, a motion to proceed *in forma pauperis* must be filed with the affidavit of indigency, as set forth in 28 U.S.C. § 1915.[47]

4. Counsel and Expert Services

Under the Criminal Justice Act of 1970, a district court may appoint counsel in proceedings pursuant to section 2254.[48] "Whenever the United States magistrate or the court determines that the interests of justice so require,

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41. *See* discussion *infra* part III.A.

42. 28 U.S.C. § 2242 (1988); FED. R. CIV. P. 15(c).

43. FED. R. CIV. P. 15(a).

44. HABEAS RULES, *supra* note 22, Rule 2(c). Blank petitions are available without charge from the clerk of the district court. *Id.*

45. HABEAS RULES, *supra* note 22, Rule 2(a). On the other hand, if a petitioner is subject to future custody, "the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents." HABEAS RULES, *supra* note 22, Rule 2(b).

46. 4TH CIR. R. 22(b).

47. HABEAS RULES, *supra* note 22, Rule 3(a).

48. 18 U.S.C. § 3006A(a)(2)(B) (1994).

representation may be provided for any financially eligible person who . . . is seeking relief under section 2241, 2254, or 2255 of title 28."[49] If an evidentiary hearing is required,[50] the court must appoint counsel to represent the petitioner.[51]

In addition to providing for the appointment of paid counsel, the Criminal Justice Act allows a federal court to provide experts and investigators to indigent inmates seeking relief pursuant to section 2254.[52] Although no constitutional or statutory right to counsel in section 2254 proceedings existed prior to the Criminal Justice Act of 1970, Congress chose to extend needed assistance to habeas applicants because such proceedings "frequently raise[] serious and complex issues of law and fact."[53]

With the passage of the Anti-Drug Abuse Amendments Act of 1988,[54] Congress provided that death-sentenced inmates challenging their convictions and sentences pursuant to section 2254 are *entitled* to appointed counsel.[55] In this act, Congress also lifted, almost word-for-word, the provision of the Criminal Justice Act providing for experts and investigators.[56] Counsel may request, *ex parte*, funds for investigative, expert, or other services that are "reasonably necessary" for the proper presentation of issues relating to guilt or sentence.[57] The funds may be approved *nunc pro tunc*.[58] In addition, Congress decided that district courts could reimburse counsel and experts for death-sentenced inmates at rates above those set forth in the Criminal Justice Act.[59]

5. Preliminary Judicial Consideration

Once a petition is filed, the case is assigned to a district judge.[60] The

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49. *Id.*

50. *See* discussion *infra* part IV.B.

51. HABEAS RULES, *supra* note 22, Rule 8(c).

52. 18 U.S.C. § 3006A(e) (1994).

53. H.R. Rep. No. 1546, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3982, 3993.

54. 21 U.S.C. §§ 801-978 (1988 & Supp. V 1993).

55. 21 U.S.C. § 848(q)(4)(B) (1988) (emphasis added). To effectuate the intent of Congress, the Court has held that district courts have the authority to enter a stay of execution and appoint counsel even before a death-sentenced inmate files a habeas petition. McFarland v. Scott, 114 S. Ct. 2568, 2573 (1994).

56. *Compare* 21 U.S.C. § 848(q)(9) (1994) *with* 18 U.S.C. § 3006A(e)(1) (1994).

57. 21 U.S.C. § 848(q)(9) (1994).

58. *Id.*

59. *See* 21 U.S.C. § 848(q)(10) (1994); *see also In re* Berger, 498 U.S. 233 (1991) (per curiam) (setting the maximum compensation amount).

60. In the District of South Carolina, capital cases are assigned on a rotating basis. The number and letters at the end of the civil action number will indicate the judge and magistrate,

respondent must file an answer unless the district court determines from "the face of the petition" that the petitioner is not entitled to relief.[61] A habeas petition cannot be summarily dismissed unless the allegations are "palpably incredible . . . patently frivolous or false."[62] Otherwise, a petitioner is entitled to "careful consideration and plenary processing" of claims, including the "full opportunity for presentation of the relevant facts."[63] While the petitioner may not be entitled to an evidentiary hearing, he may supplement the record by resorting to civil discovery[64] and expansion of the record.[65] One caveat is in order: a petitioner is not entitled to discovery unless "the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise."[66]

6. Respondent's Answer and Motion for Summary Judgment

The Attorney General will almost invariably file a motion for summary judgment with the State's answer. The court may treat the State's failure to dispute the factual allegations in the petition as an admission.[67] Although the petition can set forth in detail the legal and factual bases supporting the grounds for relief, in many cases a petitioner's lengthy pleading, or brief in support of the petition, is filed in response to the Attorney General's motion for summary judgment.[68] The State is not entitled to summary judgment unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . . ."[69] The court must construe the factual record

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respectively, to whom the case has been assigned.

61. HABEAS RULES, *supra* note 22, Rule 4.

62. Blackledge v. Allison, 431 U.S. 63, 76 (1977) (quoting Machibroda v. United States, 368 U.S. 487, 495 (1962) and Herman v. Claudy, 350 U.S. 116, 119 (1956)).

63. *Id.* at 82-83 (quoting Harris v. Nelson, 394 U.S. 286, 298 (1969)).

64. *See* HABEAS RULES, *supra* note 22, Rule 6.

65. HABEAS RULES, *supra* note 22, Rule 7; *see* Vasquez v. Hillery, 474 U.S. 254 (1986). Expanded material may include letters, documents, exhibits, transcripts, answers under oath, and affidavits. HABEAS RULES, *supra* note 22, Rule 7(b).

66. HABEAS RULES, *supra* note 22, Rule 6; *see also* Harris v. Nelson, 394 U.S. 286, 297 (1969) (concluding that extending a broad discovery right to habeas proceedings "would do violence to the efficient and effective administration of the Great Writ").

67. Bland v. California Dep't of Corrections, 20 F.3d 1469, 1474 (9th Cir.), *cert. denied,* 115 S. Ct. 357 (1994); HABEAS RULES, *supra* note 22, Rule 5 ("The answer shall respond to the allegations of the petition.").

68. This is also the time that a motion for an evidentiary hearing with a supporting memorandum is generally filed. *See* D.S.C. R. 12.04.

69. FED. R. CIV. P. 56(c); *see* Temkin v. Frederick County Comm'rs, 945 F.2d 716 (4th Cir. 1991), *cert. denied,* 112 S. Ct. 1172 (1992).

in the light most favorable to the nonmoving party.[70] This is the standard applicable to federal habeas corpus proceedings.[71]

Summary judgment procedure in habeas cases, however, differs from other types of civil actions. For example, contrary to the Federal Rules of Civil Procedure, the district court need not give a petitioner ten days notice that it intends to rule on the basis of the state court record.[72]

7. Magistrate Practice

In South Carolina most district judges refer habeas cases to their magistrates. The magistrate will initially handle the case and issue a report and recommendation. An evidentiary hearing, if held, will also usually be conducted before the magistrate.[73] Both the petitioner and the attorney general may file objections to the report and recommendation within ten days of being served with a copy.[74] The district court judge "shall [then] make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."[75] However, the district court can still order an evidentiary hearing or otherwise permit the record to be expanded.

To preserve the possibility of appeal, a petitioner must object to unfavorable portions of the magistrate's report and recommendation.[76] The failure to file timely and proper objections within ten days to the magistrate's fact-finding or legal conclusions may result in a waiver of a petitioner's otherwise unqualified right to seek de novo review on appeal.[77]

8. Appeals

A timely notice of appeal must be filed within thirty days after the district court's entry of judgment.[78] This requirement is mandatory and jurisdic-

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70. *See* Bishop v. Wood, 426 U.S. 341, 347 (1976); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam).

71. *See, e.g.*, Myers v. Collins, 8 F.3d 249 (5th Cir. 1993).

72. *See* McBride v. Sharpe, 25 F.3d 962, 970 (11th Cir.) (en banc), *cert. denied*, 115 S. Ct. 489 (1994).

73. HABEAS RULES, *supra* note 22, Rule 8(b)(1).

74. HABEAS RULES, *supra* note 22, Rule 8(b)(3).

75. 28 U.S.C. § 636(b)(1) (1988); HABEAS RULES, *supra* note 22, Rule 8(b)(4).

76. *See* 28 U.S.C. § 636(b)(1) (1988); HABEAS RULES, *supra* note 22, Rule 8(b)(3). These requirements apply to the attorney general as well as the petitioner.

77. *See* Carr v. Hutto, 737 F.2d 433 (4th Cir. 1984) (per curiam). *But see* Kelly v. Withrow, 25 F.3d 363, 366 (6th Cir. 1994) (holding that the failure to file specific objections to the magistrate's report and recommendation is not jurisdictional and the failure to do so may be excused in the interests of justice).

78. FED. R. APP. P. 4(b)(1).

tional,[79] and the court of appeals may not grant an extension.[80] On the other hand, the district court, upon a showing of excusable neglect or good cause, may extend the time to file the notice of appeal by no more than thirty days so long as a motion for extension has been filed within the thirty-day period.[81] A motion to alter or amend the district court's judgment, however, tolls the time for filing the notice of appeal.[82]

a. Certificate of Probable Cause to Appeal

In order to appeal a district court's denial of habeas relief, an inmate must seek and obtain a certificate of probable cause from the district court or the court of appeals stating that a reasonable ground for appeal is present.[83] The Fourth Circuit requires that an application for a certificate of probable cause be accompanied by a memorandum or informal brief.[84] If a petitioner does not file an application for a certificate of probable cause to appeal in the court of appeals after the district court denies the certificate, the appellate court will treat the notice of appeal as a request for a certificate of probable cause.[85] To obtain a certificate of probable cause, a petitioner must make a "substantial showing of the denial of [a] federal right,"[86] which requires a demonstration "that the issues are debatable among jurists of reason; that a court *could* resolve the issues . . . [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'"[87]

b. Other Appellate Concerns

The Federal Rules of Appellate Procedure, Local Rule 22, and the Fourth Circuit's Internal Operating Procedures also address issues relating to appeals of capital habeas corpus proceedings. Pursuant to internal operating

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79. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982) (per curiam).

80. FED. R. APP. P. 26(b).

81. FED. R. APP. P. 4(a)(5); *see also* Martinez v. Hoke, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (finding that a district court may, upon a showing of excusable neglect, extend the time for filing a notice of appeal for up to thirty days).

82. *See* FED. R. APP. P. 59(e); *see also Griggs*, 459 U.S. at 60-61 (per curiam) (holding that a notice of appeal is invalid if filed prior to disposition on a motion to alter or amend). Courts use an abuse of discretion standard when reviewing denial of FED. R. CIV. P. 59(e) motions. Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989).

83. *See* 28 U.S.C. § 2253 (1988); FED. R. APP. P. 22(b).

84. 4TH CIR. INTERNAL OPERATING PROC. 22.1.

85. Spencer v. Murray, 18 F.3d 237, 239 n.2 (4th Cir. 1994).

86. Barefoot v. Estelle, 463 U.S. 880, 893 (1983) (alteration in original) (quoting Stewart v. Beto, 454 F.2d 263, 270 n.2 (5th Cir. 1971), *cert. denied*, 406 U.S. 925 (1972)).

87. Gordon v. Willis, 516 F. Supp. 911, 913 (N.D. Ga. 1980) (quoting United States *ex rel.* Jones v. Richmond, 245 F.2d 234 (2d Cir. 1957)).

procedures, at least one member of the review panel will be from the state where the petitioner's conviction arose.[88] The Fourth Circuit has a death penalty coordinator whose job is to monitor capital cases as they proceed through the federal courts. Finally, as in other cases, the district court's legal conclusions are reviewed de novo, but its factual findings are reviewed pursuant to the clearly erroneous standard.[89]

III. THE STATE'S DEFENSE

In the State's answer or memorandum in support of its motion for summary judgment, the State must inform the court whether the petitioner has sufficiently presented all federal constitutional claims in state court.[90] At this stage, the State may raise various procedural defenses designed to preclude the court from reaching the merits of the claims.

A. Exhaustion of State Remedies

1. The Basic Doctrine

A habeas petitioner must exhaust available state remedies before a federal court will review the constitutional claims.[91] The purpose of the exhaustion requirement is "to protect the state courts' role in the enforcement of federal law and [to] prevent disruption of state judicial proceedings."[92] Courts generally consider remedies exhausted when claims have been "fairly presented" one time to the highest state court.[93] For example, if a claim was raised on direct appeal, it does not have to be raised again in the state post-conviction proceedings.[94] The Supreme Court has held that the exhaustion requirement

88. 4TH CIR. INTERNAL OPERATING PROC. 22.2.

89. *See* Amadeo v. Zant, 486 U.S. 214, 223 (1988); FED. R. CIV. P. 52(a).

90. HABEAS RULES, *supra* note 22, Rule 5.

91. 28 U.S.C. § 2254(b) (1988). In capital cases tried in South Carolina prior to State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), the defendant was not required to present all possible grounds for relief to the state supreme court because capital cases were reviewed *in favorem vitae*, under which all record-based claims "are assumed to have been reviewed." Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 519, *cert. denied*, 114 S. Ct. 607 (1993). The state court's treatment of record-based claims on direct appeal effectively satisfied the exhaustion requirement. The effect of *Torrence* in the procedural default context is discussed *infra* part III.B.1.

92. Rose v. Lundy, 455 U.S. 509, 518 (1982).

93. Picard v. Connor, 404 U.S. 270, 275 (1971).

94. *See* Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (per curiam); Myers v. Collins, 919 F.2d 1074, 1075-77 (5th Cir. 1990). On the other hand, the exhaustion requirement is not satisfied if a petitioner raises a claim for the first and only time in a petition for discretionary review to a state appellate court. *See* Castille v. Peoples, 489 U.S. 346, 351 (1989).

is satisfied even if the state tribunal does not fully consider the claim, so long as the state court had a fair opportunity to do so by being reasonably informed of the nature of the claim.[95] Generally, the state courts must be given the relevant facts and controlling legal principles and must be apprised that the claim rests, in whole or in part, on the federal constitution.[96] A petitioner may satisfy this requirement by citing a specific federal constitutional provision, alerting the state court to the federal nature of the claim through the substance of the claim, relying on federal constitutional precedents, or asserting a state claim that is "functionally identical" to a federal claim.[97] However, a petitioner need not cite "book and verse on the federal constitution"[98] if the nature of the claim is evident. Generally, however, state courts "must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution."[99] At the same time, the submission of additional evidence in the district court that does not fundamentally alter the legal claim already considered by the state courts does not mean the claim is not exhausted.[100] The claim may be deemed unexhausted, however, if the new evidence places the claim in a significantly different posture than it was when the state courts considered it.[101]

Furthermore, a habeas petitioner may not need to exhaust claims if "there is either an absence of available State corrective process or . . . circumstances rendering such process ineffective to protect the rights of the prisoner."[102]

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95. *See* Blume, *supra* note 1, at 250-51 (discussing how to plead a claim in state post-conviction proceedings in a manner satisfying the exhaustion requirement).

96. *See* Anderson v. Harless, 459 U.S. 4, 10 (1982) (per curiam); *Picard*, 404 U.S. at 275-76. The petitioner must "alert fairly" the state court of the federal nature of the claim and permit it to "adjudicate squarely" the federal issue. Verdin v. O'Leary, 972 F.2d 1467, 1474 (7th Cir. 1992).

97. Scarpa v. DuBois, 38 F.3d 1, 6 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 940 (1995).

98. *Picard*, 404 U.S. at 278 (quoting Daugharty v. Gladden, 257 F.2d 750, 758 (9th Cir. 1958)); *see also* Renzi v. Virginia, 794 F.2d 155, 158 (4th Cir. 1986) (finding that a claim alleging denial of due process accompanied by supporting federal authority was fairly presented).

99. Duncan v. Henry, 115 S. Ct. 887, 888 (1995) (per curiam) (finding unexhausted a claim raised under California law but not under the Fourteenth Amendment due process clause). If, on the other hand, the state court would not have viewed the claim differently had the word "federal" appeared in the heading, the claim is exhausted for purposes of habeas review. *See* Beauchamp v. Murphy, 37 F.3d 700, 703-04 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1365 (1995).

100. *See* Vasquez v. Hillery, 474 U.S. 254 (1986); *see also* Chacon v. Wood, 36 F.3d 1459, 1468-69 (9th Cir. 1994) (holding that a new factual allegation that an interpreter had intentionally misadvised petitioner did not fundamentally alter the claim that petitioner was induced to plead guilty by grossly incorrect advice).

101. *E.g.*, Wise v. Warden, 839 F.2d 1030, 1033 (4th Cir. 1988).

102. 28 U.S.C. § 2254(b) (1988); *see also* Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam) ("An exception is made only if there is no opportunity to obtain redress in state court . . ."). Occasionally, due to significant delays in the state court system, a federal habeas

In addition, a petitioner has only to exhaust state remedies which existed at the time the federal petition was filed. A federal court has the discretion, however, to require a petitioner to resort to new postconviction remedies.[103] Intervening legal decisions do not generally require a petitioner to return to the state courts to "re-exhaust" the issue.[104] In sum, because exhaustion is a rule of comity and not of jurisdiction, it is to be applied flexibly.[105]

2. Mixed Petitions

A habeas petition that contains unexhausted issues may be dismissed.[106] Even if a petition is "mixed," containing exhausted and unexhausted claims, a federal court may dismiss the petition entirely.[107] The dismissal for failure to exhaust, however, is without prejudice.[108]

3. The State's Waiver of the Exhaustion Requirement

The exhaustion requirement is not jurisdictional.[109] Thus, a respondent in a federal habeas corpus action is permitted to waive exhaustion.[110] The State must indicate in its answer to the petition whether the petitioner has exhausted available state remedies.[111] But if the State fails, either intentionally or inadvertently, to raise an exhaustion defense, the district court may address the merits of the claims. Nevertheless, the district court does not have to accept the waiver.[112]

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court will dispense with the exhaustion requirement and address the merits of the claims raised in the petition. *See, e.g.*, Story v. Kindt, 26 F.3d 402, 405 (3d Cir.), *cert. denied*, 115 S. Ct. 593 (1994); Workman v. Tate, 957 F.2d 1339, 1344 (6th Cir. 1992); Elcock v. Henderson, 902 F.2d 219, 220 (2d Cir. 1990) (per curiam).

103. *See* James v. Copinger, 428 F.2d 235, 242 (4th Cir. 1970), *cert. denied*, 404 U.S. 959 (1971).

104. *See* Francisco v. Gathright, 419 U.S. 59 (1974) (per curiam).

105. *E.g.*, Patterson v. Leeke, 556 F.2d 1168, 1170 (4th Cir. 1977) (per curiam).

106. *See* Richardson v. Turner, 716 F.2d 1059, 1062 (4th Cir. 1983).

107. Rose v. Lundy, 455 U.S. 509, 520-21 (1982).

108. *Id.* at 510.

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

110. *See* Granberry v. Greer, 481 U.S. 129, 132-35 (1987); Esslinger v. Davis, 44 F.3d 1515, 1524 (11th Cir. 1995).

111. HABEAS RULES, *supra* note 22, Rule 5; *see also* United States *ex rel.* Johnson v. Gilmore, 860 F. Supp. 1291, 1294 (N.D. Ill. 1994) (finding that the State waived the nonexhaustion defense by failing to raise it properly in its answer).

112. *See Granberry*, 481 U.S. at 134-35.

B. Procedural Default

1. The Basic Rule

The United States Supreme Court has held that federal habeas courts must honor legitimate state trial and appellate procedural rules.[113] The rule is rooted in the independent and adequate state ground doctrine[114] and in concerns of comity and federalism.[115] For a federal court to be forced to honor a state procedural default, the last state court decision must have clearly expressed that it was barring review of a federal constitutional claim by reliance on a state procedural rule.[116] Furthermore, a federal court must presume that a state court's dismissal of a constitutional claim does not rest on independent and adequate state grounds and that the court has rejected the claims on the merits.[117]

The most common examples of procedural default are the failure to lodge a contemporaneous objection at trial,[118] the failure to raise a claim on direct appeal,[119] the failure to raise a claim in a petition for discretionary review by a state appellate court,[120] and the failure to file a discretionary appeal in state court.[121] In South Carolina, however, the failure to lodge a proper objection at trial is not a default in capital cases tried prior to *State v. Torrence*.[122] Prior to *Torrence*, the South Carolina Supreme Court reviewed capital cases *in favorem vitae*, or "in favor of life." The effect of *in favorem vitae* is that all record-based claims "are assumed to have been reviewed" by the South Carolina Supreme Court on direct appeal; thus, the claims are exhausted and not defaulted.[123] Because the state supreme court does not

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113. Wainwright v. Sykes, 433 U.S. 72, 90-91, *reh'g denied*, 434 U.S. 880 (1977).

114. Under this doctrine, a federal court will not review a decision of a state court if the state court's ruling rests on a state law ground which is independent of the federal question and is an "adequate" basis of the state court decision. *See* Harris v. Reed, 489 U.S. 255, 260 (1989).

115. *See* Coleman v. Thompson, 501 U.S. 722 (1991).

116. *Harris*, 489 U.S. at 263. Federal courts are to presume that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

117. Nickerson v. Lee, 971 F.2d 1125, 1127 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1289 (1993).

118. *Wainwright*, 433 U.S. at 72.

119. *See* Anderson v. Harless, 459 U.S. 4 (1982) (per curiam).

120. *See* Whitley v. Bair, 802 F.2d 1487 (4th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987).

121. *Coleman*, 501 U.S. at 722.

122. 305 S.C. 45, 406 S.E.2d 315 (1991); *see also* Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (declining to extend *in favorem vitae* review to collateral proceedings brought prior to *Torrence*), *cert. denied*, 114 S. Ct. 607 (1993).

123. *See Drayton*, 312 S.C. at 8-9, 430 S.E.2d at 519.

review the postconviction record in capital cases *in favorem vitae*, all issues in the application for postconviction relief must be appealed or they will be deemed waived.[124] Nonrecord-based claims also may be deemed defaulted if they are raised in a federal habeas petition for the first time.[125]

2. Avoiding the State's Attempt to Assert a Procedural Bar

a. Failure to Satisfy the "Adequate and Independent State Law" Doctrine

In responding to the State's assertion of a procedural default, a habeas petitioner must first consider whether the claim had been adequately presented to the state court or whether the state court ruled on the merits of the claim.[126] Next, a petitioner must determine whether the State satisfies the "adequate and independent state law" doctrine. If, for example, the state procedural rule is intertwined with federal law, it is not independent of federal law. Accordingly, the state's default rule cannot preclude a federal court from entertaining the claim.[127]

Furthermore, a federal court may honor state procedural rules only if those rules are "adequate." A rule is adequate when it is firmly established[128] and consistently applied.[129] When a state court ignores the default

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124. *See Whitley*, 802 F.2d at 1500.

125. *See* Adams v. Aiken, 965 F.2d 1306 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2966 (1993), *reh'g granted and case remanded on other grounds*, 114 S. Ct. 1365 (1994).

126. *See, e.g.*, Horsley v. Alabama, 45 F.3d 1486, 1489 (11th Cir. 1995) (addressing merits *sua sponte* despite available procedural default); Abdullah v. Groose, 44 F.3d 692 (8th Cir. 1995) (reviewing a claim that petitioner was tried while shackled pursuant to the state's plain-error rule); Hall v. Delo, 41 F.3d 1248, 1250 (8th Cir. 1994) (finding ineffectiveness claim fairly presented in motion to recall the mandate); Johnson v. Cowley, 40 F.3d 341, 344 (10th Cir. 1994) (finding ineffective assistance of counsel claim properly raised, even though claim could have been "better stated").

127. *See* Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985); Boyd v. Scott, 45 F.3d 876, 880 (5th Cir. 1994) (finding that state court decision was "interwoven with federal law, and did not express clearly that its decision was based on state procedural grounds"), *cert. denied*, 115 S. Ct. 1964 (1995); Brecheen v. Reynolds, 41 F.3d 1343 (10th Cir. 1994).

128. *See* Ford v. Georgia, 498 U.S. 411, 424 (1991); Forgy v. Norris, 64 F.3d 399, 401-02 (8th Cir. 1995); Easter v. Endell, 37 F.3d 1343, 1346 (8th Cir. 1994) (finding a rule setting time limit for filing state postconviction petition not firmly established); Del Vecchio v. Illinois Dep't of Corrections, 31 F.3d 1363, 1381 (7th Cir. 1994) (en banc) (rejecting asserted procedural bar because petitioner's case in state court raised a question that state courts had not specifically addressed before), *cert. denied*, 115 S. Ct. 1404 (1995); Reynolds v. Ellingsworth, 23 F.3d 756, 764 (3d Cir. 1994) (finding no procedural default for failing to raise objection to evidentiary ruling because, at the time, state law permitted error to be reviewed in postconviction proceedings), *cert. denied*, 115 S. Ct. 778 (1995); Hansbrough v. Latta, 11 F.3d 143 (11th Cir.), *cert. denied*, 115 S. Ct. 291 (1994).

129. *See* Johnson v. Mississippi, 486 U.S. 578 (1988); James v. Kentucky, 466 U.S. 341, 348-

and decides the merits of a claim, a federal court may also review the merits.[130] The procedural default defense may also be waived if the State does not assert it in a timely manner.[131] Other exceptions exist as well.[132]

b. Cause and Prejudice

Even if the state procedural default rests on adequate and independent state law grounds, federal courts may nevertheless reach the merits of a federal claim if a petitioner can show cause and prejudice.[133]

i. Cause for Defaulting a Claim

The Supreme Court has declined "to essay a comprehensive catalog of the circumstances that would justify a finding of cause."[134] Generally speaking, courts have found cause for a procedural default where there existed an objective external impediment that could have prevented the claim from being

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49 (1984) (holding that only state procedures that are "firmly established and regularly followed . . . can prevent implementation of federal constitutional rights"); Barr v. City of Columbia, 378 U.S. 146, 149 (1964) ("[S]tate procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review."); Lowe v. Scott, 48 F.3d 873, 876 (5th Cir. 1995); Cochran v. Herring, 43 F.3d 1404 (11th Cir. 1995); Rosa v. Peters, 36 F.3d 625, 634 (7th Cir. 1994) (finding that Illinois courts do not uniformly bar *Batson* claims where defendant has failed to make a record of racial composition); Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994) (finding that a rule against successive state habeas petitions was not consistently applied until after state had denied petitioner's application), *cert. denied,* 115 S. Ct. 1175 (1995); Smith v. Black, 970 F.2d 1383, 1386 (5th Cir. 1992) (holding that procedural bars that are not "strictly or regularly followed" will not function as an adequate and independent state ground supporting a judgment).

130. *See* Caldwell v. Mississippi, 472 U.S. 320 (1985); McKenna v. McDaniel, 65 F.3d 1483, 1488-89 (9th Cir. 1995); Johnson v. Maryland, 915 F.2d 892, 895 (4th Cir. 1990); Mann v. Dugger, 844 F.2d 1446, 1448 n.4 (11th Cir. 1988), *cert. denied,* 489 U.S. 1071 (1989); Oliver v. Wainwright, 795 F.2d 1524, 1528-29 (11th Cir. 1986), *cert. denied,* 480 U.S. 921 (1987).

131. *See, e.g.*, Odum v. Boone, 62 F.3d 327, 329-30 (10th Cir. 1995) (refusing to raise a state procedural bar defense *sua sponte*); Davis v. Zant, 36 F.3d 1538, 1545 (11th Cir. 1994) (finding that the State waived the procedural default defense by failing to assert it in district court and on appeal); Lawrence v. Armontrout, 31 F.3d 662, 666 (8th Cir. 1994) (holding that default defense was waived because the State did not present it in district court), *cert. denied,* 115 S. Ct. 1124 (1995); Cupit v. Whitley, 28 F.3d 532 (5th Cir. 1994), *cert. denied,* 115 S. Ct. 1128 (1995). *But see* Esslinger v. Davis, 44 F.3d 1515, 1524-25 (11th Cir. 1995) (holding that a federal court may raise *sua sponte* a procedural bar to relief that the State has waived if an important federal interest is served).

132. A discussion of procedural default and the legal grounds for challenging its invocation can be found in LIEBMAN & HERTZ, *supra* note 9.

133. Wainwright v. Sykes, 433 U.S. 72, *reh'g denied,* 434 U.S. 880 (1977).

134. Smith v. Murray, 477 U.S. 527, 533-34 (1986) (quoting Reed v. Ross, 468 U.S. 1, 13 (1984)).

raised. For example, state action that makes compliance with the state's procedural rule impracticable is cause.[135] Courts have additionally held that where the factual or legal basis for a novel claim was not reasonably available to counsel, cause may exist for a procedural default.[136] Furthermore, federal courts have consistently recognized that constitutionally ineffective assistance of counsel is cause that will excuse a procedural default.[137] Still, the ineffective assistance claim serving as cause must have been exhausted in state court before it can be presented in a federal habeas proceeding.[138]

ii. Prejudice for a Defaulted Claim

The Supreme Court has made it clear that a petitioner must show actual prejudice resulting from a constitutional violation in order to establish the prejudice prong of the cause and prejudice test.[139] A petitioner who procedurally defaults "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[140] It is important to establish that a constitutional violation needs to be corrected when addressing the prejudice prong of the procedural default analysis in *Wainwright v. Sykes*.

c. Fundamental Miscarriage of Justice

A federal court can review a state procedural default, absent a showing of cause and prejudice, if failing to do so would result in a fundamental

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135. *See, e.g.*, Amadeo v. Zant, 486 U.S. 214, 215 (1988) (affirming that a secret prosecutorial memorandum discovered after trial constituted cause for failure to raise jury challenge).

136. Reed v. Ross, 468 U.S. 1 (1984). *But cf.* Teague v. Lane, 489 U.S. 288 (1989) (holding that new rules of law are not given retroactive effect unless one of two exceptions is found to exist). The retroactivity doctrine is discussed in more detail *infra* part III.C.

137. Murray v. Carrier, 477 U.S. 478, 488 (1986); *see also* Noble v. Barnett, 24 F.3d 582, 586 n.4 (4th Cir. 1994) ("[C]onstitutionally ineffective assistance of counsel is cause *per se* in the procedural default context . . ."); Smith v. Dixon, 14 F.3d 956, 973 (4th Cir. 1994) (en banc) (recognizing that counsel's ineffectiveness may excuse procedural default); United States v. De La Fuente, 8 F.3d 1333, 1337 (9th Cir. 1993) (holding that counsel's failure to bring a claim to court's attention constituted ineffective assistance); Freeman v. Lane, 962 F.2d 1252 (7th Cir. 1992) (finding ineffectiveness of appellate counsel is cause for failure to raise Fifth Amendment claim); Daniel v. Thigpen, 742 F. Supp. 1535, 1559-60 (M.D. Ala. 1990) (finding ineffective assistance of counsel provided cause for failure to charge on lesser included offense). *But see* Coleman v. Thompson, 501 U.S. 722, 755 (1991) (finding that ineffective assistance of postconviction counsel is not cause because there is no right to counsel in postconviction).

138. *See* Justus v. Murray, 897 F.2d 709 (4th Cir. 1990).

139. Wainwright v. Sykes, 433 U.S. 72, 84, *reh'g denied*, 434 U.S. 880 (1977).

140. United States v. Frady, 456 U.S. 152, 170 (1982).

miscarriage of justice.[141] The most notable fundamental miscarriage of justice is where "a constitutional violation has probably resulted in the conviction of one who is actually innocent."[142] To satisfy this standard "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."[143]

In *Schlup v. Delo*[144] an inmate accused of killing another inmate in prison submitted a second habeas petition, which presented for the first time affidavits and a videotape establishing his alibi.[145] The Court emphasized that the petitioner was not arguing that he was entitled to relief because he was innocent or that the Eighth Amendment prohibits the execution of one who is innocent. Rather, the petitioner properly made a colorable showing of innocence to excuse his prior failure to litigate claims of ineffective assistance of counsel and the failure of the state to disclose material exculpatory information.[146]

Regarding the fundamental miscarriage of justice exception for death sentences, the Court has acknowledged the difficulty in translating the concept of "actual innocence" from the guilt phase to the sentencing phase of a capital trial.[147] However, in *Sawyer v. Whitley*,[148] the Court held that the standard for actual innocence as it pertains to sentencing phase error, is that "but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[149] The Court noted that actual innocence "must focus on those elements which render a defendant eligible for the death penalty" under state law.[150] Thus, pursuant to the Court's analysis, the statutory aggravating factors which determine death penalty eligibility must be undermined, or the petitioner must demonstrate facts which categorically bar the imposition of the death penalty.

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141. Murray v. Carrier, 477 U.S. 478, 495-96 (1986).

142. *Id.*

143. Schlup v. Delo, 115 S. Ct. 851, 867 (1995); *see also* Kuhlmann v. Wilson, 477 U.S. 436, 454-55 n.17 (1986) (requiring the prisoner to "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt") (quoting Stone v. Powell, 428 U.S. 465, 491-92 n.31 (1976)).

144. 115 S. Ct. 851 (1995).

145. *Id.* at 858.

146. *Id.* at 860 (distinguishing Herrera v. Collins, 113 S. Ct. 853 (1993) (raising innocence as "a novel substantive claim")).

147. *See* Dugger v. Adams, 489 U.S. 401, 410-12 n.6 (1989); Smith v. Murray, 477 U.S. 527, 537 (1986).

148. 112 S. Ct. 2514 (1992).

149. *Id.* at 2517.

150. *Id.* at 2523.

C. Retroactivity

1. Overview

To validate "reasonable good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions,"[151] the Court has held that, with two exceptions, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[152] In *Teague v. Lane*,[153] a non-capital case, the petitioner sought a ruling that the Sixth, in addition to the Fourteenth, Amendment applied to the prosecutor's use of peremptory challenges. The *Teague* Court declined to reach the merits of petitioner's argument. Instead, the Court held that it first must consider whether the petitioner, then in federal habeas corpus litigation, could even gain the benefit of a favorable ruling. Stated differently, the Court had to decide whether a ruling on the merits could be applied retroactively to the petitioner's case.[154]

Drawing on analysis suggested by Justice Harlan,[155] the Court determined that only those defendants whose cases are pending on direct review when a new rule of law is announced can rely on that rule to attack their convictions. Under *Teague*, therefore, the retroactivity of a petitioner's request for relief is now a threshold issue in federal habeas corpus proceedings. As such, retroactivity should be addressed before the merits of the claim are decided.[156] As with other nonjurisdictional procedural defenses, the state may waive retroactivity if it is not timely and properly raised as a defense.[157]

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151. Butler v. McKellar, 494 U.S. 407, 414 (1990).

152. Teague v. Lane, 489 U.S. 288, 310 (1989); *see also* Penry v. Lynaugh, 492 U.S. 302 (1989) (applying *Teague*'s retroactivity analysis to capital cases).

153. 489 U.S. 288 (1989).

154. *Id.* at 300. The Court has held that *Teague* is a one-way street, so to speak. The State sometimes receives the benefit of new rules, while a habeas petitioner does not. *See* Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993).

155. Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring).

156. *See* Saffle v. Parks, 494 U.S. 484, 488 (1990) (finding that a federal court's task is to "determine whether a state court considering [the petitioner's constitutional] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [sought] was required by the Constitution").

157. *See* Caspari v. Bohlen, 114 S. Ct. 948, 953 (1994) (holding that because nonretroactivity is not jurisdictional, a federal court may choose not to apply *Teague* if the State does not raise it); Sinastaj v. Burt, 66 F.3d 804, 805 n.1 (6th Cir. 1995); Williams v. Dixon, 961 F.2d 448, 456 (4th Cir.), *cert. denied*, 113 S. Ct. 510 (1992).

2. The Three-Step Retroactivity Analysis

In *Caspari v. Bohlen*[158] the Court articulated a three-step analysis. First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court should survey the legal landscape as it then existed in order to determine if a state court considering the defendant's claim at the time the conviction became final would have felt compelled by existing precedent to grant relief. The issue at this step is whether the petitioner is seeking the benefit of a new rule. Third, even if the court determines that the defendant seeks to benefit from a new rule, the court must decide whether the two exceptions to nonretroactivity apply.[159]

a. Determining When a Case Becomes Final

A case is final for the purposes of retroactivity analysis when certiorari is denied by the United States Supreme Court following the initial direct appeal. If a defendant does not file a certiorari petition, the case is final when the time for filing a petition for a writ of certiorari has elapsed.[160]

b. What Constitutes a New Rule

"[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States . . . [or] if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[161] In *Butler v. McKellar*[162] the Court expanded the scope of the new rule doctrine. Pursuant to *Butler*, a case establishes a new rule if its outcome was "susceptible to debate among reasonable minds."[163] The new rule principle "validates reasonable, good-faith interpretations of existing precedents made by state courts" even though they are later shown to be erroneous.[164]

In *Stringer v. Black*[165] the Court limited the effect of *Butler* by indicating that the application of new facts to established constitutional principles does not trigger the retroactivity bar.[166] Specifically, the *Stringer* Court

158. 114 S. Ct. 948 (1994).

159. *Id.* at 953.

160. *Id.*; Powell v. Nevada, 114 S. Ct. 1280 (1994); Griffith v. Kentucky, 479 U.S. 314 (1987).

161. Teague v. Lane, 489 U.S. 288, 301 (1989).

162. 494 U.S. 407 (1990).

163. *Id.* at 415.

164. *Id.* at 414.

165. 503 U.S. 222 (1992).

166. *Id.*; *see also* Yates v. Aiken, 484 U.S. 211, 216 n.3 (1988); Turner v. Williams, 35 F.3d

considered the retroactivity of *Maynard v. Cartwright*,[167] where the Court had found that Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague.[168] The petitioner in *Stringer* argued that *Maynard* was not new because it was dictated by the Court's holding in *Godfrey v. Georgia*.[169] In *Godfrey* the Court found unconstitutionally vague the aggravating circumstance that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."[170] Both *Godfrey* and *Maynard* were based on the Eighth Amendment mandate that capital sentencing provisions limit and channel the sentencer's discretion in imposing the death penalty to minimize "the risk of wholly arbitrary and capricious action."[171]

Although the unconstitutionally vague language in *Godfrey* differed from the language in *Maynard*, both sets of aggravating circumstances violated the Eighth Amendment prohibition against the arbitrary infliction of capital punishment. Despite differences in wording, both decisions stemmed from the same constitutional provision. Because the Supreme Court found no new burden on the states, the result in *Maynard* was dictated by *Godfrey*.[172] The Court noted that "it would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited to the precise language before us in that case."[173] Recent cases have waxed and waned on the strictness of the application of dictated-by-precedent rule.[174] However, the courts have made clear that certain Supreme Court decisions, such as the Court's ruling in *Strickland v. Washington*,[175] which established the standard for assessing whether a criminal defendant's representation was effective, have set forth broad

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872, 884 (4th Cir. 1994) (distinguishing between a new rule, which seeks the extension of an existing rule, and "the mere application" of an normative rule to a new set of facts). The Supreme Court has stated that the existing rule must be fairly specific; otherwise, the practical effect "would be meaningless if applied at this level of generality." Sawyer v. Smith, 497 U.S. 227, 236 (1990).

167. 486 U.S. 356 (1988).

168. *Id.* at 359-60.

169. 446 U.S. 420 (1980).

170. *Id.* at 422.

171. *Maynard*, 486 U.S. at 362; *see Godfrey*, 446 U.S. at 428.

172. *Stringer*, 503 U.S. at 229.

173. *Id.* at 228-29; *see also* Turner v. Williams, 35 F.3d 872 (4th Cir. 1994) (holding that petitioner sought only to apply *Godfrey* to a different factual setting rather than to benefit from a new rule).

174. For an indication of how the Court has dealt with the retroactivity question, see Caspari v. Bohlen, 114 S. Ct. 948 (1994); Gilmore v. Taylor, 113 S. Ct. 2112 (1994); Sawyer v. Smith, 497 U.S. 227 (1990); Saffle v. Parks, 494 U.S. 484 (1990); Butler v. McKellar, 494 U.S. 407 (1990); Penry v. Lynaugh, 492 U.S. 302 (1989).

175. 466 U.S. 668 (1984).

normative rules designed to be applied to different factual circumstances.[176] Thus claims of ineffective assistance of counsel will not implicate *Teague*'s retroactivity principles.

c. Exceptions to the Retroactivity Doctrine

In *Teague* the Court announced that new rules would be applied retroactively if they fell into one of two narrow categories. A new rule falls within the first exception if it places certain kinds of primary private individual conduct beyond the power of the state to proscribe, or if it addresses a substantive categorical guarantee accorded by the Constitution. An example of this exception is a rule that "prohibits imposing the death penalty on a certain class of defendants because of their status or . . . offense."[177]

The second exception is for "'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding."[178] "A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding."[179]

D. Subsequent Petitions

Due to concerns about the finality of convictions and federalism, federal courts may decide not to reach the merits of constitutional claims under the abuse-of-the-writ doctrine if a prisoner raises a claim that was already raised in a previous habeas petition[180] or if a prisoner raises a claim in a subsequent petition that he could have raised in an earlier petition.[181] In *McCleskey v. Zant*[182] the Court established the following principles for successive petitions.

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176. Ostrander v. Green, 46 F.3d 347 (4th Cir. 1995).

177. *Penry*, 492 U.S. at 329-30 (citations omitted).

178. *Sawyer*, 497 U.S. at 241-42 (quoting Teague v. Lane, 489 U.S. 288, 311-13 (1989)).

179. *Id.* at 242 (quoting *Teague*, 489 U.S. at 311); *see also* Adams v. Aiken, 41 F.3d 175 (4th Cir. 1994) (finding that the rule announced in Cage v. Louisiana, 498 U.S. 39 (1990), regarding defective reasonable doubt instruction, fell within the second *Teague* exception); Williams v. Dixon, 961 F.2d 448 (4th Cir. 1992) (finding that the rule established in McKoy v. North Carolina, 494 U.S. 433 (1990), fell within the second *Teague* exception).

180. *See* Kuhlmann v. Wilson, 477 U.S. 436 (1986); *see also* HABEAS RULES, *supra* note 22, Rule 9(b) (providing that a second or successive petition may be dismissed if the petitioner fails to allege new or different grounds and the prior determination was on the merits).

181. *See* McCleskey v. Zant, 499 U.S. 467 (1991); *see also* HABEAS RULES, *supra* note 22, Rule 9(b) (providing that a second or successive petition may be dismissed despite new and different grounds if the judge finds that the failure to assert the grounds in a prior petition "constituted an abuse of the writ").

182. 499 U.S. 467 (1991).

1. Initial Pleading Burden

When a prisoner files a second or subsequent petition, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if it clearly and specifically notes the petitioner's writ history, identifies the claim that appears for the first time, and alleges that the petitioner has abused the writ.[183] Like other procedural defenses, the State may waive the abuse issue by failing to raise it in the district court.[184]

2. Petitioner's Burden

The burden then shifts to the petitioner to disprove abuse and to excuse his failure to raise the claim earlier. In *McCleskey* the Court adopted the cause and prejudice test of *Wainwright v. Sykes*.[185] To avoid application of the abuse-of-the-writ doctrine, the petitioner must show cause and prejudice as those concepts have been defined in the Court's procedural default decisions.[186] A petitioner is entitled to an evidentiary hearing regarding abuse of the writ unless the district court determines as a matter of law that the petitioner cannot satisfy the standard.[187]

As in other contexts, if a petitioner cannot show cause, the failure to raise the claim earlier may still be excused if the petitioner can show that a "fundamental miscarriage of justice" would result from a failure to entertain the claim.[188] In other words, a petitioner must supplement his petition with a colorable showing of factual innocence or with a showing that he is innocent of the death penalty.[189]

IV. DECIDING THE MERITS OF THE PETITION

Even if a federal court concludes that no procedural defense precludes it from addressing the merits of particular constitutional claims, a habeas

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183. *Id.* at 494.

184. *See, e.g.*, Lewandowski v. Makel, 949 F.2d 884 (6th Cir. 1991); Aldridge v. Dugger, 925 F.2d 1320 (11th Cir. 1991).

185. 433 U.S. 72 (1977).

186. *McCleskey*, 499 U.S. at 494.

187. *Id.* For a more detailed discussion of when a federal court must conduct an evidentiary hearing, see *infra* part IV.B.

188. *McCleskey*, 499 U.S. at 494-95.

189. *See* Schlup v. Delo, 115 S. Ct. 851 (1995) (discussing necessary showing of innocence at the guilt phase); Sawyer v. Whitley, 112 S. Ct. 2514, 2520-23 (1992) (discussing what petitioner must show to argue that he is "actually innocent" of the death penalty). For a discussion of these cases and the fundamental miscarriage of justice exception, see *supra* part III.B.2.c.

petitioner must navigate through additional doctrinal obstacles before achieving a favorable result. The first obstacle is that factual determinations of state courts are afforded a presumption of correctness.[190] Second, with respect to claims requiring factual development, a petitioner must either show entitlement to an evidentiary hearing or convince the court to exercise its discretion and convene a hearing.[191] Finally, even if a petitioner convinces the court that constitutional rights were violated, the court must assess the harmfulness of the error.

A. Presumption of Correctness Afforded to State Court Findings of Fact

1. Distinguishing Questions of Fact from Mixed Questions of Law and Fact

A federal court should ordinarily presume that factual determinations made by state courts are correct if (1) there has been a hearing on the merits of a factual issue; (2) in a state court of competent jurisdiction; (3) where the applicant and the State were parties; and (4) which is evidenced by a written finding or opinion.[192] The presumption in section 2254(d) also applies to findings of fact made by a state appellate court.[193]

The deference to the state courts reaches only to findings of "basic, primary, or historical facts," not to determinations of law or to mixed questions of law and fact.[194] Findings relating to questions of law or to mixed questions of law and fact are not presumed to be correct.[195] However, as the Supreme Court has noted, the "appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive."[196] The Supreme Court has yet to arrive at a "rule or principle that will unerringly distinguish a factual finding from a legal conclusion."[197] Thus, it is important to know how and why the Court distinguishes which questions are factual and which are legal. In its most recent treatment of these questions, the Supreme Court concluded that the determination of whether a

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190. 28 U.S.C. § 2254(d) (1988).

191. *See* Townsend v. Sain, 372 U.S. 293, 313 (1963), *overruled in part on other grounds by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

192. 28 U.S.C. § 2254(d) (1988).

193. Sumner v. Mata, 449 U.S. 539, 546-47 (1981).

194. *Townsend*, 372 U.S. at 309 n.6; *see* Strickland v. Washington, 466 U.S. 668, 698 (1984).

195. *Strickland*, 466 U.S. at 698; Fields v. Murray, 49 F.3d 1024, 1029-30 (4th Cir.) (en banc), *cert. denied*, 116 S. Ct. 224 (1995); Hoots v. Allsbrook, 785 F.2d 1214, 1219 (4th Cir. 1986).

196. Miller v. Fenton, 474 U.S. 104, 113 (1985).

197. Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).

suspect was "in custody" for *Miranda* purposes was a mixed question of law and fact warranting independent federal review.[198] The Court discussed the reason for its previous decisions as being grounded in the circumstances in which the decision is made. For example, if an issue involves the credibility or demeanor of a witness and the facts are developed in open court on a full record, the state court is in a better position to make the requisite findings. Thus, the issue is treated as a question of fact.[199] If, on the other hand, the legal standard is complex and observation of the state court proceeding will not assist in resolving the issue, a federal court should consider the issue to be a mixed question of law and fact and address it de novo.[200] Because the determination of whether a defendant was "in custody" involves the resolution of whether a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation" and because the trial court does not have a first-person vantage on whether a defendant was "in custody," application of the controlling legal standard to the historical facts in this "ultimate determination . . . presents a 'mixed question of law and fact' qualifying for independent review."[201] A mixed question should also be found where there is an elevated risk that the constitutional right at issue will not be properly protected in state courts because of bias or some other factor.[202]

2. Exceptions to the Presumption of Correctness of State Findings of Fact

Several important exceptions to the presumption of correctness were also established by Congress.[203] Most of the exceptions entail inadequacies in the factfinding procedures employed in the state court. The exceptions are:

(1) that the merits of the factual dispute were not resolved in the State court hearing;
(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

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198. Thompson v. Keohane, 116 S. Ct. 457 (1995).

199. *See, e.g.*, Demosthenes v. Baal, 495 U.S. 731 (1990) (per curiam); Wainwright v. Witt, 469 U.S. 412 (1985) (juror impartiality is a question of fact); Patton v. Yount, 467 U.S. 1025 (1984); Massio v. Fulford, 469 U.S. 111 (1983) (per curiam) (competency to stand trial is a question of fact); Fields v. Murray, 49 F.3d 1024 (4th Cir.) (en banc), *cert. denied*, 116 S. Ct. 224 (1995).

200. *Fields*, 49 F.3d at 1030; *see also Miller*, 474 U.S. at 113 (voluntariness of a confession is a legal issue); *Strickland*, 466 U.S. at 698 (effectiveness of counsel is a legal issue).

201. *Thompson*, 116 S. Ct. at 465.

202. *Fields*, 49 F.3d at 1030.

203. 28 U.S.C. § 2254(d)(1)-(8) (1988).

(3) that the material facts were not adequately developed at the State court hearing;
(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
(7) that the applicant was otherwise denied due process of law in the State court proceeding;
(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.[204]

The absence of a full and fair hearing is the most common basis for challenging factfinding made by a state court. Habeas counsel should review section 2254(d) carefully in formulating arguments to prevent a federal judge from deferring to fact determinations made by a state court.[205]

Unless a petitioner can show that the presumption of correctness should not apply to state court factfinding, a petitioner bears the burden of establishing "by convincing evidence that the factual determination by the [s]tate court was erroneous."[206]

B. Evidentiary Hearings

1. When Federal Hearings Are Mandatory

A petitioner may be entitled to an evidentiary hearing in federal court.[207] In moving for a federal evidentiary hearing, a petitioner must allege facts which, if proved, would entitle him to relief.[208] Furthermore,

204. *Id.*

205. Habeas counsel should challenge the court's determinations as being neither full nor fair where the state postconviction court adopted wholesale the factual conclusions proposed by the attorney general. *See* Blackmon v. Scott, 22 F.3d 560, 563-64 (5th Cir.) (finding that in failing to raise the issue below, the petitioner waived the right to object to finding of fact drafted by assistant district attorney and submitted *ex parte*), *cert. denied*, 115 S. Ct. 671 (1994).

206. 28 U.S.C. § 2254(d) (1988).

207. The hearing may be conducted by a federal magistrate. HABEAS RULES, *supra* note 22, Rule 8(b), 10.

208. Procunier v. Atchley, 400 U.S. 446, 451 (1971); Townsend v. Sain, 372 U.S. 293, 307

a de novo evidentiary hearing must be held "in every case in which the state court has not after a full hearing reliably found the relevant facts."[209]

In *Townsend*, the Court catalogued six circumstances in which a federal court must hold a hearing due to various deficiencies in the state court factfinding processes:

> (1) the merits of the factual dispute were not resolved in the state hearing;
> (2) the state factual determination is not fairly supported by the record as a whole;
> (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;
> (4) there is a substantial allegation of newly discovered evidence;
> (5) the material facts were not adequately developed at the state-court hearing;
> (6) for any reason it appears that the state trier of fact did not afford the applicant a full and fair fact hearing.[210]

Also, if the state conducted a full and fair hearing but did not make findings of fact, the petitioner is entitled to a de novo federal hearing.[211]

In *Keeney v. Tamayo-Reyes*[212] a five to four majority overruled a narrow portion of *Townsend*. Under *Keeney*, a petitioner is not entitled to a federal evidentiary hearing based on *Townsend*'s fifth factor—that "material facts were not adequately developed in the state court hearing"—unless the petitioner can meet the cause and prejudice standard excusing petitioner's failure to develop the necessary facts in state court.[213] Attorney error accounted for material facts not being developed in *Keeney*. The Court found that the error did not constitute cause for failing to develop the facts in the state courts.[214] In the Court's view, comity and federalism require adoption of the principle that a petitioner should be encouraged to fully develop facts in the state courts, so that state courts can correct errors in the first in-

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(1963), *overruled on other grounds by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); Washington v. Murray, 952 F.2d 1472, 1476 (4th Cir. 1991).

209. *Townsend*, 372 U.S. at 318; *see also* Wainwright v. Sykes, 433 U.S. 72, 87 (1977) ("[Petitioner is] entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings.").

210. *Townsend*, 372 U.S. at 313. The overlap between the factors listed in *Townsend* and the factors related to the presumption of correctness in 28 U.S.C. § 2254(d) is close, but not exact. For a more detailed treatment of this area, see LIEBMAN & HERTZ, *supra* note 9.

211. *Townsend*, 372 U.S. at 313; *see* Becton v. Barnett, 920 F.2d 1190, 1192 (4th Cir. 1990).

212. 504 U.S. 1 (1992).

213. *Id.* at 12.

214. *Id.* at 10 n.5.

stance.[215] *Keeney* was remanded to the federal district court to afford the petitioner an opportunity to show cause and prejudice.[216] Because *Keeney* applies to the fifth *Townsend* circumstance only, the other *Townsend* grounds entitling a petitioner to an evidentiary hearing are not affected by the ruling.[217] Thus, if the facts were not resolved in the state court hearing,[218] if the hearing was not full and fair,[219] if the facts as found are not supported by the record,[220] if there is newly discovered evidence,[221] or if there is any other reason justifying a hearing,[222] then the federal district court still must conduct an evidentiary hearing in a habeas corpus proceeding.

2. Discretionary Hearings

Even if none of *Townsend*'s six circumstances exists, the district judge always has the discretion to hold an evidentiary hearing.[223] However, state court factfindings made after a full hearing will be presumed correct unless one of the eight criteria set forth in section 2254(d) is applicable. Although section 2254(d) establishes the presumption of correctness, in practice no such presumption will be applied if a hearing is mandatory under *Townsend* because of the overlap between the *Townsend* criteria and the statutory criteria. Even if section 2254(d) requires state factfindings to be presumed correct, a petitioner still may request an evidentiary hearing "to establish by convincing evidence that the factual determination by the [s]tate court was erroneous."[224]

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215. *Id.* at 9; *see also* Stewart v. Nix, 31 F.3d 741, 743 (8th Cir. 1994) (holding that petitioner was not entitled to an evidentiary hearing because "newly-alleged facts" supporting diminished capacity defense could have been presented in state court).

216. *Keeney*, 504 U.S. at 1.

217. Brecheen v. Reynolds, 41 F.3d 1343, 1362 n.14 (10th Cir. 1994).

218. *See, e.g.*, Zilich v. Reid, 36 F.3d 317, 321-22 (3d Cir. 1994); Lesko v. Lehman, 925 F.2d 1527, 1540 (3d Cir.), *cert. denied*, 504 U.S. 898 (1991).

219. *See, e.g.*, Ford v. Wainwright, 477 U.S. 399 (1986); Dumond v. Lockhart, 885 F.2d 419, 421 (8th Cir. 1989); Coleman v. Zant, 708 F.2d 541, 548 (11th Cir. 1983), *rev'd on other grounds sub nom.* Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985).

220. *See* Blackmon v. Scott, 22 F.3d 560, 566 & n.20 (5th Cir.), *cert. denied*, 115 S. Ct. 671 (1994); Burns v. Clusen, 798 F.2d 931, 942 (7th Cir. 1986).

221. *See* Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994).

222. *See* Noland v. Dixon, 831 F. Supp. 490, 508 (W.D.N.C. 1993).

223. Townsend v. Sain, 372 U.S. 293, 318 (1963); *see also* Keeney v. Tamayo-Reyes, 504 U.S. 1, 23 (1992) (O'Connor, J., dissenting) ("[D]istrict courts . . . still possess the discretion, which has not been removed by today's opinion, to hold hearings even where they are not mandatory.").

224. 28 U.S.C. § 2254(d); *see In re* Wainwright, 678 F.2d 951 (11th Cir. 1982).

3. Hearings on Procedural Defenses

The State's assertion of procedural defenses may trigger the need for additional factfinding. For example, a petitioner may be able to show cause for a procedural default only if he can establish through an evidentiary hearing that the State had withheld critical evidence[225] or that counsel's ineffectiveness prevented him from raising a meritorious claim. A petitioner is entitled to a hearing in federal court if the petitioner has not had a full and fair hearing in state court on these issues.[226]

C. Harmless Error

Even if a federal court finds that the state court committed a constitutional error, a habeas petitioner will not be entitled to relief if the error was harmless.[227] In *Brecht v. Abrahamson*[228] the Court held that an error is not harmless if it "'had substantial and injurious effect or influence in determining the jury's verdict.'"[229] Prior to *Brecht*, an error was harmless only if there was no reasonable probability that the error contributed to the verdict.[230] The Court noted the distinctions between direct review and habeas corpus in order to rationalize its use of different harmless error standards: "Direct review is the principal avenue for challenging a conviction" whereas the "role of federal habeas proceedings . . . is secondary and

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225. *See* Amadeo v. Zant, 486 U.S. 214 (1988).

226. *See* McCleskey v. Zant, 499 U.S. 467 (1991); Porter v. Singleton, 49 F.3d 1483 (11th Cir. 1995); Watson v. New Mexico, 45 F.3d 385 (10th Cir. 1995); Jamison v. Lockhart, 975 F.2d 1377, 1381 (8th Cir. 1992); Buffalo v. Sunn, 854 F.2d 1158, 1165 (9th Cir. 1988); Sockwell v. Maggio, 709 F.2d 341, 344 (5th Cir. 1983); McShane v. Estelle, 683 F.2d 867, 870 (5th Cir. 1982). At the hearing, petitioner must be allowed to demonstrate either cause and prejudice, or that it would be a fundamental miscarriage of justice not to address the claims on the merits. *See* Sawyer v. Whitley, 505 U.S. 333 (1992).

227. Of course, some errors can never be harmless. Structural defects such as trial before a biased judge or the total deprivation of the right to counsel defy harmless error analysis. Arizona v. Fulminante, 499 U.S. 279, 309 (1991); *see also* Sullivan v. Louisiana, 113 S. Ct. 2078 (1993) (holding that a defective reasonable doubt instruction can never be harmless); Abdullah v. Groose, 44 F.3d 692, 695 (8th Cir. 1995) (finding that forcing defendant to stand trial shackled is a structural error); Rosa v. Peters, 36 F.3d 625, 634 n.17 (7th Cir. 1994) (finding that *Batson* violations are not subject to harmless error analysis); Bland v. California Dep't of Corrections, 20 F.3d 1469, 1478-79 (9th Cir.) (finding that denial of the right to counsel of choice was structural error), *cert. denied,* 115 S. Ct. 357 (1994).

228. 113 S. Ct. 1710 (1993). For a more detailed discussion of *Brecht*, see John H. Blume & Stephen P. Garvey, *Harmless Error in Federal Habeas Corpus After* Brecht v. Abrahamson, 35 WM. & MARY L. REV. 163 (1993).

229. *Brecht*, 113 S. Ct. at 1714 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

230. Chapman v. California, 386 U.S. 18 (1967).

limited."[231] The Court rejected the argument that the more stringent test of *Chapman* is necessary to deter state courts from relaxing their guard. It determined that "the costs of applying the *Chapman* standard on federal habeas outweigh the additional deterrent effect, if any, which would be derived from its application on collateral review."[232] The Court also stated that the costs of reversing a state court conviction, where there was only a reasonable probability that the error affected the outcome, was too high.[233]

Justice Stevens, in a concurring opinion, stated that the burden of demonstrating that the error was harmless rests upon the prosecution.[234] He also stated that the error must be evaluated in the context of the entire record because a reviewing court must be sensitive to "all the ways that error can infect the course of a trial."[235] The emphasis is not on how the error affected the verdict. Accordingly, the court cannot ask only if the petitioner would have been convicted absent the error. Rather, habeas courts must be able to determine that "'the error did not influence the jury,'" and that "'the judgment was not substantially swayed by the error.'"[236] Again, the issue is not whether the decision was right, but "'what effect the error had or reasonably may be taken to have had upon the jury's decision.'"[237] Justice Stevens pointed out that the inquiry cannot be whether there was enough evidence to support the result.[238] Consequently, the Court has held that when a federal habeas judge "is in grave doubt" about the harmfulness of the trial error, "the petitioner must win."[239]

In some circumstances, a federal court may appropriately employ the more demanding *Chapman* harmless error test. If, for example, the state court did not find constitutional error and, thus, had no occasion to resort to the *Chapman* test, the federal court may then examine the harmlessness using *Chapman*.[240] Even in *Brecht*, the Court noted that one federal court had

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231. *Brecht*, 113 S. Ct. at 1719.

232. *Id.* at 1721.

233. *Id.*

234. *Id.* at 1723 (Stevens, J., concurring).

235. *Id.* at 1724.

236. *Brecht*, 113 S. Ct. at 1724 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

237. *Id.* at 1724 (quoting *Kotteakos*, 328 U.S. at 764).

238. *Id.* at 1724 n.2.

239. O'Neal v. McAninch, 115 S. Ct. 992, 994 (1995).

240. Williams v. Clarke, 40 F.3d 1529, 1541 (8th Cir. 1994); *see* Fields v. Leapley, 30 F.3d 986, 991 (8th Cir. 1994) (applying the *Chapman* test). *But see* Horsley v. Alabama, 45 F.3d 1486, 1492 (11th Cir. 1995) (applying the *Brecht* test rather than *Chapman*); Smith v. Dixon, 14 F.3d 956, 976 (4th Cir. 1994) (en banc) (applying *Brecht* rather than *Chapman*).

already conducted the *Chapman* test to determine if there was a reasonable probability that an error affected the outcome of the state trial.[241]

V. STAYS OF EXECUTION

A death-sentenced inmate may have to request a stay of execution in federal court pending resolution of the writ of habeas corpus.[242] An inmate is entitled to a stay of execution even before filing the petition, guaranteeing that the inmate will be appointed counsel and that counsel will have a meaningful opportunity to investigate the case and prepare the petition.[243]

The leading Supreme Court case addressing stays of execution is *Barefoot v. Estelle*.[244] In essence, if a first federal habeas petition is involved, a stay of execution should be issued if the petition raises any "nonfrivolous claims of constitutional error."[245] The standard for a stay pending appeal is the same standard used to determine whether to issue a certificate of probable cause to appeal.[246] If a court issues a certificate of probable cause, a petitioner must be given an opportunity to address the merits. A petitioner is then entitled to a stay.[247] A petitioner should seek a stay pending appeal from the district court before requesting it from the court of appeals. Generally, an execution date will not be set in a South Carolina case until the inmate has completed one round of state post-conviction and federal habeas corpus proceedings.

In a second or successive petition, the relevant standard for a stay of execution is more stringent: whether there are "substantial grounds upon which relief might be granted."[248]

VI. CONCLUSION

Recent developments in habeas doctrine have created numerous procedural traps for inmates seeking to vindicate their most fundamental rights. Despite the increasingly hostile judicial and political attitudes toward prisoners, habeas corpus remains available to those punished in violation of the federal constitution. This overview of the procedural issues in federal habeas corpus and its

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241. *Brecht*, 113 S. Ct. at 1721.

242. 28 U.S.C. § 2251 (1988).

243. McFarland v. Scott, 114 S. Ct. 2568 (1994).

244. 463 U.S. 880 (1983).

245. *Id.* at 888; *see also* Shaw v. Martin, 613 F.2d 487 (4th Cir. 1980) (granting a stay of execution where pending proceedings were not an attempt to relitigate prior issues).

246. *Barefoot*, 463 U.S. at 892-93. For a discussion of when a court will issue a certificate of probable cause to appeal, see *supra* part II.B.8.a.

247. *Barefoot*, 463 U.S. at 893.

248. *Id.* at 895; Delo v. Stokes, 495 U.S. 320, 321 (1990) (per curiam).

relationship with state postconviction proceedings is designed to assist South Carolina inmates in effectively challenging their convictions and sentences. The ultimate goal is to provide basic justice.