

Folly by Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings

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INTRODUCTION

It is an aphorism that nobody contests: The person who represents himself ⁿ³ has a fool for a client. However exceptional his natural abilities, however superior his legal training, however thorough his preparation of the facts, the lack of objectivity of the person who proceeds **pro se** is sufficient to brand him an idiot. [*56]

Yet, the law occasionally reaches a conclusion that simply makes no sense. In these cases, the judiciary risks alienating itself from the people it serves, as the nation looks on askance. For example, most citizens believe it obvious that the guilt or innocence of the accused should be the most important factor in any criminal proceeding. The United States Supreme Court, on the other hand, strains credulity when it suggests that there may be no constitutional bar to executing the innocent. ⁿ⁴

Likewise, nobody in his right mind would expect the average inmate to be capable of proceeding **pro se** in a capital case -- researching the most complex issues known to the law, investigating the facts from his narrow **death row** cell, and providing himself with meaningful legal representation. Yet a plurality of the

Supreme Court has indicated that an equitable justice system may deny legal representation to those on **death row**. n5 "If the law says that," as Mr. Bumble might bellow, "then the law is a ass, a idiot!" n6

Fortunately, with the recent conversion of the Mississippi Supreme Court, n7 now thirty-three of the thirty-eight states with the death penalty on the books agree with Mr. Bumble and automatically provide for counsel in state post-conviction proceedings. By statute or by practice, all but two states provide counsel, with Georgia and Louisiana standing in unhappy isolation. It is the thesis of this article that the Eighth Amendment is violated by any state that refuses this fundamental right. It is the aim of the article to provide a blueprint to challenge any state that remains recalcitrant on this issue. [*57]

The Role of State Post-Conviction Relief

In theory, those convicted of crimes still have remedies even if their convictions have been affirmed on direct appeal. The writ of habeas corpus, originally preserved by the federal constitution, n8 has an analogous counterpart in every state's constitution. n9 State post-conviction relief reviews the legal errors that may have occurred at trial and allows for expansion of the record where the original transcript does not reflect potential constitutional error. Indeed, state post-conviction is often the first time a court hears claims of ineffective assistance of counsel, prosecutorial misconduct, jury irregularity, or facts discovered subsequent to the trial that exculpate the convict. Through time and custom, state post-conviction remedies are required to be exhausted before any federal habeas review will take place. n10

While the Supreme Court has long since recognized the right to counsel at trial n11 and on direct appeal, n12 in *Murray v. Giarratano*, n13 four members of the Supreme Court opined that there was no constitutional right to the assistance of counsel in [*58] post-conviction proceedings, even in a capital case. n14 The key to the case, however, was in the concurrences that supplied the decisive votes. Justice Kennedy, joined by Justice O'Connor, limited his opinion to the specific facts before the Court, noting that no indigent defendant in Virginia had ever actually proceeded without counsel. n15

There were many reasons to question the wisdom of *Giarratano*, even when it was decided ten years ago. However, the purpose of this article is not to make an exhaustive criticism of the case. Other authors have performed this task, and admirably. n16 Yet most discussions -- from the Supreme Court on down -- have focused single-mindedly on legal theory, with scant attention paid to the absurd practical realities that would flow from a decision to deny counsel to those who are under a death sentence.

In Mississippi, until very recently, the state supreme court had flatly refused to provide counsel, and had refused to stay the execution dates of those who had

no lawyer. n17 One man, Willie Russell, came within forty-five minutes of his execution without a lawyer, and it was only the intervention of the United States Court of Appeals for the Fifth Circuit that prevented his death. n18

In an effort to compel a solution to this problem, Mr. Russell sued the State of Mississippi in federal court. n19 His lawsuit focused heavily on practical facts. Mr. Russell had tested in the range of mental retardation while in school. His lawyers planned to present a full scale evaluation of the other men on **death row**, commissioned by the Southern Poverty Law Center and conducted by two independent psychologists, Dr. Mark Cunningham and Dr. Mark Vigan. n20 They determined that twenty [*59] seven percent of the other inmates might also fall within the range of mental retardation. n21 A battery of tests also established that the men had very limited reading comprehension abilities. n22 Another test was specifically designed to determine the educational level that would be required merely to understand the Mississippi Post-Conviction Relief Statute. n23 Ultimately, based on the logic that a person who could not get into law school should not be required to act as a lawyer, the inmates were asked to attempt the Law School Admission Test (LSAT). n24

Perhaps it is not surprising that the results of these tests proved what most sensible people would automatically assume -- that indigent, under-educated men who had been sentenced to death are ill-equipped to understand, much less perform, the task of self-representation in post-conviction.

However, this only answered a part of the practical question. The researchers and lawyers also tested the hypothesis that the state of mind of a person condemned to death could have an effect on his ability to prepare and present his own defense. n25 Again, the strong findings of hopelessness and depression suggested that the emotional state of those on **death row** would further reduce their capacity to act as their own attorneys. n26

Finally, even a highly intelligent and well-educated individual would be challenged if he were asked to seek out and present the evidence that is so crucial to a successful post-conviction petition while confined to his cell for more than twenty-three hours every day. Mr. Russell's attorneys therefore explored the practical realities of his day-to-day existence in an effort to gauge the avenues left open to his self-representation. This focused [*60] not only on the obvious fact that Mr. Russell would not be allowed to leave the penitentiary to perform his own investigation, but also on the extremely limited -- and rapidly diminishing -- legal assistance provided to inmates by the Mississippi State Penitentiary.

The State was not keen to see how far the federal courts would be willing to stretch the rationale of Giarratano and sought settlement discussions before discovery could even begin. In the meantime, Mr. Russell added the individual justices of the Supreme Court of Mississippi as defendants to the lawsuit and

indicated his intention to take their depositions early in the discovery process.

Fortunately, the judicial system was spared the embarrassing spectacle of the justices under oath trying to explain how, on the one hand, they could speak of the incredible complexity of capital litigation, n27 and yet on the other hand, leave a mentally retarded person like Mr. Russell to represent himself. All of a sudden, in Jackson v. State, n28 the court decided that it could "no longer sit idly by and wait for state legislatures to provide a remedy." n29 The court noted that the "writ of habeas corpus has been a hallmark in the protection of our individual freedoms since being brought to this country by our forefathers from England." n30 While it may once have been viewed as a discretionary appeal, "the reality is that post-conviction efforts, though collateral, have become an appendage, or part, of the death penalty appeal process at the state level." n31 This significance is emphasized, the court continued, by the fact that no federal relief could be sought without first exhausting the state avenues for relief. n32

The court recognized the reality that "applications for post-conviction relief often raise issues which require investigation, [*61] analysis, and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of [the post-conviction statute]." n33

Given that the United States Supreme Court had recently told Mississippi that it may not "bolt the door to equal justice," even in cases involving parental rights, n34 the state court held that "access to equal justice is an even greater interest where the State seeks to impose the penalty of death." n35

Turning to Giarratano, the Mississippi court discounted the plurality opinion, which flatly held there was no right to counsel, in favor of Justice Kennedy's concurrence, which emphasized that no Virginia inmate had actually been forced to proceed without counsel. n36 In contrast, "in Mississippi, repeatedly, since 1995, **death row** inmates have been unable to obtain counsel or requisite help from institutional lawyers." n37

Mississippi therefore tentatively recognized that the State should not make a fool of itself by making **death row** inmates represent themselves. This was a notable opinion, for skeptics often suggest that Mississippi ranks fifty-first among the States in its recognition of civil rights. Such is not the case on this occasion. There are, unfortunately, other states that now lag behind Mississippi. It is the purpose of this article to provide a blue print for a challenge in the states that have yet to follow Mississippi's example. [*62]

I. WHAT THE SUPREME COURT DID NOT SAY IN MURRAY v. GIARRATANO ABOUT THE RIGHT TO COUNSEL IN POST CONVICTION

The right of an indigent inmate to have counsel appointed to help guide him

through the murky swamp of state postconviction has been the subject of much debate. Twelve years ago the Supreme Court addressed this issue in the non-capital case of *Pennsylvania v. Finley*.ⁿ³⁸ The Court found that neither the Due Process Clause nor the Equal Protection Clause was violated where counsel was not appointed to represent a prisoner in state post-conviction.ⁿ³⁹

The next term, the Supreme Court considered a similar challenge brought in a capital case. Several inmates on Virginia's **death row** filed a class action lawsuit against the state of Virginia seeking appointed counsel in their efforts to secure state post-conviction relief.ⁿ⁴⁰ The district court found that the appointment of counsel was necessary in capital cases and identified three reasons to set death penalty prosecutions apart from other criminal cases.ⁿ⁴¹ First, **death row** inmates have a "limited amount of time to prepare their petitions."ⁿ⁴² Second, the court realized that capital cases are "unusually complex" and require the skill and education of one trained in the law.ⁿ⁴³ Finally, the court saw that the "shadow of impending execution would interfere with [a **death row** inmate's ability] to do legal work."ⁿ⁴⁴ Because of these reasons the trial court ordered the requested relief.ⁿ⁴⁵ [*63]

On certiorari review, Chief Justice Rehnquist wrote for the plurality.ⁿ⁴⁶ In his opinion, Chief Justice Rehnquist found no difference between capital and non-capital cases, relying upon *Finley*.ⁿ⁴⁷ The plurality would have flatly held that no right to counsel exists for state post-conviction proceedings even in capital cases.ⁿ⁴⁸

The plurality opinion speaks solely to legal theory, and there is no mention of the practical problems that might face an under-educated **death row** inmate in presenting his appeals. Only in the last paragraph does the plurality note that the parties disagree whether "prisoners are denied adequate and timely access to a law library during the final weeks before the date set for their execution."ⁿ⁴⁹ The only relief contemplated by the plurality, then, was to remand with instructions to the district court to consider the issue and, if necessary, to "remedy this situation without any need to enlarge the holding of *Bounds*."ⁿ⁵⁰

The four justices in dissent would have held that Due Process requires the appointment of counsel in state capital postconviction proceedings under all circumstances.ⁿ⁵¹ The dissent believed that "the appropriate question <ellip> is not whether there is an absolute "right to counsel" in collateral proceedings, but whether due process requires that these respondents be appointed counsel in order to pursue legal remedies."ⁿ⁵² Conceding that *Finley* had provided a negative answer for non-capital litigants, the dissent argued that counsel was required here for three reasons.

First, the Court had historically recognized a broader right to counsel in cases involving the death sentence.ⁿ⁵³ Second, the [*64] dissent believed that the nature of capital post-conviction litigation was qualitatively different from the

proceedings contemplated in Finley. n54 Third, and perhaps most important, "as the District Court's findings reflect, the plight of the **death row** inmate constrains his ability to wage collateral attacks far more than does the lot of the ordinary inmate considered in Finley." n55 While the ordinary inmate "presumably had ample time to use and reuse the prison library," n56 this is not the case for the **death row** inmate: "a grim deadline imposes a finite limit on the condemned person's capacity for useful research." n57

The dissent mentions both the amount of time that must be spent to prepare and present a capital post-conviction petition -- an average of 992 lawyer hours in Virginia n58 -- and the fact that the law is complex, "unquestionably <ellip> difficult even for a trained lawyer to master." n59

However, the dissent is still quite short on any consideration of the practical realities of the inmate's plight. There is a brief mention in a footnote that the problems are compounded by "the typically low educational attainment of prisoners." n60 There is virtually no mention of the most critical reason to require the help of a lawyer: The need for factual investigation. n61 Since the vast majority of post-conviction issues must be based on facts that are not in the record, the most critical aspect of any case will be the required factual investigation. Regardless of how educated the individual, or how long he has to prepare, this task is simply impossible for the condemned inmate to perform from his prison cell.

The deciding votes were left to Justice Kennedy and Justice O'Connor, who joined Justice Kennedy's concurrence. n62 Justice [*65] Kennedy expressly limited his concurrence to "the facts and record of this case <ellip>." n63 He recognized the fact that an inmate could not be expected to represent himself:

It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death. As Justice Stevens observes, a substantial proportion of these prisoners succeed in having their death sentences vacated in habeas corpus proceedings. The complexity of our jurisprudence in this area, moreover, makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law. n64

However, the dispositive fact for him was that, at the time, every Virginia **death row** inmate had been provided with an attorney, as well as help from inmate counselors, which provided access to the courts. n65

Thus, Justice Kennedy's all-important concurrence effectively holds that a scheme denying appointment of counsel to **death row** inmates does not offend the constitution where every **death row** inmate has counsel, and every **death row** inmate has access to the courts through institution counselors who will help in drafting post-conviction petitions.

Since 1989 there have been various passing references to the scope of Giarratano in other Supreme Court decisions. In 1991, a majority of the Court cited the case for the proposition that "there is no constitutional right to an attorney in state post-conviction proceedings." n66 Three years later, in *McFarland v. Texas*, n67 the Court read Giarratano differently when discussing the right to counsel in federal habeas petitions. The Court quoted Justice Kennedy's concurring opinion for the proposition that "the complexity of our jurisprudence in this area <ellip> makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of [*66] persons learned in law." n68

Regardless of how the Court felt ten years ago, the truth remains the truth: An inmate on **death row** has no more of a chance of meaningfully representing himself than a patient would of performing heart surgery on himself. However, this truth has not been recognized in some states.

Until January 1999, Mississippi was one such state. The authors hope that the litigation in Mississippi may provide a helpful blueprint for bringing other states into line.

II. THE REAL ISSUE -- A STUDY TO DETERMINE WHETHER A **DEATH ROW** INMATE REALLY CAN REPRESENT HIMSELF IN THE MOST COMPLEX LITIGATION KNOWN TO THE AMERICAN LEGAL SYSTEM

The major purpose of presenting the study that had been conducted regarding Mississippi's **death row** n69 was to demonstrate what may seem intuitively obvious to most people -- that the average inmate, let alone a mentally retarded inmate, cannot possibly represent himself in a complex capital case. n70

The study exposes the courts' exacerbated reliance upon ideology without reality. Giarratano possesses such an example by its myopic focus upon whether a particular constitutional provision should be read to provide a particular right and not upon whether the practical plight of the inmate/effectively denies right.

Some theoreticians among the marble columns -- perhaps the ivory towers -- of Washington sometimes seem to have little understanding of these practicalities. It is critically important [*67] for litigators to keep the focus on reality, rather than esoteric issues of theory.

A. A Case Study: The Evaluation of Those Condemned to **Death Row** in Mississippi

At the time that the study began, in the spring of 1997, the Mississippi State Penitentiary at Parchman housed fifty-two inmates on **death row**. The only

person sentenced to death in Mississippi, housed elsewhere, was also the only woman under a sentence of death. Vernice Ballenger, who was at the Rankin County Correctional Facility, because of logistical problems, was not included in the study. Of the rest, four inmates refused to participate in interviewing and testing, and four did not participate because their attorneys declined consent. n71 The remaining forty-four **death row** inmates were evaluated in May and June of 1997.

The inmate's general intellectual capability was assessed through an individual interview by one of the two psychologists conducting the study as well as by objective verbal intelligence and reading comprehension testing. At the same time, the inmate was administered the Law School Admission Test (LSAT) to compare his ability to those of students starting out in the field of law.

In order to determine their current comprehension of their task, the inmates were given a measure that had been specifically constructed to evaluate their knowledge of legal terms and procedures routinely used in Mississippi post-conviction proceedings. Personality testing gave an estimate of their current emotional and mental well-being, gauging whether their capacity to perform the task ahead of them was affected by depression or another debilitating mental illness. Finally, malingering screens were used to attempt to ensure the validity of the overall evaluations. The methodology and findings of this study are comprehensively described elsewhere n72 but are summarized and anecdotally illustrated below. [*68]

1. Inadequate education

Merely looking to their education, it was doubtful that the inmates had the academic capability to comprehend postconviction statutes and case law. Only four inmates (9.1%) had graduated from high school. n73 Eleven others (25%) had completed their GED at a later point. n74 The Mississippi **death row** population is therefore slightly less educated than its peers across the nation. The Justice Department has reported that 36% of prison inmates across the nation in 1974 had a high school diploma. n75 A significant number of the inmates (13.6%) reported receiving special education services during their school years. n76

2. Intellectual deficits

The verbal scale sub-tests of the Wechsler Adult Intelligence Scale-Revised n77 (WAIS-R) were administered to obtain a standardized assessment of verbal intellectual abilities. n78 By definition, the average Verbal IQ (VIQ) score of the American population should be 100. n79 The VIQ scores of the **death row** inmates [*69] ranged from 58 to 103. n80 The mean VIQ score of the inmate sample was 81.5. n81

This places the Mississippi **death row** inmates far below the general population of the United States. n82 Approximately 90% of the adult American population would exceed a score of 81. n83 The mean VIQ (81.5) of the Mississippi **death row** sample was below the mean IQ scores reported for some other **death row** samples n84 but close to the scores reported in other samples. n85 The VIQ score is on a par with the average IQ score of 80 among condemned inmates in Alabama and Louisiana n86 but considerably lower than their counterparts in North Carolina (90), Texas (86), and Florida, where only 22% of prison inmates scored below 80. n87

Roughly 27% of the Mississippi inmates fell within the range of potential mental retardation. n88 While no definitive diagnosis [*70] of mental retardation could be made without additional evaluation, the data seems to be valid, n89 and a high proportion of inmates falling this low on the scale is very troubling. Nationally, roughly 1% of the population is defined as mentally retarded. n90 While some estimates of prison populations estimate that 3.5 to 5% of inmates are mentally retarded, n91 estimates of retardation among **death row** populations tend to be much higher. n92 While the causes for this are not fully understood, n93 it [*71] becomes self-evident that these inmates would not be able to represent themselves in a complex capital case.

While the VIQ score distribution of the Mississippi **death row** inmates reflected a particularly deficient population, even the comparatively higher IQ's found in other **death rows** in prior studies would not alter the ultimate conclusion that the inmates are ill-equipped to represent themselves. Looking to all the different studies, it is clear that there is no **death row** population with an intellectual capability that compares to the typical IQ scores of attorneys. It would seem that a minimum level of intelligence is required for effective occupational function as an attorney. Indeed, research demonstrates that attorneys and other related professionals obtain mean IQ scores of approximately 125, with ranges from 110 to 145. n94 Thus, the lowest score for attorneys is above the highest score for the Mississippi sample.

3. Low functional literacy

An effort was also made to assess the inmate's ability to comprehend the basic terms that he would have to understand and apply. n95 The verbal sub-tests of the WAIS-R were complemented with the reading comprehension sub-test of the Wechsler Individual Achievement Test (WIAT), a standardized measure of reading comprehension levels. On this test, the mean reading comprehension level was measured at the 5.13 grade level. n96 Over 84% fell below the seventh grade level, and more than half (52%) scored at or below the fourth grade level.

To make this literacy finding more meaningful, the clinicians evaluated a sample of seventeen documents relevant to post-conviction relief for their reading

difficulty. n97 These documents, [*72] which would be fundamental to even a beginner in postconviction work, had a reading difficulty between 12.8 grade level (as scored on the Flesch-Kincaid Index) and 15.2 grade level (using the Gunning Fog Index). Thus, the inmates would have great difficulty even understanding the terms of the statute, let alone seeking to apply them.

4. Poor understanding of the law to be applied

The **death row** inmates revealed little understanding of applicable post-conviction statutes or case law. Specifically, thirty-nine inmates completed a measure to quantify their understanding of the basic legal terminology, procedures, and principles that would be critical to their self-representation. The maximum possible score was ninety-six. On one level, it could be argued that the inmate should answer all questions correctly in order to pass. After all, one mistake in a capital case can be fatal. n98

The **death row** inmate sample answered only 17% of these items correctly, getting a terrifying 83% of the answers wrong. n99 Some examples of their erroneous answers well illustrated their limitations. For example:

* When asked to explain what "vacation" of a conviction or sentence meant, four men responded with something to the effect of: "Off on a visit / train trip."

* The term *res judicata* was described as meaning "picking different jurors, different colors like black and white, picking the right kind of jury."

* The word "mitigation" was defined as "stuff saying you have a bad character."
[*73]

* Few men knew where to send any post-conviction petition, were they ever to complete it. One thought it should be sent to the President.

* When asked how to go about securing counsel in postconviction proceedings, one person replied, "By prayer."

The inmates' scores were compared to those of forty-two criminal defense attorneys, who averaged 69% correct. It was significant that only two of these attorneys had any experience with Mississippi practice. n100

5. LSAT scores too low to crack the door of Law School

On the theory that if they could not get into law school they should not be expected to represent themselves, it would perhaps be sensible to compare the LSAT scores of **death row** inmates to those of the budding young law school applicants. n101 Most of the LSAT questions are multiple choice, with five possible answers. On these questions, the student should score 20% correct by

answering at random. Eleven of the inmates simply declined to complete an LSAT, expressing the fear that they would embarrass themselves. The thirty-three **death row** inmates completing this measure obtained a mean raw score of 19.2%, which meant that they would have done equally well by selecting each answer by chance. Their mean score was surpassed by 99% of the students taking the LSAT in 1994-1997.

The LSAT included one item calling for the subject to write a brief, critical essay on a question regarding two plans for renovating a shopping center. n102 The **death row** subjects responded [*74] with various entirely inappropriate answers, including the following from Inmate #50, one of the men who scored in the range of mental retardation on the Verbal IQ:

I love to shop in the store. I like ice cream very much <less than>smileyface> . I like horse. I like food to eat, yes I like cat and dog. I love anamel very much. God love you very very much. The lord is come back real soon. God bless you. <less than>smileyface> Smile God love you.

More typical, perhaps, was Inmate #47, who wrote, "I dont understand this sorry <less than>sadface> ." n103

The LSAT requires careful reading of complex verbal material, n104 a capability integral to success in both law school and legal practice. n105 The particularly poor performance of the **death row** sample on the LSAT Preptest reveals their fundamental deficits in the verbal analytical capabilities required for the practice of law. [*75]

6. Impaired psychological state

Previous studies have suggested that **death row** populations suffer from a very high degree of mental instability. This is perhaps not surprising, given the fact that the inmate has the damoclean sword of death hanging over him at all times. However, it has been reported that as many as half of all **death row** inmates suffer from intermittent insanity. n106

Certainly, in Mississippi, the clinical interview and psychological testing indicated that many of these **death row** inmates had a level of psychological symptoms that would interfere with their effectively representing themselves. n107 More than half of the inmates (57%) came from troubled backgrounds of parental substance abuse. Almost three quarters (73%) had suffered from substance abuse or dependence. Neurological insults such as head injuries were reported by 46% of the inmates. They were also currently troubled with symptoms of clinical depression (43%), anxiety (30%), and psychosis (5%). Psychological testing confirmed these clinical impressions, with 82% acknowledging depressive symptoms on the Beck Depression Inventory (BDI), n108 and 82% displaying a clinically significant elevation on the Personality Assessment

Inventory (PAI). n109 Many inmates (39%) had highly significant scores on at least four of the PAI scales. n110 [*76]

The depressive symptoms alone (i.e., reduced concentration, reduced energy, reduced initiative, interpersonal withdrawal, feelings of apathy and hopelessness, various somatic complaints, and loss of perspective) could have a profound impact on the inmate's ability to represent himself. The relationship between depression or mental impairment and attorney ineffectiveness has been borne out in research on attorney disciplinary actions. n111

7. If anything, the findings reflect an overestimate of **death row** inmates' capability

While resources did not allow a complete and thorough compilation of the mental health histories of all of the inmates, prior mental health records were secured for nine of the men who took part in the study of Mississippi's **death row**. The records that were obtained suggested that the study underestimated, rather than exaggerated, the psychological problems faced by the inmates. n112

For three, no earlier IQ test was available. However, one of these men had a long history of manic depression, n113 one had been diagnosed as depressed, n114 and one had been suicidal. n115

There were IQ tests available for six of the inmates. Three were reported as falling within the range of mental retardation, n116 and three were not. However, those whose IQ scores fell [*77] above seventy did not leave much room for optimism. Of the two whose intelligence fell towards the top of the range in the study, one was psychotic and the other had been diagnosed with paranoid personality disorder. The third, who had an IQ of only seventy-seven, additionally suffered from a mixed personality disorder. n117

Likewise, for three of the nine inmates not involved in the testing, records were secured from independent sources. These were also consistent with the other results. The Verbal IQ of one inmate fell within the range of mental retardation. n118 The other two both fell into the borderline range and both exhibited major mental illnesses. n119 This confirmed the anecdotal indications that those who refused to cooperate were even more disturbed than those who agreed.

In the testing that was performed to determine the validity of the results, n120 none of the inmates seemed to be attempting to mask his intelligence, academic aptitude, or legal knowledge on the malingering measures. When the results of the study were compared to earlier independent evaluations, it seemed likely the psychological problems faced by the **death row** inmates were underestimated. [*78]

Overall, then, the data provided no room for hope that the inmates would be

able to deal with any complex legal issues, however expansive their opportunity might be to research and study their cases. You simply cannot make omelettes without eggs.

B. The Manner in Which Mississippi Provides for "Access To Courts" is Radically Inferior to the System that the Supreme Court Believed to Exist in Virginia

It is critical, in any effort to secure the basic right to counsel to those on **death row**, to prove the reality of "access to courts," rather than talk in the bland generalizations of any consent decree. Armed with the results of this clinical study, the lawyers n121 in the Russell litigation conducted a thorough investigation to determine the true state of the legal program at the Mississippi State Penitentiary at Parchman.

In Giarratano, Justice Kennedy noted that "Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief." n122 This, he decided, along with the practical reality that everyone did receive a lawyer of some sort, was sufficient to provide meaningful access to courts. However, he cautioned that "the complexity of our jurisprudence in this area <ellip> makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." n123

Whatever the true state of the Virginia prison system, Willie Russell was fully prepared to prove that the Mississippi provisions for "access to courts" bordered on the absurd.

There are currently sixty-two men and one woman on **death row** in Mississippi. n124 The men are housed in Unit 32-C, which is one of five extremely high security sections of Unit 32. There are 197 inmates currently in Unit 32-C n125 and roughly 1,000 in [*79] all of Unit 32. This, in turn, is just one of many housing units in the prison, which holds a total of 5,000 inmates.

Years of litigation have defined the right of access to courts at Parchman. n126 However, three years ago the United States Supreme Court radically cut back on the inmates' right to seek redress for their complaints in federal court. n127 This prompted the institution to return to court in an effort to lift some of the restrictions imposed by Gates v. Collier. n128 With little opposition from the class counsel, the district court approved a new plan for the delivery of legal services to the inmates. n129

Long before anyone chose to cut back on the access to courts program, some courts had expressed the opinion that even access to a complete library would not provide the inmate with much chance of success: n130

In this court's view, access to the fullest law library anywhere is a useless and meaningless gesture in terms of the great mass of prisoners. The bulk and complexity [of the legal issues] have grown to such an extent that even experienced lawyers cannot function efficiently today without the support of special research tools <ellip>. To expect untrained laymen to work with entirely unfamiliar books whose contents they cannot understand, may be worthy of Lewis Carroll, but hardly satisfies the substance of the constitutional duty [of access to courts]. [*80] Access to full law libraries makes about as much sense as furnishing medical services through books like: "Brain Surgery SelfTaught", or "How to remove your own Appendix", along with scalpels, drills, hemostats, sponges and sutures.

With all due respect to the judge in Falzerano, the better analogy would be to provide inmate-surgeon with the medical books but deny him the scalpel, since the inmate-lawyer is denied any chance to do the investigation that is so critical to the presentation of a post-conviction petition.

Under the new plan, even the right to review law books would be taken away, and the law libraries at Units 29, 30 and 32 were to be closed. By the end of 1997, the practice of training inmate counsel to assist their fellows had been discontinued. Now, there is one staff attorney at Parchman and one paralegal, who are supposedly available to service the legal needs of all 5,000 inmates in the institution.

When Jesus Christ fed the 5,000, it was considered a miracle. For Richard Pennington to represent the 5,000 would probably take divine intervention as well. n131 Mr. Pennington, on the other hand, does not even have the benefit of a Mississippi bar card, and there is some question whether his work advising inmates at the Mississippi State Penitentiary constitutes the unauthorized practice of law.

Indeed, the Mississippi Bar Association, apparently with the agreement of the penitentiary, has taken the rather extraordinary position that, because he was not licensed to practice law in Mississippi, Mr. Pennington was not legally permitted to provide legal advice to the inmates. n132 [*81]

No other person is meant to be providing legal advice in the penitentiary. n133 The only role for the inmate is in processing other inmates' requests, which are submitted to Pennington and McGraw. Direct visits to the law library by the inmates are also no longer allowed.

According to those working at the institution, when it began the legal assistance program was receiving an average of 200 forms per week from Unit 32C, or roughly one per inmate. n134 If this translated equally across the institution, then Pennington and McGraw would receive several thousand inmate requests each week for processing, on top of their other duties.

One other such duty is the personal consultation with the inmate that was meant to be an integral part of the plan submitted to the district court. With respect to Unit 32, Pennington and McGraw are reported to have roughly one hour a week available for individual consultations, n135 when they meet with roughly a dozen inmates per visit. n136 If each member of the Unit [*82] wished to have one consultation, then, each person would wait eighty-three weeks -- a year and a half -- between meetings. Each consultation would last roughly twelve minutes. Less than ten minutes of legal advice a year is unlikely to provide any meaningful access to courts.

In between these meetings, each inmate fills out a legal assistance request form n137 either to receive cases or when requesting legal help. Of course, this is a challenge for the illiterate inmate. He must be able to read and write enough to ask for a "conference because I cannot read and/or write." Indeed, in the same form the inmate is required to "provide a short description of his legal question."

The illiterate inmate, n138 like any other, is required to include the cause number of his case in order to receive any help. n139 Of course, this poses the inmate with a classic Catch22. n140 If he does not have a cause number then he cannot get legal [*83] research, n141 yet if he has not done his legal research he should not be filing a petition or complaint.

The form then requires the inmate to request cases, statutes, or rules of court by providing the precise citation. While the form only allows for three cases per form, the inmates immediately respond by filing multiple forms every week. This resulted in a new policy limiting each inmate to eight to ten cases per week.

In order to assess the practical application of the program, the authors tracked the success rates of various request forms submitted by the men on **death row**. Were Ebenezer Scrooge to enforce these rules he would probably take his lead from the Parchman practice. For example, two inmates were recently charged with violating a disciplinary rule for asking for too many cases. n142 Desmond Phillips had requested twelve cases. [*84] Lisa McGraw, the penitentiary Paralegal Specialist, cited him for refusing to obey the order of a staff member. The same fate befell Thomas Taylor, who had asked for twenty-nine cases and statutes.

It became clear that there were other apparently random limitations placed on the already draconian rules. For example, the inmates have been told that they are limited to requesting cases that have been cited by the prosecution, n143 which are likely to be the cases that are least helpful to the accused. Still, the inmate complied:

I asked for two cases and a statute that the State cited in opposition to my direct appeal brief. They sent another rejection form back, saying that I had provided the wrong cite for Odom v. State, and that the other case (Puckett v. Ables) and the statute (Miss. Code Ann. § 47-7-3) "would not affect a direct appeal" -even though they had both been cited by the State in my direct appeal. n144

One of the better educated men on **death row** detailed his travails with the legal request program as follows:

On November 5, 1997, I submitted a request for cases, procedure relating to prisoners' access to outdoor recreation and pens, for supplies and also assistance in preparing writs and motions which I am unable to do myself. The response was a denial <ellip> which gave no explanation whatsoever, but did supply me with a pencil. I do not understand how I am supposed to know how or if I filled the form in incorrectly as I am never given reasons or instructions. On November 12, 1997, I put forward a similar request for cases, supplies and legal assistance. I received a reply which mentioned neither the cases nor the assistance, provided some paper, but said that as for the pen and envelopes, "I showed no need". I do not understand this as the form has only one line:

"(8) Supplies: Pen Paper Envelope(s) Copies " [*85] and nowhere does it [ask me to] state what my need is. * * * On November 19, 1997 I submitted a further request for cases, supplies, assistance and also some complaint forms. Again I was declined and told that I should see the case manager to narrow down my request. I was also told that I must "show proof of exhausting all ARP [Administrative Remedy Procedure] before filing a complaint" but I cannot see what more I could have done and in any event I was only requesting and not submitting complaint forms.

On November 26, 1997 I submitted yet another request similar to the others, but trying to give more detail in the limited space that they allow for the request. This time I was declined for "not providing a case number which is necessary before giving assistance." There had not been a space on the form where we were told that we should put the case number down. However, unlike so many people here on **Death Row**, I did have a case number, and I knew it. Coincidentally, given that they did not require it on the form, I had given it on my request. I don't know what extra information I must give as it seem sic as if they are not even reading what is on my form! * * * On November 30, 1997, I wrote to the Administrative Remedy Program Legal Claims Adjudicator explaining how the system was not working and was hindering my research and endangering my life. I was informed that I should "contact the Case Manager for my unit for assistance in how to narrow down my request." My requests are to the best of my knowledge detailed, specific, relevant, and, as I understand, perfectly legitimate. However, I did contact the Case Manager, Mr Braggs on December 1, 1997.

I finally got to have an interview with Mr Richie Pennington on December 4, 1997 and I briefly thought things were going to get better. He did give me copies of three of the rules that are applied in Mississippi Courts, which were of little help and which I had to return to him. He promised to send me other documents that never materialized. He also never gave me any of the other legal assistance I had requested (such as drawing up writs and motions, filling in prisoner complaint forms and help in legal research). This left me very little better off and rapidly losing hope.

Again, on December 10, 1997, I submitted yet another request for cases, supplies and legal assistance. I was again denied my requests and informed "ink pens are not allowed in Unit 32" presumably in response to my demand for a copy of a Northern District of Mississippi decision making ink pens accessible to prisoner in Unit 32-C. It also included a sentence saying "your request for envelopes has been denied" without qualifying reasons. No mention was made to the other supplies, but it did claim that [*86] I had a legal assistance interview the following day. This never took place for reasons I do not know.

At this point I am about ready to give up. I achieved nothing in two months of trying to get research done <ellip>. n145

None of these experiences was unique. For example, on December 18, 1997, one inmate was informed that he would be having his conference with Pennington on December 17. He was never taken to the library for the meeting and had already missed his chance. If everyone else insisted on his rights, this inmate's number would have come up next for a conference in late July 1999.

The system is therefore pathetically inadequate even to address the limited goal of providing inmates with copies of cases to read. However, institutional rules ensure that it does not even attempt to address the real needs of the inmate who must file a petition for post-conviction relief. Pennington and McGraw categorically refuse the two kinds of legal assistance most needed by the inmate: First, any help with factual investigation. n146 In other words, the inmate is denied any assistance other than the copying of legal research and extremely basic annual minutes of advice on a particular point. Second, the inmate apparently receives no assistance with the actual drafting and completion of a petition. n147

As if the predicaments of the **death row** inmate were not bad enough, there is yet another reason that his chances of success are diminished still further. When the state supreme court denies his direct appeal, the inmate loses his right to counsel. Generally, however, counsel continues on the case and, within the ninety days allowed, files a petition with the United States Supreme Court for a writ of certiorari. n148 It is the practice of the [*87] state court not to schedule

execution dates while certiorari is pending. However, once certiorari is denied, Mississippi has taken the position that the court must order that the execution take place within 30 days. n149 The court's historical practice was to stay the execution only upon the filing of a completed petition, or upon counsel's request for a limited time in which to file the petition. Thus, the inmate is left with very little time in which to complete all the work necessary.

More troubling still, as the execution date nears, the inmate's ability to avoid its grim consequences declines. Willie Russell hand wrote the following letter and sent it to the Supreme Court of Mississippi as his execution drew near:

Monday

To the Justices of the Mississippi Supreme Court.

I do not want to lose my only chance to ask for state postConviction release. But I have no lawyer. I am not in the position that I can help myself. I am locked in a cell 23 3/4 hours a day. I do not have a pencil (I borrowed this pen for this note). I do not have paper (I borrowed this paper to). I do not have any legal papers in the cell with me. All that they have allowed me to have in this cell is (2) sheets and a blanket to sleep on. I don't have the materials to write legal briefs even if I had the training to do so.

I am set to be executed tomorrow-night. (Please) appoint me a lawyer.

Sincerely, Willie C. Russell n150

Again, this adds a sense of reality to the issue. Willie Russell might be Albert Einstein, yet he could not write briefs without a pencil. He might be Judge Learned Hand, yet he could not research without law books. He might be Columbo, himself, yet he could not seek out critical witnesses when locked up twentyfour hours a day on **death row**. [*88]

III. THE TASK AHEAD OF THE **DEATH ROW** INMATE IS IMPOSSIBLE UNDER THESE CIRCUMSTANCES

This brings us to the nub of the issue: In a very real sense, in testing the hypothesis that no inmate, let alone a mentally retarded person, could represent himself in a complex capital case, one might be accused of questioning the obvious. Yet, it is the obvious that the law occasionally ignores.

The purpose of this article is not to detail exhaustively the manner in which post-conviction litigation should proceed in any case. More thorough discussions of the scope of post-conviction litigation may be found elsewhere. n151 However, it

is important to discuss the nature of post-conviction litigation in order to truly appreciate the plight of the inmate in his confinement.

A. The Nature of the Claims That Must Be Raised in Post Conviction Relief Makes It Unlikely That an Inmate Could Meaningfully Identify, Investigate and Present Them

What is the role of the advocate in a capital post-conviction proceeding? n152 As a general matter, post-conviction is the appropriate forum to adjudicate claims that an inmate "never had a meaningful opportunity to raise <ellip> in the courts below." n153 Since the courts will consider issues that are included in the record on appeal, by definition the issues that are to be presented in post-conviction tend to be issues where factual development is necessary.

In order to develop the facts, the litigant must necessarily investigate those facts. This is a role that the condemned inmate is uniquely unable to fulfill. In Mississippi, he is locked in his cell for more than twenty-three hours per day. He is hardly likely to be allowed a foray outside the prison walls to investigate his case himself. Thus, were he the most intelligent person in the world, with the best library of legal resources, his hands would still be tied. n154 [*89]

A brief discussion of the claims that have been presented and have succeeded in post-conviction litigation illustrates the point.

1. Ineffective assistance of counsel

Perhaps chief among these claims is the question of ineffective assistance of counsel. n155 "In general, no <ellip> meaningful opportunity exists for the full and fair litigation of a habeas petitioner's ineffective-assistance claims at trial and on direct review." n156 Ordinarily, then, this is a claim that cannot be raised on direct appeal. n157

Likewise, this is a claim where it often takes an expert to know that the lawyer has failed the client. As the Mississippi Supreme Court has noted, "a criminal defendant will rarely know he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings." n158 Some claims of ineffectiveness stem from counsel's failure to understand the law to be applied in the case. n159 If a trained lawyer does not know what the law is, it strains credulity to suggest that an inmate -- possibly retarded and recently committed to **death row** -- would spot the mistake. [*90]

Further, an ineffectiveness claim is classically an issue that requires additional evidentiary development. While there are various claims of ineffectiveness that focus on the trial record, n160 "at the heart of effective representation is the

independent duty to investigate and prepare." n161 If trial counsel did not prepare, then the post-conviction advocate must not only prove this (by contacting trial counsel and securing his admission), but must also demonstrate prejudice -- i.e., show the difference that the proper investigation would have made to the outcome of the completed trial. Obviously, the only way this can be done is to perform the investigation himself.

2. Issues of mental health and competency

Issues of mental health present a still more extreme problem. While on other issues the inmate must be capable of discovering, understanding, and presenting the law and the facts, [*91] with respect to mental health, he must understand and present himself.

In some form or fashion, evidence of mental state is pertinent to virtually every capital case. n162 In *Tison v. Arizona*, n163 the Court stated that a "critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." n164 The Court has continually recognized the importance of the defendant's mental state when determining the severity of the punishment. n165 "Because the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant," n166 evidence of a defendant's mental debilities may be an important, relevant, and compelling mitigating circumstance which must be adequately explored by defense counsel. n167

For this reason, in some circumstances the "failure to investigate <ellip> mental history constitutes an impermissible deficiency in rendering effective assistance <ellip>." n168 However, for [*92] obvious reasons, a deranged person is highly unlikely either to appreciate his mental illness or to be open to discussing it in public. Indeed, there are numerous cases which recognize that a trial lawyer should not accept his mentally ill client's insistence not to investigate and present a defense involving mental illness. n169 How likely is it that a mentally ill inmate, who did not want his lawyer to present evidence of his illness at trial, will later decide on his own that his lawyer made a mistake? To ask the question is to answer it.

In the cases that deal with the failure to inform the jury of the client's mental illness, courts have recognized the obvious:

An attorney who does seriously interview an arguably insane client may find him to be one of those many insane persons who placidly insist that they are entirely sane; and the attorney is likely to find that an arguably insane client is not the best or most reliable source of information. n170

If the mentally ill inmate cannot give reliable information to his attorney, he is unlikely to metamorphose into a self-perceptive legal scholar who is able to

present his own insanity to the appellate courts.

Even if the condemned inmate were willing to face up to the tragedy n171 of his own mental illness, he could never present it [*93] without help. The Supreme Court has held that even a lawyer may not be able to understand and present the mental health picture of his client. In *Ake v. Oklahoma*, n172 the Court held that "a reality that we recognize today <ellip> is that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal a defense." n173 Indeed, "courts have "long recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel. "" n174

Mental retardation, apparently so prevalent among those on **death row**, is no different in this regard. The inmate's mental retardation may be critical to the post-conviction proceedings, because trial counsel failed to fully explore it, n175 the defense was denied an expert, n176 or it had an impact on other aspects of the trial. n177 In some ways the mentally retarded inmate is even worse off. While at least there is some chance that a mental illness would go into remission, there is no chance that the inmate's mental retardation will evaporate.

There are many other ways in which the inmate's mental state may prove critical to post-conviction proceedings. It would be ridiculous to argue, for example, that an incompetent person [*94] should raise and litigate his own incompetency. As the Supreme Court has specifically held, "it is contradictory to argue that a defendant may be incompetent, and yet knowingly and intelligently "waive' his right to have the court determine his capacity to stand trial." n178 Yet questions of legal competency may permeate the proceedings, from trial, n179 through every stage of the legal process, n180 to challenges to counsel's effectiveness, n181 right up to the very moment of execution. n182

Very often the question of the forcible or voluntary administration of anti-psychotic drugs threads through these claims from trial n183 into post-conviction proceedings. n184 Again, it is folly to tell the inmate that he must litigate his own involuntary medication by the institution (premised on the mental health [*95] staff finding him a danger to himself) while the institution is simultaneously denying him access to a law library. n185

3. Violations of the rules of discovery

Another classic area of post-conviction litigation is the suppression of favorable evidence by the prosecution. n186 In some states, it is possible to secure information after the trial through Public Records Act requests. n187 In most instances, however, there is no substitute for going out to investigate and talking to witnesses to determine whether they had deals n188 or were sent into the cell

of the accused to extract a statement. n189

The complex case of *Kyles v. Whitley*, both in the lower courts n190 and the Supreme Court, n191 provides a good illustration of how detailed the investigation often needs to be. Again, this is not something that can be accomplished from a **death row** cell. [*96]

4. Issues of jury misconduct

Often, it is not until after the trial that issues arise concerning misconduct by jurors. Perhaps they were exposed to prejudicial information during their service, n192 perhaps they went out to visit the scene, n193 or perhaps they improperly brought a book into the jury deliberations. n194 Indeed, depending on the state, there are many ways in which jury misconduct may result in reversal. n195

If there is one thing that is certain, it is that even were the condemned inmate allowed out of the prison on an investigative furlough, he could never talk to the jurors who had condemned him. Terror would strike to the heart of the local community. Yet this is critical information, and someone must perform the investigation necessary to find it.

5. Challenges to prior convictions

The history of one Mississippi case makes clear the need both for counsel and for the resources brought by a lawyer if a post-conviction challenge is to be successful. The death sentence imposed upon Samuel Johnson was ultimately vacated because the courts of New York had overturned a twenty year old conviction which had been used in aggravation. n196 The litigation in New York was done by a firm, Cahill, Gordon & Reindel, and involved extensive investigation through musty files in Rochester, [*97] New York, as well as appearances in courts from Rochester to Albany. It is inconceivable that this work could have been done by an inmate in his Parchman cell. n197

The use and abuse of prior convictions can be presented in post-conviction proceedings either as substantive issues -- as with the Johnson litigation n198 -- or because counsel was ineffective for properly seeking their exclusion at trial. It is clear that "the failure to object to an invalid conviction can constitute a constitutionally deficient performance." n199 This has been true even when the convictions were not invalid on their face. n200 [*98] Claims of ineffectiveness have also involved rather technical legal rules that would not be known to the average lay person. n201

The prior convictions used to enhance punishment in the capital case can be challenged for a laundry list of reasons, sometimes as long as the list of claims that may be launched at the capital conviction itself. n202 [*99]

Indeed, sometimes the prior conviction may be substantively challenged because of prior counsel's ineffective performance with respect to that case. n203 Again, only Alice's Wonderland Rules of Post-Conviction Litigation would presume that an inmate recently committed to **death row** would be able to weave his way through a claim that his lawyer in the capital trial was ineffective because he failed to determine that the lawyer in the earlier trial was ineffective because the first lawyer failed to perform important tasks.

6. Actual innocence

Another obvious, yet complex, claim that may be presented in post-conviction is that of actual innocence. While the state courts will generally consider such a claim, n204 this may be the only forum, since the federal courts generally will not. n205 Yet the [*100] question of innocence is surely the most significant claim that could be considered by a court, and it is certainly one of the most fact bound. To be sure, an innocent inmate on **death row** is likely to know that he is innocent. He may think of little else. However, proving it is a wholly different matter.

7. Other post-conviction issues

By no means is this brief list intended to canvass every possible claim that can arise in post-conviction litigation. The essence of capital litigation is that each individual case is likely to be tainted by unique issues. n206 For example, there may be extraordinary evidence of prosecutorial misconduct, such as the rigging of the jury pools. n207 Failing this, the petitioner should consider more pedestrian challenges to the composition of the grand jury n208 or the petit jury. n209 The list of possible issues goes on and on. There is only one factor that binds almost of them together, and that is the need for a thorough factual investigation prior to pleading and proof. [*101]

B. The Manner in Which Mississippi Conducts Its Post Conviction Litigation Made the Inmate's Task Even More Impossible

The impossible task facing the **death row** inmate cannot be defined solely by what he has to do, but also the manner in which he has to do it. In Mississippi, in a procedure that is different from many states, the inmate must file his application with the state supreme court requesting permission to file a petition in the trial court. n210 While many states provide for notice pleading followed by an evidentiary hearing at which the petitioner may seek to prove his claim, the Mississippi Supreme Court has made it clear that "notice pleadings have no place in the post-conviction process. Instead our law imports a regime of sworn, fact pleadings based on personal knowledge." n211 Thus, the initial pleading must be accompanied by affidavits in support of the various facts pled. n212 If the factual support is insufficient, the claim will be dismissed. n213

Before writing up the fruits of his factual investigation, the petitioner must deal with various complex legal questions. For example, he must plead his way around the maze of procedural default rules. n214 This is an area that makes the average lawyer wince at its complexity. The byzantine series of Supreme Court decisions on procedural issues, complimented by the new habeas statute that bars almost all habeas relief if it is not sought within a one year statute of limitations, n215 only adds to the nightmare that would face even an educated lay person. n216 [*102]

It is critical that the inmate complete all of the legal and factual investigation before presenting his first petition to the Mississippi Supreme Court. If the first petition is not sufficient, not only will this result in the denial of an evidentiary hearing, but it will also bar a second, successive petition. n217

This is a very difficult task for any inmate given all the time in the world -- a time frame that even the average Mississippi inmate does not enjoy. The rules require that most inmates file for post-conviction relief within three years of their conviction becoming final. n218 Within those three years, the inmates must train themselves in the law, pull together all the facts, and present their petition. While at this point the law provides for counsel if the supreme court determines that an evidentiary hearing should be ordered in the trial court, securing counsel is still uncertain. n219 [*103]

The predicament of the condemned inmate on **death row** was much more desperate, for once his direct appeal was final, he had no right to counsel in state capital post-conviction proceedings. n220 However, the supreme court was required to set the inmate's execution almost immediately, to be carried out within eight weeks. n221 If, within these two months, the condemned inmate did not file a petition, the court would deny a stay. n222

It takes the top student at Yale Law School three years to get a degree, and even then many states would not allow the student to try a capital case for at least another five years. n223 In contrast, the indigent, an under-educated person recently sentenced to death is allowed two months to learn and apply the most complex law in the land.

The combination of the inmate's lack of capacity, the complexity of the task, the fact that no investigation is possible, and the extraordinary time limits, effectively slam the door on any inmate proceeding **pro se** in post-conviction. Just as lightning might strike on occasion, so perhaps one inmate in a thousand would secure himself relief. However, for the vast majority of those confined in prison or on **death row**, the promise of "access to courts" was a patently false one. [*104]

IV. THE EIGHTH AMENDMENT CAN HELP THE LAW CATCH UP WITH COMMON SENSE: THE EVOLVING RECOGNITION OF THE RIGHT TO

COUNSEL IN STATE POST-CONVICTION PROCEEDINGS IN CAPITAL CASES

As discussed above, it is generally thought that any right to counsel -- or to meaningful access to the courts -- in postconviction proceedings stems from either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment, n224 as discussed in Giarratano. n225 It is not clear why the Court has never considered whether the answer would be different under an Eighth Amendment analysis. n226

To be sure, death is different. n227 The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." n228 The Supreme Court generally measures "evolving standards of decency" by comparing contemplated punishments or policies with contemporary societal values. n229 The Court has expressed a desire to avoid an arbitrary determination of what truly constitutes the contemporary values of our society. Thus, the Court has determined that "the clearest and most reliable objective evidence of contemporary [*105] values is the legislation enacted by the country's legislatures." n230

Using the will of state legislatures as a guide, the Eighth Amendment is very likely to be offended where only one state legislature permits the punishment. For example, in *Ford v. Wainwright*, n231 the virtual unanimity with which the other states barred the execution of the incompetent was extremely important to the Supreme Court's finding of an Eighth Amendment violation. n232 The Supreme Court has similarly held, where only one state legislature allowed the death penalty for the rape of an adult woman, the punishment violated the Eighth Amendment. n233 However, the standard is broader than a "lonely isolation" test. For example, prior to 1982, eight states allowed capital punishment for an accomplice to murder. Upon reviewing Florida's statute, the Supreme Court found that executing those who neither killed, attempted to kill, nor intended to kill violated the Eighth Amendment. n234

At the other end of the scale, in *Penry v. Lynaugh* n235 the Supreme Court declined to find the execution of the mentally retarded a violation of the Eighth Amendment where thirty-four of the thirty-six death penalty states did not prohibit the practice. n236 Again, looking simply to the numbers of state legislatures, this was not a difficult application of the rule. Likewise, in *Stanford v. Kentucky*, n237 where twelve states had elected not [*106] to impose the death penalty on minors while twice as many authorized it, the Supreme Court held that imposition of the death penalty on a seventeen year old did not violate the Eighth Amendment. n238

Whatever the Supreme Court's Fourteenth Amendment analysis in *Giarratano*, when one applies the Eighth Amendment rationale to the right to counsel in capital post-conviction proceedings, it is clear that this is an idea whose time

has now arrived. A decade ago when the Supreme Court decided *Giarratano*, the plurality identified four states that provided counsel automatically to **death row** inmates in state post-conviction proceedings. n239 The dissent contended that "of the 37 States authorizing capital punishment, at least 18 automatically provide their indigent **death row** inmates counsel to help them initiate state collateral proceedings." n240

Whatever the truth then, the balance has clearly swung now. The right to counsel in state post-conviction proceedings is an area in which the law has been evolving quite rapidly. The figures show that the state courts and legislatures have recognized the reality expressed by the Mississippi Supreme Court in *Jackson*: "The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of [the post-conviction statute]. The inmate is in effect denied meaningful access to the courts by lack of funds for this state-provided remedy." n241

As the states have struggled with their duty to ensure a level of fairness, various studies have been commissioned to review the manner in which sister states have fulfilled their obligations. n242 Even discounting the states that do not utilize the death penalty, at least thirty-two of the thirty-eight death penalty states automatically provide for counsel in capital postconviction [*107] proceedings, and as a matter of practice, thirty-six of the states have provided counsel to all those on **death row** to date. Now that Mississippi has joined the majority, the lonely exceptions to this rule are Georgia and Louisiana.

As of this writing, there are twelve states and the District of Columbia that do not have a death penalty statute. While an argument can be made that they should not be considered in the balance when it comes to capital cases, it is notable that ten states provide attorneys on what is essentially an automatic basis in post-conviction representation even where life is not at stake, including Alaska, n243 Hawaii, n244 Iowa, n245 Maine, n246 Michigan, n247 Minnesota, n248 North Dakota, n249 Rhode Island, n250 Vermont, [*108] n251 and West Virginia. n252 The two other states make the appointment of counsel more discretionary. n253

Thirty-eight states and the United States have a death penalty statute on the books, although New Hampshire has not actually imposed a death sentence on any of its citizens. Thirteen states provide an absolute right to counsel in all post-conviction proceedings, regardless of whether the death penalty was imposed. These states include Arizona, n254 California, n255 Connecticut, n256 Indiana, n257 Kentucky, n258 Maryland, n259 Missouri, n260 New [*109] Jersey, n261 Ohio, n262 Oregon, n263 Pennsylvania, n264 South Dakota, n265 and Washington. n266 [*110]

Nineteen states, along with the federal government, n267 provide a discretionary right to counsel in post-conviction proceedings, often denying

appointment in non-capital cases, but always allowing it when the death penalty is at issue. These states include Alabama, n268 Delaware, n269 Florida, n270 Idaho, n271 Illinois, n272 Kansas, n273 Montana, n274 Nebraska, n275 Nevada, n276 New Mexico, n277 [*111] New York, n278 North Carolina, n279 Oklahoma, n280 South Carolina, n281 Tennessee, n282 Texas, n283 Utah, n284 and now Mississippi. n285 Significantly, [*112] two years after Giarratano, the Virginia legislature enacted a similar provision. n286

Thus, at least thirty-two of the thirty-eight states, as well as the federal government, provide an automatic right to counsel by statute. There are some states where the practice and the law seem to be in conflict. For example, in Colorado, where there is a right to counsel in non-capital post-conviction proceedings, n287 efforts have been made to deny counsel in capital cases in order to speed up appeals. n288 The issue remains, then, whether state post-conviction proceedings are considered "appeals of right" in capital cases. Spangenberg reports that all of the persons condemned to death in capital cases, three in Colorado currently n289 have received compensated appointed [*113] counsel. n290

In Arkansas, the right to counsel theoretically applies only once the trial judge has determined that an evidentiary hearing should be permitted. However, generally counsel is appointed in capital cases, although the compensation may be inadequate. n291 Thus, although there are forty-one people on **death row**, n292 none has ever gone without counsel.

Finally, we come to the three states where there is no clear right to counsel in capital post-conviction. Wyoming is unique insofar as there used to be a right to counsel in capital postconviction, but in 1990 the law was amended specifically to take it away. n293 However, it has not been an issue of any major significance, since there is only one person on **death row** in the state, n294 and everyone who has reached post-conviction has been represented by pro bono counsel. n295

The two real problems are Georgia and Louisiana. The Georgia Supreme Court has struggled with the issue of postconviction representation but recently issued a devastating opinion rejecting the right to counsel. n296 Starting in 1975, the court consistently held that there was no right to counsel n297 or any [*114] state funds n298 in state habeas proceedings, capital or non-capital. In turn, the federal courts found that the state proceedings were so inadequate that an evidentiary hearing was required once the case reached federal court. n299

In recent years, the issue has become more contentious. n300 Georgia once had a Resource Center and maintained roughly \$ 300,000 in state funding when the federal monies were cut off. With a **Death Row** of 123 people, however, this is clearly a drop in the bucket. n301 The case of Exzavious Gibson crystallized support for a more rational system n302 but fell one vote short, when the

Georgia Supreme Court ruled 4-3 that counsel was not constitutionally required. n303

The facts in Gibson are extraordinary enough. Mr. Gibson's IQ was roughly 80, in the borderline range of mental retardation. n304 A pro forma habeas petition was filed on his behalf, raising only one cognizable claim, n305 while the Resource Center sought to find him pro bono counsel. n306 However, the state trial court scheduled a hearing on the petition in the prison, where an attorney from the Resource Center appeared to ask that counsel be provided. n307 The trial court refused, and forced Mr. Gibson to represent himself. n308 At the hearing, his own trial lawyer [*115] testified against him, asserting that any alleged errors were a result of a "mitigation strategy that was "two-pronged:" n309 Mr. Gibson had been just seventeen years-old at the time of the crime and had been totally neglected as a child, his father leaving him when he was a few months old, and his mother being murdered when he was just two years-old. n310 Thus, there were three people trained in the law who were arrayed against Mr. Gibson - the trial judge, the assistant attorney general, and his own trial lawyer. Nobody was allowed to speak on his behalf.

On one level, the Gibson majority reveals an extraordinary misunderstanding of the purpose of post-conviction. To be sure, the majority speaks in platitudes when it speaks of the possibility of executing an innocent person: "The citizens of this state should be, must be, appalled at the prospect of executing an innocent person, or a murderer undeserving of the ultimate punishment." n311

However, this does not mean that Mr. Gibson needed a lawyer because he is, according to the majority, just a "bad dude:" "But anyone familiar with the facts that underlie this petitioner's convictions and sentences, of what he did to a shopkeeper on February 2, 1990, knows that Exzavious Lee Gibson is neither innocent nor undeserving of the death penalty." n312

This is a most striking statement. n313 While every murder is terrible on one level, n314 in every case that reaches postconviction the Georgia Supreme Court has found sufficient evidence to support the conviction n315 and has held that the individual [*116] death penalty is not disproportionate. n316

Under the theory of the Georgia Supreme Court, then, nobody who would ever be seeking post-conviction relief apparently deserves it, unless he can somehow prove that he is actually innocent. n317

The majority also stood federal constitutional law on its head. The court held:

In determining what is constitutionally required, a relevant inquiry is <ellip> what is the contemporary practice. As part of his claim of lack of fundamental fairness, Gibson asserts that Georgia is one of only two states that does not permit appointed counsel for indigent death-sentenced habeas corpus

petitioners. However, closer examination reveals that no state, save for Mississippi, has recognized a constitutional right to appointed counsel upon habeas corpus. Almost every jurisdiction that provides state-funded counsel to indigent **death-row** habeas corpus petitioners does so by statute. The contemporary practice thus illustrates that a law providing appointed counsel to indigent **death row** habeas petitioners usually results from legislative enactment, not judicial fiat. n318

[*117] This is another extraordinary statement. Of course, the only states that have been forced to consider the constitutional question have been those in the tiny minority where the legislature failed to recognize the right. n319

In addition, the Georgia Supreme Court has inverted the Eighth Amendment analysis, for the United States Supreme Court has relied far more heavily on acts by elected legislatures, reflecting the will of the people, than decisions made by courts, reflecting the legal opinions of a small number of judges. n320 If there were not a large number of state legislatures that disagreed with the principle in case before it, the court would often have no Eighth Amendment issue to adjudicate.

Three of the seven justices dissented in Gibson, arguing: n321

When a petitioner is on **death row** and pursuing his first habeas petition, there can be no glimmer of hope that fundamental fairness will prevail in the absence of counsel and, without a procedure for appointed counsel, the right to meaningful access to habeas review under the Georgia Constitution is lost.

Any reasonable on-looker must agree with the dissent. Certainly, the fact that the Georgia Supreme Court is the only court in recent years to have flatly rejected the need to provide counsel must, especially given the narrow 4-3 vote, be little consolation to those who would deny the existence of a constitutional right.

Not only are there eighty-two people on **death row**, n322 but in terms of the proportion of its condemned people who have been executed, Louisiana ranks fourth after Texas, Virginia, and Missouri. n323 Louisiana law provides for the appointment of counsel for any case where "it orders an evidentiary hearing on the merits of a claim." n324 On various occasions the Louisiana Supreme Court has ordered that counsel be appointed for an evidentiary hearing, even in non-capital cases. n325 Likewise, in capital cases, [*118] the court has ordered the appointment of counsel when required by statute. n326

Until recently, the rule posed no problems. There was a Resource Center that was relatively well funded by the federal government. Thus, in every case in

which a petition was filed that mandated a hearing, counsel was available. However, the Resource Center's funds are now exhausted and chaos reigns. As of February 1, 1999, there were three inmates with execution dates without counsel, an additional eleven facing state postconviction without counsel, and thirty-five more who may reach post-conviction in the next several months. In one case, the supreme court is considering an application by Eddie Mitchell, a mentally retarded man, who was denied counsel by the trial court. n327 Another case involves a seriously disturbed man, Scott Bourque, who has already been found incompetent to waive his appeals. n328 Clearly he cannot represent himself, since he has repeatedly, albeit incoherently, stated his desire to die. The trial judge stayed the execution and held that "since Scott Jude Bourque has been found mentally incompetent to represent himself, appointed counsel must act in his stead." n329 The question remains: Who will pay the bill? n330

Sooner or later, the Louisiana Supreme Court must face the ultimate question. The court has noted that the rule denying counsel in Giarratano was only a plurality n331 but has provided no further indication as to what the future may hold for those condemned to Louisiana's **death row**.

The states have now come to a near-unanimous decision that contemporary standards of decency require that counsel be provided to a person who faces imminent execution. Common [*119] sense, as reflected in the study in Mississippi, surely supports this notion. It is high time that the final few recalcitrant states be told that the Eighth Amendment forbids enforcing folly by fiat.

FOOTNOTES:

n1 Kay v. Ehrler, 499 U.S. 432, 438 (1991) ("The adage that 'a lawyer who represents himself has a fool for a client' is the product of years of experience by seasoned litigators."); see also Faretta v. California, 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting) ("If there is any truth to the old proverb that 'one who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a constitutional right on one to make a fool of himself.").

n2 Charles Dickens, *Oliver Twist* 491 (1994).

n3 Throughout this article, the male gender is used. This is done because 98.64% of the people currently under sentence of death, and 99.38% of those executed since 1976, have been male. See NAACP Legal Defense and Educational Fund, Inc., **Death Row**, U.S.A. (Fall 1998) [hereinafter **Death Row**, U.S.A.].

n4 See, e.g., *Herrera v. Collins*, 506 U.S. 390, 392 (1992) (holding that Texas' failure to allow consideration of newly discovered evidence of innocence did not

violate fundamental fairness, even assuming, but not accepting, that a "truly persuasive post-trial demonstration of 'actual innocence' would render a defendant's execution unconstitutional and warrant federal habeas relief if there were no state avenue open to process such a claim").

n5 See *Murray v. Giarratano*, 492 U.S. 1, 12 (1989) (plurality opinion) (holding that under the specific conditions in Virginia, where all **death row** inmates had legal counsel, states are not required to provide counsel to indigent **death row** prisoners seeking state post-conviction relief). See also *infra* notes 32-63 and accompanying text for a thorough analysis of *Giarratano*.

n6 *Dickens*, *supra* note 2, at 491.

n7 See *Jackson v. State*, No. 98-DR-00708, 1999 WL 33904, at *4 (Miss. Jan. 28, 1999).

n8 The great writ of habeas corpus requires the government to address an assertion of wrongful imprisonment. If the government cannot justify the citizen's incarceration, the writ calls for his immediate release. See U.S. Const. art. I, § 9; *Fay v. Noia*, 372 U.S. 391, 402 (1963).

n9 See Ala. Const. art. I, § 17; Alaska Const. art. I, § 13; Ariz. Const. art. II, § 14; Ark. Const. art. II, § 11; Cal. Const. art. I, § 11; Colo. Const. art. II, § 21; Conn. Const. art. I, § 12; Del. Const. art. I, § 13; Fla. Const. art. I, § 13; Ga. Const. art. I, § 1, para. 15; Haw. Const. art. I, § 15; Idaho Const. art. I, § 5; Ill. Const. art. I, § 9; Ind. Const. art. I, § 27; Iowa Const. art. I, § 13; Kan. Const. Bill of Rights, § 8; Ky. Const. Bill of Rights § 16; La. Const. art. I, § 21; Me. Const. art. I, § 10; Md. Const. art. III, § 55; Mass. Const. art. VII, § 2; Mich. Const. art. I, § 12; Minn. Const. art. I, § 7; Miss. Const. art. III, § 21; Mo. Const. art. I, § 12; Mont. Const. art. II, § 19; Neb. Const. art. I, § 8; Nev. Const. art. I, § 5; N.H. Const. art. 91, § 2; N.J. Const. art. I, § 14; N.M. Const. art. II, § 7; N.Y. Const. art. I, § 4; N.C. Const. art. I, § 21; N.D. Const. art. I, § 14; Ohio Const. art. I, § 8; Okla. Const. art. II, § 10; Or. Const. art. I, § 23; Pa. Const. art. I, § 14; R.I. Const. art. I, § 9; S.C. Const. art. I, § 18; S.D. Const. art. VI, § 8; Tenn. Const. art. I, § 15; Tex. Const. art. I, § 12; Utah Const. art. I, § 5; Vt. Const. art. II, § 41; Va. Const. art. I, § 9; Wash. Const. art. I, § 13; W. Va. Const. art. III, § 4; Wis. Const. art. I, § 8, cl. 4; Wyo. Const. art. I, § 17.

n10 See, e.g., *Rose v. Lundy*, 455 U.S. 509, 510 (1982).

n11 This right was first recognized for capital defendants in *Powell v. Alabama*, 287 U.S. 45, 73 (1932), and was extended to all defendants in serious criminal cases in *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

n12 In *Douglas v. California*, 372 U.S. 353, 357-58 (1963), the Court recognized the right to counsel in the first appeal of right from such criminal judgements.

n13 492 U.S. at 1.

n14 *Id.* at 12.

n15 *Id.* at 14-15 (Kennedy & O'Connor, JJ., concurring).

n16 See, e.g., Jennifer N. Ide, Comment, The Case of Exzavious Lee Gibson: A Georgia Court's (Constitutional?) Denial of a Federal Right?, 47 *Emory L.J.* 1079 (1998); Brad Snyder, Note, Disparate Impact on **Death Row**: M.L.B. and the Indigent's Right to Counsel at Capital State Postconviction Proceedings, 107 *Yale L.J.* 2211 (1998).

n17 See *infra* notes 121-50 and accompanying text for a more thorough discussion of the struggle for counsel in Mississippi capital post-conviction which appears below.

n18 See Order Staying Execution, *Russell v. Anderson*, No. 97-60038, at 8 (5th Cir. July 22, 1998) (*per curiam*).

n19 *Id.*

n20 For a detailed discussion of the technical aspects of this study, see Mark D. Cunningham & Mark P. Vigan, *Without Appointed Counsel in Postconviction Proceedings: A Study of the Self-Representation Competency of Mississippi Death Row Inmates* (1997) (on file with authors).

n21 *Id.* at 5. Only the verbal portion of the Wechsler Adult Intelligence Survey Revised could be administered. While one necessary precedent to a finding of mental retardation is generally a full scale score of 70 or less, there is a five point margin for error; thus, any score at or below 75 can potentially qualify. *Id.*

n22 *Id.* at 6.

n23 *Id.* at 12-13.

n24 *Id.* at 11. Although the conclusions of these tests are discussed below, throughout this article the reader is referred to the Cunningham & Vigan study, *supra* note 20, for a thorough treatment of the expert and technical aspects of the study.

n25 *Id.* at 10.

n26 See *id.* at 10-11.

n27 For example, the Mississippi Supreme Court previously explained that: "Opinions of this Court have previously recognized that death penalty litigation has become highly specialized and that few attorneys have "even a surface familiarity with the seemingly innumerable refinements put on Gregg v. Georgia and progeny.'" Irving v. State, 441 So. 2d 846, 856 (Miss. 1983) (citations omitted).

n28 See Jackson, 1999 WL 33904, at *4.

n29 Id. at *3; see also Giarratano, 492 U.S. at 14 (Kennedy, J., concurring).

n30 Jackson, 1999 WL 33904, at *1.

n31 Id.

n32 Id. at *3 (citing 28 U.S.C. § 2254(b) (1994); Coleman v. Thompson, 501 U.S. 722, 731 (1991)).

n33 Jackson, 1999 WL 33904, at *3.

n34 Id. at *4 (quoting M.L.B. v. S.L.J., 117 S. Ct. 555, 568 (1996) (holding as unconstitutional a mandatory filing fee in parental termination cases that applied even for indigents)).

n35 Id.

n36 Three concurring justices reached the same conclusion based on a novel interpretation of state statutory law. Id. at *5 (Mills, Roberts, & Waller, JJ., concurring) (finding that post-conviction proceedings constitute a "critical stage" requiring appointment of counsel pursuant to Miss. Code Ann. § 99-15-15 (1994)). The concurrence also characterized the majority opinion as an application of "the Mississippi Constitution of 1890." Id. at *5. However, there is no such limitation placed on the majority opinion, and it seems to be squarely based on federal law as well as an interpretation of Giarratano.

n37 Jackson, 1999 WL 33904, at *4.

n38 481 U.S. 551 (1987).

n39 Id. at 555-56.

n40 See Giarratano, 492 U.S. at 3-4.

n41 See Giarratano v. Murray, 668 F. Supp. 511, (E.D. Va. 1986). The trial judge found the result was dictated by Bounds v. Smith, 430 U.S. 817 (1977). Bounds is the seminal case on the right to "access to courts." The district court

judge found that "meaningful access" included the appointment of attorneys to assist defendants in preparing state post-conviction petitions. *Giarratano*, 668 F. Supp. at 514; see also *Giarratano*, 492 U.S. at 3-4.

n42 *Giarratano*, 492 U.S. at 4.

n43 *Id.*

n44 *Id.* at 4.

n45 A three judge panel initially reversed part of the trial court's ruling. *Giarratano v. Murray*, 836 F.2d 1421 (4th Cir. 1988). On rehearing, the en banc Fourth Circuit Court of Appeals affirmed the district court's order in its entirety. *Giarratano v. Murray*, 847 F.2d 1118 (4th Cir. 1988) (en banc). Subsequently, in a plurality opinion, the United States Supreme Court reversed the Fourth Circuit. *Giarratano*, 492 U.S. at 1.

n46 The Chief Justice's opinion was joined by Justices White, O'Connor, and Scalia. See *Giarratano*, 492 U.S. at 3 (Rehnquist, C.J., White & O'Connor, JJ., concurring). However, Justice O'Connor concurred separately to say that she also agreed with Justice Kennedy's opinion. *Id.* at 13 (O'Connor, J., concurring). Therefore, it is probably fair to say that only three members of the Court believed that under no circumstances could counsel be constitutionally required in state post-conviction proceedings.

n47 See *Giarratano*, 492 U.S. at 10 ("We think that these cases require the conclusion that the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in non-capital cases.").

n48 *Id.*

n49 *Id.* at 13.

n50 *Id.*

n51 *Id.* at 15 (Stevens, Brennan, Marshall & Blackmun, JJ., dissenting).

n52 *Giarratano*, 492 U.S. at 19 (dissenting opinion).

n53 *Id.* at 20-22 (dissenting opinion).

n54 *Id.* at 25-26 (dissenting opinion).

n55 *Id.* at 27 (dissenting opinion).

n56 *Id.*

n57 Id.

n58 Giarratano, 492 U.S. at 27 n.20 (dissenting opinion).

n59 Id. at 28 (dissenting opinion).

n60 Id. at 28 n.23 (dissenting opinion).

n61 The dissent noted in passing that counsel should be allowed time for "examination of the case record, factual investigation, and preparation of a petition <ellip>." Id. at 29. The dissent also mentioned that "occasionally, new evidence even may even suggest that the defendant is innocent." Id. at 24.

n62 Giarratano, 492 U.S. at 13 (O'Connor, Kennedy, JJ., concurring). It is not clear precisely what Justice O'Connor meant, since she announced that she was joining both the plurality opinion and Justice Kennedy's concurring opinion. She suggested that it would be proper for the State to deny counsel in light of our "scarce legal resources," id. at 15, a difficult notion to accept in a nation with a million lawyers. However, she seemed to leave open the option that some state models for providing "access to courts" would not be adequate. Id.

n63 Id. at 14 (Kennedy & O'Connor, JJ., concurring).

n64 Id.

n65 Giarratano, 492 U.S. at 14-15.

n66 Coleman v. Thompson, 501 U.S. 722, 752 (1991).

n67 512 U.S. 849 (1994).

n68 Id. at 855-56 (quoting Giarratano, 492 U.S. at 14 (Kennedy, O'Connor, JJ., concurring)).

n69 While the plaintiff in Russell obviously sought to use the study because it so clearly supported his case, this cannot be said to have been the purpose of the original study. Dr. Cunningham and Dr. Vigan were not setting out to prove one thing or another, but rather to test a hypothesis. See generally Cunningham & Vigan, *supra* note 20.

n70 Judge Godbold, former chief judge of the United States Eleventh Circuit Court of Appeals, once said that "the average trial lawyer, no matter what his or her expertise, doesn't know any more about habeus than he does about atomic energy. Habeus is the most complex area of law I deal with." *Ashmus v. Calderon*, 935 F. Supp. 1048, 1074 (N.D. Cal. 1996) (quoting "You Don't Have

to Be a Bleeding Heart," Representing **Death Row**) (citations omitted).

n71 There were obvious legal concerns since all 52 inmates have pending or anticipated challenges to their convictions. For this reason, the names of all participants were kept strictly confidential. Even during their direct interview by the psychologists, they were identified only by the number that had been assigned to them.

n72 See generally Cunningham & Vigan, *supra* note 20.

n73 *Id.* at 3.

n74 *Id.*

n75 Michael Mello, Facing Death Alone: The Post-Conviction Attorney Crisis on **Death Row**, 37 Am. U.L. Rev. 513, 549 n.226 (1988) (citing National Criminal Justice Information and Statistics Service, U.S. Dep't of Justice, Profile of State Prison Inmates: Sociodemographic Findings from the 1974 Survey of Inmates of State Correctional Facilities 9-12 (1979)).

n76 Given the intelligence testing performed in this study, it seems highly probable that a far larger proportion of the inmates could have benefitted from special education had it been available to them.

n77 The authors of the study explain that:

The WAIS-R is an individually administered intelligence test comprised of Verbal and Performance (nonverbal) Scales. The Verbal Scale sub-tests of the WAIS-R were administered to each inmate as this aspect of intellectual capability seemed most relevant to considerations of competency to function as one's own attorney. An additional impediment to administering the Performance Scale of the WAIS-R was the security requirement of the Parchman prison administration that all inmates remain in wrist shackles anchored to belly chains.

Cunningham & Vigan, *supra* note 20, at 4-5.

n78 The performance portion of the test was considered both less significant to the inmate's ability to perform the legal test ahead of him and impractical to administer due to the inmate's shackling during the interview process.

n79 Cunningham & Vigan, *supra* note 20, at 5 ("There is a standard error of measurement (SEM), or degree of statistical error variation, associated with any test score. The SEM of these Verbal IQ's is <plusmn> 5 (95% confidence level).").

n80 See Cunningham & Vigan, *supra* note 20, at encls. 1. The mean VIQ score

was significantly lower than the mean score of the WAIS-R standardization sample. The standard deviation was 10.7 points.

n81 *Id.* at 5.

n82 Both malingering measures and areas of data consistency with past research suggest that lack of effort and feigning of ignorance were not responsible for these differences. See generally Cunningham & Vigan, *supra* note 20.

n83 *Id.* at 5.

n84 See D.O. Lewis et al., Psychiatric, Neurological, and Psychoeducational Characteristics of 15 **Death Row** Inmates in the United States, 143 *Am. J. Psychiatry* 838 (1986) (indicating the median Verbal IQ to be 87.5); Johnnie L. Gallemore, Jr. & James H. Panton, Inmate Responses to Lengthy **Death Row** Confinement, 129 *Am. J. Psychiatry* 167 (1972) (indicating the Median Beta IQ to be 95.6); J.H. Panton, Personality Characteristics of **Death-Row** Prison Inmates, 32 *J. Clinical Psychology* 306-09 (1976) (indicating the median IQ to be 90.7); J.H. Panton, Pre and Post Personality Test Responses of Prison Inmates Who Have Had Their Death Sentences Commuted to Life Imprisonment, in *Research Communications in Psychology, Psychiatry and Behavior* 143-56 (1978) (indicating the median IQ to be 96.5).

n85 For example, the Mississippi finding that 42% of **death row** inmates obtained VIQ scores of 79 or below was quite similar to the 37% of Sing-Sing **death row** inmates scoring in this range on the full IQ test. See H. Bluestone & C.L. McGahee, Reaction to Extreme Stress: Impending Death by Execution, 119 *Am. J. Psychiatry* 393 (1962).

n86 See Mello, *supra* note 75, at 549.

n87 See *id.*

n88 Obviously, without being able to provide a complete battery of tests and determine the developmental history of the individuals, it is not possible to make a final diagnosis of mental retardation. However, the "Verbal IQ scores of 9 inmates (20.45%) were between 70-74 (<plusmn>5), straddling the borderline of mentally deficient/mentally retarded classifications." Cunningham & Vigan, *supra* note 20, at 5. Roughly "96-98% of the United States would have Verbal IQ scores greater than these 9 inmates." *Id.* "Three other inmates (6.8%) had IQ scores of less than 63, unquestionably in the mentally deficient classification even allowing for the most optimistic error variance." *Id.*

n89 As discussed below, the sample records secured for a limited number of the inmates to test the validity of the study reflected in full-scale IQ scores in the

range of retardation for three of the six inmates where such scores were available.

n90 See Diagnostic & Statistical Manual of Mental Disorders 44 (4th ed. 1994).

n91 See Mello, *supra* note 75, at 550.

n92 Immediately after Georgia enacted a bill barring the execution of mentally retarded inmates, estimates of retardation in the **death row** population ranged as high as thirty percent. See **Death Row**, U.S.A., *supra* note 3, at 26. This was probably not too far from the truth. In short order, there were at least 11 reported instances of mentally retarded persons on **death row** in Georgia, which has had a condemned population of roughly 110-120 over the past decade. See *id.* In the case of *Fleming v. Zant*, 386 S.E.2d 339, 342 (Ga. 1989) (superceded by statute), the Georgia Supreme Court found that the execution of the mentally retarded was cruel and unusual punishment, and set out procedures for assessing the mental capacity of this defendant. Following the *Fleming* decision, other appellate decisions dealt with inmates where at least one expert had determined the individual to be retarded. See *Livingston v. State*, 444 S.E.2d 748, 752 (Ga. 1994); *State v. Patillo*, 417 S.E.2d 139, 140 (Ga. 1992); *Zant v. Foster*, 406 S.E.2d 74, 75 (Ga. 1991), overruled by *State v. Patillo*; *Stripling v. State*, 401 S.E.2d 500, 503 (Ga. 1991); *Zant v. Beck*, 386 S.E.2d 349, 350 (Ga. 1989). Other cases dealt with the failure to provide expert assistance to mentally retarded inmates and other related issues. See *Curry v. Zant*, 371 S.E.2d 647, 648-49 (Ga. 1988) (holding that an ineffective assistance of counsel claim at guilty plea proceedings for failing to use funds would permit for independent psychological assistance where client had low IQ and state doctors reported organic brain damage); *Holloway v. State*, 361 S.E.2d 794, 795 (Ga. 1987) (reversing and remanding where defendant had an IQ of 49, and trial court failed to appoint expert assistance and did not conduct a competency hearing); *Smith v. Zant*, 855 F.2d 712 (11th Cir. 1988), vacated for reh. en banc, 873 F.2d 253 (11th Cir. 1989), *aff'd* by equally divided court, 887 F.2d 1407 (11th Cir. 1989) (en banc) (affirming the district court's determination that a mentally retarded defendant who had an IQ of 65 and mental age of 10 or 11, did not intelligently waive Miranda rights; introduction of illegally obtained confession not harmless at penalty phase). Two other inmates who were executed, Jerome Bowden and Ivan Stanley, were retarded. See Mello, *supra* note 75, at 550 n.239. While it may not be reflected in the appellate opinions, several other inmates were removed from **death row** because of their retardation after reversal on other grounds. Indeed, one of the authors helped in the representation of two of these, James Cook, *Zant v. Cook*, 379 S.E.2d 780 (Ga. 1989), and Troy Tyree, *Tyree v. State*, 418 S.E.2d 16 (Ga. 1992).

n93 It has been suggested that the mentally retarded find themselves on **death row** in extraordinarily high numbers for two main reasons: First, once they lose control of a situation, it is possible for them to lose total control, resulting in a

savage battering to the victim, and accompanied by gruesome photographs. Second, such a person is highly malleable in the hands of law enforcement officers, who are often not trained in interrogating retarded offenders, and, therefore, are easy to convict.

n94 See Joseph Matarazzo, *Wechsler's Measurement and Appraisal of Adult Intelligence* 166 (5th ed. 1972).

n95 See Cunningham & Vigan, *supra* note 20, at 4-7.

n96 *Id.* at 6. The standard deviation was 2.87. *Id.* Looking to individual inmates, the reading scores ranged from a 1.2 grade level to a 12 grade level. *Id.* However, only two inmates read at or above the 12th grade level. *Id.*

n97 See Cunningham & Vigan, *supra* note 20, at 7. They used three standard methods in making this assessment: First, the Flesch Reading Ease formula, Rudolph Flesch, *A New Readability Yardstick*, 32 *J. Applied Psychol.* 221-33 (1948); Rudolph Flesch, *How to Test Readability* 1-24 (1951); second, the Flesch-Kincaid Index, Georgelle Thomas, et al., *Test-Retest and Inter-Analyst Reliability of the Automated Readability Index, Flesch Reading Ease Score, and the Fog Count*, 7 *J. Reading Behav.* 149 (1975); third, the Gunning Fog Index, Robert Gunning, *The Technique of Clear Writing* 36-37 (1952).

n98 For example, in *Mann v. Lynaugh*, 840 F.2d 1194, 1196 (5th Cir. 1988), the Fifth Circuit affirmed the district court's denial of habeas relief because the petitioner was one day late in filing notice of appeal, thereby precluding him from presenting the merits of his claims to the appellate court. However, the district court later vacated its judgment denying habeas relief in part because the court did not wish to penalize the petitioner based on his attorney's late filing. *Mann v. Lynaugh*, 690 F. Supp. 562, 564-65 (N.D. Tex. 1988), vacating 688 F. Supp. 1121 (N.D. Tex. 1987).

n99 The median raw score was 16.5, and the standard deviation was 10.45. See Cunningham & Vigan, *supra* note 20, at 12.

n100 Of course, this test assessed only the raw knowledge of the attorney or the inmate. Some of the questions were specific to the State of Mississippi, such as the statute of limitations imposed on the filing of a post-conviction petition or the rule requiring that such petitions be filed with the state supreme court. See Cunningham & Vigan, *supra* note 20, at 12. Many of the attorneys who took the test at least knew to make it clear that they were uncertain. *Id.* at 11. They would certainly have an advantage if they were trying to research the issues where they were uncertain - first, they would have a better idea of what the issues were, and then they would not be constrained in their research as the inmates are.

n101 See Law School Admissions Council, Inc., Law School Admissions Test (1991). The test used was administered in June 1991.

n102 Id. The question provided as follows:

The Citizens' Association of Winchester is deciding whether to renovate the town's original Park and Shop shopping center or to demolish and replace it. Write an argument favoring one plan over the other based on the following guidelines:

The association wants to increase the variety of shops and services in the neighborhood by attracting new merchants to the area.

The association wants the building to remain a center of community orientated activity for residents of the neighborhood.

One proposal calls for renovating the Park and Shop by adding two stories to the existing structure for additional shops and a restaurant. The original twostory structure surrounded by thirty parking spaces, currently houses twelve family-owned businesses, including a gift shop, a bakery, a hardware store, and a small clothing boutique. The building also houses the offices of a doctor, an attorney, and a dental group. It is architecturally undistinguished, and it blends well with the neighborhood. Every Saturday morning, a section of the parking lot is used for a flea market where people from the neighborhood come to buy crafts and fresh produce. The current shop-owners are not likely to be able to afford the rent if the center is demolished and a new building is constructed.

The other proposal is to demolish the existing Park and Shop and replace it with a six-story building that features a dramatic forty-foot atrium and an undergoing parking garage. The top two floors of the new structure will be for offices, the ground floor will house a four screen movie theater, and the remaining floors will be used for clothing and jewelry stores, exotic gift shops, and the like. The "open air" restaurants, each with an ethnic theme, will surround the atrium on the first floor. The developer has agreed to provide a large room on the ground floor rent-free for ten years for community art work and projects.

n103 The use of the "smile" symbol ("`<less than>smileyface>`") is, for some reason, a common aspect of prison correspondence.

n104 See A. Anastasi, Psychological Testing 457 (5th ed. 1982); Bureau of Labor Statistics, Occupational Outlook Handbook 117 (1996).

n105 See Anastasi, *supra* note 104, at 457.

n106 See Mello, *supra* note 75, at 551-52.

n107 These interviews were all conducted by the psychologists who carried out the study. See Cunningham & Vigan, *supra* note 20, at 10.

n108 See Cunningham & Vigan, *supra* note 20, at 8. The BDI is a widely used self-report scale designed to measure symptoms and levels of depression. See Aaron T. Beck & R.A. Steer, *Manual for Revised Beck Depression Inventory* (Psychological Corp. ed., 1988). The scores of 16 inmates had to be discarded because their reading comprehension was too limited for the test. See Cunningham & Vigan, *supra* note 20, at 7-8.

n109 The PAI is an objective self-report test of personality functioning and psychological disorders. See Leslie C. Morey, *Personality Assessment Inventory* (1991). Once again, the scores of 16 inmates were discarded from analysis because their reading comprehension levels were below the fourth grade reading level of the test items. See Cunningham & Vigan, *supra* note 20, at 8. In almost every instance of discarded scores, the PAI validity scales reflected an invalid pattern of test responses (principally reflecting inattention to item content) even in instances that test items were read aloud to the inmate. *Id.* at 8. "In all but one instance of discarded PAI profiles the inmates excluded from analysis had obtained [Verbal IQ] scores of 77 or less, suggesting that intellectual deficits as well as reading problems interfered with their responding relevantly to the test." *Id.*

n110 *Id.* at 9. Comparative norms regarding the frequency of multiple scale elevations in the PAI standardization sample have not been published.

n111 For example, Illinois disciplinary hearing matters involving 485 attorneys between 1988 and 1993 found that depression was a component in 46 cases, and other mental impairments were contributing factors in 48 cases. See Arlene Jacobius, *Coming Back From Depression*, 82 A.B.A. J. 74, 77 (April 1996).

n112 All records are on file with the authors. However, the records are referenced by number rather than by name to protect the confidentiality of the client.

n113 Number 25 had been diagnosed as manic depressive in the East Mississippi State Hospital, Psychological Evaluation from Mississippi State Hospital, at 2 (Dec. 23, 1992) (name withheld) (on file with authors), in a Tennessee hospital and in the Mississippi State Hospital at Whitfield.

n114 These records related to the case of number 51. *Id.* at 1.

n115 The records of 8 included a prison evaluation which indicated a passive-aggressive personality disorder with a long history of suicidal efforts and alcoholic blackouts. Psychological Evaluation from Mississippi State Hospital, at 1-3 (Feb. 21, 1995) (name withheld) (on file with authors).

n116 Their records may be briefly summarized as follows: 27 had two earlier verbal IQ scores, one of 49 (at the age of 6) and 69 (at the age of 18). Psychological Evaluation from Region VI Mental Health-Mental Retardation Center, 62, 65 (Dec. 12, 1980) (name withheld) (on file with authors). His records reflected that he read at the third grade level. Id. at 65. Number 50 had a full scale IQ of 62 and had been diagnosed as mentally retarded. Psychological Evaluation from Mississippi Dep't of Corrections, 3 (Dec. 20, 1990) (name withheld) (on file with authors). Number 56 had a verbal IQ of 69, a history of head injuries, and read at a fourth grade level. See id. at 2-3.

n117 The histories may be briefly summarized as follows: number 15 had a verbal IQ of 77 and had been diagnosed with a mixed personality disorder with schizoid and anti-social tendencies. Id. at 2. Although he had dropped out in the eighth grade, number 43 had a full scale IQ 100, in the highest range of the scores, yet he was psychotic, manifesting in sociopathic and paranoid schizophrenic behavior. Id. at 1. Number 45 likewise had a full scale IQ 100, yet the examiner noted a significant differential between Verbal and Performance, which is sometimes an indicator of brain damage. Id. at 9-10. He was diagnosed with paranoid schizophrenic disorder. Id. at 15.

n118 Number 19 had a performance score of 68 and dropped out of school in the eighth grade.

n119 Number 5 had a Verbal IQ of 75, dropped out of school in the eighth grade, reported auditory hallucinations, and was tentatively diagnosed by the prison experts as schizophrenic. Psychological Evaluation from Mississippi Dep't of Corrections at 1-2 (July 14, 1986) (name withheld) (on file with authors). Number 40 had also dropped out of school in the eighth grade and had a Verbal IQ score of 85 in 1982 and 96 in 1984. Psychological Evaluation from American Board of Forensic Psychology at 9, 15-16 (1984) (name withheld) (on file with authors). The differential in IQs may have been effected by his diagnosis of paranoid schizophrenia made while at the Mississippi State Hospital at Whitfield. Id. at 19.

n120 This consisted of the PAI validity scales, the Dot Counting Test, and the Ray 15 Item Test. See Muriel D. Lezak, *Neuropsychological Assessment* (3d ed. 1995); see also Cunningham & Vigan, *supra* note 20, at 7.

n121 The litigation was conducted by one of the authors, along with exceptional work from the firm of Jenner & Block in Washington, D.C., led by one of the partners, Donald J. Verrilli, Jr.

n122 See *Giarratano*, 492 U.S. at 14-15 (Kennedy & O'Connor, JJ., concurring).

n123 *Id.* at 14.

n124 See **Death Row**, U.S.A., *supra* note 3, at 31.

n125 See *Unit Bed Recapitulation*, Unit 32-C (January 24, 1999) (on file with authors).

n126 See *Gates v. Fordice*, No. 97-60616 (5th Cir. filed Dec. 29, 1997) (lasting for now over 28 years); see also *Stevenson v. Reed*, 391 F. Supp. 1375, 1380-82 (N.D. Miss. 1975), *aff'd*, 530 F.2d 1207 (5th Cir. 1976).

n127 See *Lewis v. Casey*, 518 U.S. 343, 349, 354-55 (1996).

n128 349 F. Supp. 881, 903 (N.D. Miss. 1972).

n129 In February 1997, the defendants moved for permission to establish a new inmate access to court program, desiring to abolish altogether the law library system. See Defendant's Motion for New Inmate Access to Court Program, Russell, No. 3:97CV596WS, at 2. They represented that "the Defendants have contemplated changes in legal access for inmates since *Lewis v. Casey*, <ellip> was decided on June 24, 1996." *Id.* at 2 (citations omitted). The plan was to get rid of libraries altogether in favor of an unspecified system of access to attorneys and "free world" paralegals. *Id.* The motion was granted, without substantial dispute by the class counsel, with the District Court finding that the MDOC should be "afforded this same opportunity to effect savings" by getting rid of the hard book subscription library. *Id.* at 6. The court also felt that the MDOC should be allowed to save the money being spent on security costs incurred in transferring the inmates to the libraries. *Id.* Then class counsel sought and was granted permission not to appeal the decision. *Id.* Thus, the first obstacle for the inmates, stripped of their right to counsel to litigate their right to access to courts, and denied their right to visit the law library, was to appeal to the Fifth Circuit themselves.

n130 *Falzerano v. Collier*, 535 F. Supp. 800, 803 (D.N.J. 1982).

n131 It is worth noting that the ABA guidelines suggest a limit of two capital cases for any single attorney. See *Defense Services in ABA Standards for Criminal Justice* (3d ed. 1992). Here, Mr. Pennington would have to service 62 **death row** inmates, along with an additional 5,000 others.

n132 The Mississippi Bar Association has indicated that Mr. Pennington is not a member of the bar. Indeed, when one inmate criticized Mr. Pennington for failing to provide him with legal assistance, the Bar responded:

Your Request for Assistance has been received and reviewed. In response to your request, Richard Pennington is not a member of the Mississippi Bar, and therefore cannot provide you with legal advice in the same manner as any attorney. Leonard Vincent is an attorney for the MDOC. There is certainly no good reason for Mr. Vincent to provide an inmate with advice or information. Mr. Vincent is correct in his assessment of the duties of Mr. Pennington. It is against Section 73-355 of the Mississippi Code of 1972, as amended, for someone to practice law without a license in this State, and that is what you are asking Mr. Pennington to do. Certainly, as a member of the Bar, Mr. Vincent has every right to order a halt to the unauthorized practice of law that goes on at Parchman at sic a regular basis.

Letter from Robert Glen Waddle, Mississippi State Bar, to James W. Lyle IV (Jan. 19, 1998) (emphasis supplied) (on file with authors).

A telephone call to the Mississippi Bar on February 3, 1999, confirmed that he was still not a member of the Bar of the state. The inmates received information that he was a member of the Bar of Alabama, but that association also denied that he was on its rolls. Presumably he is a member of the Bar somewhere. However, the Russell litigation was put on hold before his status could be confirmed in discovery.

n133 It is a violation of the rules for one inmate to accept any compensation for helping another: "Any legal assistance done by an inmate for another inmate for any type of compensation is prohibited and subjects both inmates to disciplinary action." Mississippi Department of Corrections, Office of Legal Assistance, Legal Assistance Information 4 (on file with authors). Therefore, an illiterate inmate must rely on the good graces of other inmates for help with the most basic matters.

n134 Because they feared recrimination, some informants within the MDOC asked that their names be kept confidential when they provided information that would assist the Russell plaintiffs with discovery. These notes are maintained in a confidential form by the authors.

n135 When the program began, the Russell plaintiffs were informed that Mr. Pennington would come to Unit 32 for one afternoon each week, for roughly four hours. Mississippi Department of Corrections, Office of Inmate Legal Assistance, Legal Assistance Information 3 (on file with authors). However, he is now apparently spending less time in these consultations as other obligations mount up.

n136 According to the Legal Assistance Schedule published by the penitentiary, Mr. Pennington is scheduled to be at a different unit every day of the week. See Mississippi Department of Corrections Office of Legal Assistance, Legal

Assistance Information 3 (on file with authors.) For example, on Thursday he is meant to meet with inmates from Units 17, 27, 32A, 32B, 32C, 32D and 32E. *Id.* However, in addition to this he is meant to process requests for help back at his office and provide copies of the authorities requested. *Id.* at 1. Therefore, he cannot spend the entire day in meetings with inmates.

n137 See Mississippi Department of Corrections, Inmate Legal Assistance Program Request Form (date) (on file with authors) [hereinafter Legal Request Form]. In order for the inmate even to request assistance, he must certify on the Legal Request Form that "by my signature affixed below, I acknowledge that MDOC Policy 20.01, effective on 12/ 15/97, provides access of Inmates to the courts which may be used to initiate legal actions pertaining to my sentence and/or confinement within prescribed security and conduct limits." *Id.* This is a classic adhesion contract which is designed to insulate the penitentiary's abysmal policies from litigation. What would happen, then, if the inmate wanted legal assistance to file a law suit challenging as inadequate the very policies that are being enforced?

n138 In theory, the illiterate inmate may request help from his case manager in completing the form. The current case manager for the 197 inmates in Unit 32C is Gregory Braggs, an MDOC employee with no specific training other than the general training he received as a correctional officer.

n139 See Legal Request Form, *supra* note 137, at 1. This is emphasized in the form both in bold and with underlining: "In order to request services below this line you must provide the cause number of your active case <ellip>." Legal Request Form, *supra* note 137, at 1 (emphasis in original).

In the early days of the new program, inmate requests were turned down because they had not cited their cause number, even though the form had no space for it. See Original MDOC Legal Request Form (on file with authors). The revised request forms now provide a space to fill in the number. See Legal Request Form, *supra* note 137, at 1.

n140 As Joseph Heller wrote:

There was one catch, and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions <ellip>. If he flew them he was crazy and didn't have to; but if he didn't want to, he was sane and had to <ellip> "That's some catch, that Catch-22," Yossarian observed. "It's the best there is," Doc Daneeka agreed.

Joseph Heller, *Catch-22* 54 (1955).

n141 As one of the inmates stated:

I have tried to use the current system. I figured maybe I would want to find out about legal issues involved in jailhouse snitches, since that was one thing that came up in my trial. I do not know if that is the kind of thing that I would be meant to raise on the next round of appeals, but I thought I would try my best anyway. So on December 12, 1997, I filled in a request for a case about the reliability of jailhouse snitches, and for research and paralegal assistance. When the guards were passing out the cases people had requested, I got nothing and neither did most of the guys here. The person who is meant to tell us what is going on, Jesse Tribune, said he did not have time to tell me why, but I did eventually get a MDOC response saying that I need to put my case number on it. I did not understand what they meant by that. There was nowhere on the form that said I had to put a case number on there. I thought maybe they meant the numbers that people use when they call out a case, that leads them to the book that it is in. On December 16, 1997, I made another attempt at requesting cases and assistance, making it clear that I did not know the case number of the cases that I wanted. Two days later, Mr Jesse Tribune came past my cell and told me that I was not going to get a case without a case number. I tried to ask him what I was supposed to do but he just walked off. This time, the written response they sent me said, "Mr. Inmate you need to put your court case number down." I was not sure what they meant then. If they meant some number on my case, I did not know any such number, or even if I had one, so I could not get anything. I do not understand how we are supposed to get case numbers without access to materials and legal help in research. I do not know how I am meant to get a case number from a court when I do not have anything that I can do to file in a court. I have always relied on my lawyer to do that and I have never put any legal paper together myself. None of this makes any sense to me.

Affidavit of Inmate 1, at 2-3, Russell, No. 3:97CV596WS (on file with authors). The affidavits were prepared during the course of the Russell litigation but never had to be filed. In order to preserve the confidentiality of the inmates, names are not used.

n142 See Mississippi Dep't of Corrections, Rule Violation Report 20714, (Nov. 4, 1998) (on file with authors); Mississippi Dep't of Corrections, Rule Violation Report 20717 (Jan. 27, 1999) (on file with authors). There is no defined "rule violation" relating to working too hard to secure one's own freedom. The "rule violation" committed by these two men was the failure to follow Ms. McGraw's order not to ask for more cases.

n143 For example, one inmate reports that his request was denied because "in order to request a cited case you must have a case pending in which the case

you request has been cited by opposing counsel." Affidavit of Inmate 5, Russell, No. 3:97CV596WS at 2 (on file with authors).

n144 Id.

n145 Affidavit of Inmate 2, Russell, No. 3:97CV596WS, at 3-4 (on file with authors).

n146 For example, "on January 6, 1997, [one inmate] filled in a request for paper and envelopes, and assistance in investigating potential witnesses who have moved to Miami <ellip>." Affidavit of Inmate 4, Russell, No. 3:97CV596WS, at 2 (on file with authors). This was turned down, as has been every request for investigative assistance. When an explanation was given, the inmate was told that the program provided no factual investigation to inmates. Id.

n147 The rules make clear that "each inmate is responsible for his own legal work," Legal Assistance Information, supra note 136, at 4, and "MDOC does not provide legal representation to inmates through this program." Id. at 3.

n148 See Sup. Ct. R. 13 (West Supp. 1998).

n149 See Miss. Code Ann. § 99-39-29 (1994).

n150 Letter from Willie Russell, to the Mississippi Supreme Court (Jan. 17, 1997) (on file with authors).

n151 See generally Mello, supra note 75.

n152 Generally, the discussion below focuses on Mississippi practice. While there are certain unique features of Mississippi post-conviction practice, for the most part, the lessons of one state are easily translated to another.

n153 Read v. State, 430 So. 2d 832, 837 (Miss. 1983).

n154 For a discussion of the problems that face the **pro se** litigant in performing the factual, as well as legal, investigation necessary in the pre-trial context, see Jeremiah F. Donovan, Note, The Jailed **Pro Se** Defendant and the Right to Prepare a Defense, 86 Yale L.J. 292, 295-306 (1976).

n155 See Strickland v. Washington, 466 U.S. 668 (1984).

n156 Kimmelman v. Morrison, 477 U.S. 365, 378 n.3 (1986).

n157 For example, while the court will entertain the claim on very rare occasions when the record is unmistakably clear, the issue is normally dismissed without

prejudice to its litigation in post-conviction proceedings. See *Vielee v. State*, 653 So. 2d 920, 923 (Miss. 1995); *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990); *Triggs v. State*, 502 So. 2d 626, 626 (Miss. 1987).

n158 *Ashby v. State*, 695 So. 2d 589, 592 (Miss. 1997) (emphasis added) (quoting *Kimmelman*, 477 U.S. at 378).

n159 See *Burley v. Cabana*, 818 F.2d 414, 417 (5th Cir. 1987) ("To be considered effective, counsel has a duty to make at least a minimum investigation of the law, especially on such an important issue as sentencing mitigation <ellip> "). For example, in *Presley v. State*, 388 So. 2d 1385, 1386 (Fla. Dist. Ct. App. 1980), defense counsel expressed his erroneous belief that "voluntary intoxication is not a defense in these matters." *Id.* at 1386. Since the crimes charged were specific intent crimes and intoxication may possibly vitiate specific intent, counsel's error formed the basis for reversal on grounds of ineffectiveness. *Id.*

n160 See *Douglas v. Wainwright*, 714 F.2d 1532, 1557 (11th Cir. 1983), vacated, 468 U.S. 1206 (1984), adhered to, 739 F.2d 531 (1984) ("Counsel's ineffectiveness cries out from a reading of the transcript."); see also *Yarbrough v. State*, 529 So. 2d 659, 662 (Miss. 1988) (citing *Waldrop v. State*, 506 So. 2d 273, 275 (Miss. 1987)) ("the record is also replete with instances of counsel's 'conduct manifesting ineffectiveness.' "); *Young v. Zant*, 677 F.2d 792, 798 (11th Cir. 1982) (noting that it was clear from the record that competent counsel would have handled the case far differently than did trial counsel).

n161 *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982); accord *Porter v. Wainwright*, 805 F.2d 930, 933 (11th Cir. 1986); *Tyler v. Kemp*, 755 F.2d 741, 745 (11th Cir. 1985); *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986) (quoting *Kimmelman*, 477 U.S. at 384 (quoting *Strickland*, 466 U.S. at 691)) ("Investigation is an essential component of the adversary process. "Because [the adversarial] testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies,' <ellip> "counsel has a duty to make reasonable investigations <ellip>' "); *Douglas*, 714 F.2d at 1556.

Space limitations obviously would not allow a listing of the cases where investigation conducted in post-conviction proceedings resulted in a finding of ineffectiveness. See, e.g., *King v. Strickland*, 714 F.2d 1481, 1490 (11th Cir. 1983), vacated, 467 U.S. 1211 (1984), adhered to, 748 F.2d 1462, 146 (11th Cir. 1984) (holding counsel ineffective where some mitigating evidence presented, but lack of preparation precluded presentation of other evidence); *Johnson v. Estelle*, 704 F.2d 232, 239 n.5 (5th Cir. 1983) (indicating that ineffective assistance of counsel may occur where counsel fails to investigate insanity defense); *Windom v. Cook*, 423 F.2d 721, 721 (5th Cir. 1970) (holding that effective representation includes counsel's familiarity with the case and

proper investigation); *Coles v. Peyton*, 389 F.2d 224, 229 (4th Cir. 1968) (holding that no investigation of prosecutrix's character or search for potential witnesses constituted ineffective assistance of counsel); *People v. LaBree*, 313 N.E.2d 730, 731 (N.Y. 1974) (holding that counsel's lack of preparation rendered "the trial a farce and a mockery of justice").

n162 Indeed, the Mississippi Supreme Court noted in *Jackson* that there was a question of counsel's effectiveness given that the accused originally filed notice of intent to present an insanity defense at trial, which was later withdrawn. *Jackson*, 1999 WL 33904 at *3.

n163 481 U.S. 137 (1987).

n164 *Id.* at 156 (holding that the death sentence may be imposed upon defendant who played a focal role in a felony that resulted in murder by acting with reckless indifference to the value of human life).

n165 See, e.g., *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (holding that the death penalty was disproportionate for person who aids and abets in commission of a murder but does not kill, attempt to kill, or intend to kill the victim); *Eddings v. Oklahoma*, 455 U.S. 104, 109-10, 455 U.S. (1982) (reasoning by sentencing court that it could not consider defendant's turbulent family history as a mitigating factor in deciding punishment was constitutional error); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (explaining that death penalty schemes must allow consideration "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (emphasis omitted).

n166 *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

n167 *Id.*

n168 *Profitt v. Waldron*, 831 F.2d 1245, 1248 (5th Cir. 1987); see also *Jones v. Thigpen*, 788 F.2d 1101, 1103 (5th Cir. 1986); *Petty v. McCotter*, 779 F.2d 299, 301-02 (5th Cir. 1986); *Johnson v. Estelle*, 704 F.2d 232, 239-40 (5th Cir.), *aff'd*, 711 F.2d 1054 (5th Cir. 1983); *Evans v. Lewis*, 855 F.2d 631, (9th Cir. 1988) (finding trial counsel ineffective for failing to investigate a capital defendant's mental condition); *Middleton v. Dugger*, 849 F.2d 491, 495 (11th Cir. 1988) (holding that failure to conduct an investigation into petitioner's background, to uncover mitigating, psychiatric, IQ, and childhood information, and to present that information at penalty phase of death penalty case was ineffective assistance of counsel -- "this kind of psychiatric evidence, it has been held, has the potential to totally change the evidentiary picture <ellip>"); *Stephens v. Kemp*, 846 F.2d 642, 653 (11th Cir. 1988); *Elledge v. Dugger*, 823 F.2d 1439, 1444-45 (11th Cir. 1987) ("Counsel's failure at least <ellip> to seek out an expert witness was outside the range of competent assistance."); *Alexander v. United*

States, 409 A.2d 618, 620 (D.C. Cir. 1979); Charles v. State, 573 S.W.2d 139, 141 (Mo. Ct. App. 1978).

n169 See Foster v. Dugger, 823 F.2d 402, 408 n.16 (11th Cir. 1987) (finding counsel's obligation to investigate possible defense, despite client's contrary instructions, "especially holds true where a possible mental impairment prevents the client from exercising proper judgment"); Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986) (the attorney's decision to allow client to veto plan to investigate mitigating mental health evidence "especially disturbing" where attorney "himself believed that defendant had mental difficulties. An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment."); People v. Mazingo, 671 P.2d 363 (Cal. 1983) (failing to investigate mental defenses, despite the defendant's initial assertion of an alibi defense and refusal to cooperate with a psychiatrist, constituted ineffective assistance). It is for this reason that several courts have held that an accused's attorney may raise an insanity defense over the defendant's objections. See, e.g., Dean v. Commonwealth, 777 S.W.2d 900, 908 (Ky. 1989); Treece v. State, 547 A.2d 1054, 1062-63 (Md. 1988); State v. Pautz, 217 N.W.2d 190, 192 (Minn. 1974); City of Bismarck v. Nassif, 449 N.W.2d 789, 797-98 (N.D. 1989); see also State v. Fernald, 248 A.2d 754, 761 (Me. 1968).

n170 Davis v. Alabama, 596 F.2d 1214, 1220 (5th Cir. 1979), vacated, 446 U.S. 903 (1980).

n171 "Tragedy" may be the wrong word. For centuries, the law operated under the ancient legal proverb, *furiosus solo fit punitur* ("madness is its own punishment," or "punishment itself"). While the insane and the mentally retarded provide good examples of the folly of the plurality opinion in *Giarratano*, we must never lose sight of the terror that mental illness may inflict upon its victims. To compound this by leaving them alone to be chewed up by the legal process is simply cruel.

n172 470 U.S. 68, 80 (1985).

n173 *Id.* at 86 (denying expert psychiatric assistance to indigent defendant where defendant's sanity was a significant factor at both guilt and penalty phase of trial constituted a denial of due process).

n174 *Blake v. Kemp*, 758 F.2d 523, 531 (11th Cir. 1985) (citation omitted).

n175 See, e.g., *Jones*, 788 F.2d at 1103 (failing to properly present the accused's retardation equated to ineffective assistance of counsel).

n176 See *Holloway v. State*, 361 S.E.2d 794, 796 (Ga. 1987) (denying appointment of an expert was held to be error where "the defendant's mental condition was not merely a 'significant' issue, but it was virtually the only issue,

at both phases of the trial"); cf. *Curry v. Zant*, 371 S.E.2d 647, 649 (Ga. 1988) (failing to secure independent expert on mental illness constituted ineffective assistance of counsel).

n177 See, e.g., *Smith v. Kemp*, 664 F. Supp. 500, 507 (M.D. Ga. 1987), (holding that a mentally retarded inmate had not understood his Miranda rights because a "person who may have the chronological age of twenty, but a mental and emotional age of ten or eleven, should not be put to death because he [or she] was not 'street wise' enough to remain silent until he [or she] conferred with a lawyer"), *aff'd sub nom. Smith v. Zant*, 887 F.2d 1407 (11th Cir. 1989) (per curiam) (en banc).

n178 *Pate v. Robinson*, 383 U.S. 375, 384 (1966); see also *Adams v. Wainwright*, 764 F.2d 1356, 1359 (11th Cir. 1985); *Enriquez v. Procnier*, 752 F.2d 111, 114 (5th Cir. 1984); *Weaver v. McKaskle*, 733 F.2d 1103, 1104-05 (5th Cir. 1984); *Silverstein v. Henderson*, 706 F.2d 361, 367 (2d Cir. 1983); *Zapata v. Estelle*, 588 F.2d 1017 (5th Cir. 1979).

n179 See *Drope v. Missouri*, 420 U.S. 162 (1975); *Dusky v. United States*, 362 U.S. 402, 402 (1960) (holding that the proper "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -and whether he has a rational as well as factual understanding of the proceedings against him").

n180 In most states, the competency of the individual may be raised at any point. For example, in the recent case of *State ex rel. Bourque v. Cain*, No. 138,657 (15th Judicial District, Louisiana Feb. 1, 1999), the trial court appointed counsel for a **death row** inmate in state post-conviction proceedings because he had been found incompetent at that stage. *Id.* at 3.

n181 See *Speedy v. Wyrick*, 702 F.2d 723, 726 (8th Cir. 1983) ("The failure of trial counsel to request a competency hearing where there was evidence raising a substantial doubt about a petitioner's competence to stand trial may constitute ineffective assistance of counsel."); *Williamson v. Ward*, 110 F.3d 1508, 1514 (10th Cir. 1997); *People v. McDonnel*, 283 N.W.2d 773, 774 (Mich. Ct. App. 1979) ("[Counsel's] failure to arrange for a competency hearing <ellip> denied the defendant effective assistance of counsel.").

n182 See *Ford v. Wainwright*, 477 U.S. 399, 417-18 (1986) (holding that the Eighth Amendment prohibits the execution of the insane; state procedures which place the ultimate decision wholly within the Executive Branch and deny the condemned the right to submit evidence or challenge or impeach the state-appointed psychiatrists are insufficient; because Ford's procedures in state court were inadequate, he is entitled to a hearing in federal court on his competence to be executed).

n183 See *Riggins v. Nevada*, 504 U.S. 127, 138 (1992) (holding that absent a hearing at which the trial court would make findings on the need for forcible administration of drugs to keep the accused competent and the dangers of taking him off drugs, balanced with the accused's liberty interest in not being forcibly medicated, forced administration of anti-psychotic drugs during trial violates the Sixth and Fourteenth Amendments; moreover, a presumption of prejudice arises from this drugging).

n184 See *Perry v. Louisiana*, 498 U.S. 38, 38 (1990) (remanding to state court for further consideration on the question of whether forcible administration of drugs to render competent a **death row** inmate violates the constitution in light of *Washington v. Harper*, 494 U.S. 210 (1990)).

n185 This is not a far-fetched notion. Michael Owen Perry was in precisely this situation. See *Louisiana v. Perry*, 610 So. 2d 746, 747 (1992).

n186 See, e.g., *United States v. Bagley*, 473 U.S. 667, 675 (1985); *Brady v. Maryland*, 373 U.S. 83 (1963). These claims may also involve allegations that the prosecution knowingly presented false evidence; see, e.g., *Giglio v. United States*, 405 U.S. 150 (1972).

n187 The scope of these provisions vary from state to state. For example, in Louisiana, once the conviction is final, the litigant is entitled to the prosecution file, minus work product. See La. Rev. Stat. Ann. § 44:3(A)(1), (4) (West 1982 & Supp. 1999) (stating that the state does not have to disclose the documents on any criminal litigation until it has been "finally adjudicated or otherwise settled," nor do they have to disclose records of an arrest or follow-up reports until a "final judgment"). Unfortunately, the indigent defendant's access is hampered by the fact that the state can charge a fee for the records. See La. Rev. Stat. Ann. § 44:32(C) (West 1982 & Supp. 1999). However, the rules in Mississippi are narrower, and virtually no records may be obtained in a criminal case even after conviction. See generally Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 Urb. Law 65, 67 n.6 (1996).

n188 The "classic" form of a Brady claim revolves around the failure to disclose the full scope of a deal struck between the prosecution and a witness. See, e.g., *DuBose v. LeFevre*, 619 F.2d 973, 978-79 (2d Cir. 1980) (failing to disclose the prosecution's promise that a witness would be rewarded for testifying against defendant by favorable testimony at witnesses own criminal proceeding amounted to a Brady violation); *United States v. Butler*, 567 F.2d 885, 889 (9th Cir. 1978) (failing to disclose assurances of reward for favorable testimony constituted a Brady violation).

n189 See *Messiah v. United States*, No. 98-4185, 1995 U.S. App. LEXIS 413, *3 (11th Cir. June 13, 1999).

n190 See *Kyles v. Whitley*, 5 F.3d 806 (5th Cir. 1993), rev'd, 514 U.S. 419 (1995).

n191 See *Kyles v. Whitley*, 514 U.S. 419 (1995), rev'g 5 F.3d 806 (5th Cir. 1993).

n192 See *Stockton v. Virginia*, 852 F.2d 740, 743-44 (4th Cir. 1988) (vacating death sentence for restaurant owner's statement to jurors that he thought "they ought to fry the son of a bitch").

n193 See *Williams v. State*, 570 So. 2d 884, 884 (Ala. Crim. App. 1990).

n194 See *Jones v. Kemp*, 706 F. Supp. 1534, 1560 (N.D. Ga. 1989) (vacating the death sentence because the jurors used a Christian Bible during their sentencing deliberations).

n195 See *Russ v. State*, 95 So. 2d 594, 600 (Fla. 1957) (en banc) ("Where a juror on deliberation [relies on or] relates to the other jurors material facts claimed to be within his personal knowledge, but which are not adduced in evidence, <ellip> it is misconduct which may vitiate the verdict <ellip>."); see also *Holland v. State*, 588 So. 2d 543, 549 (Ala. Crim. App. 1991) (holding that error resulted where one venireperson expressed opinion to other veniremembers before the trial began); *Crowell v. Montgomery*, 581 So. 2d 1130, 1133 (Ala. Crim. App. 1990) (holding that error resulted when a juror expressed an opinion to other jurors before deliberations began).

n196 See *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988).

n197 The critical importance of the prior conviction was underlined when the Mississippi resentencing trial resulted in a life verdict. See *Johnson v. State*, 511 So. 2d 1333 (Miss. 1987).

n198 See *Johnson*, 486 U.S. at 578; see also *Duest v. Singletary*, 967 F.2d 472, 480-83 (11th Cir. 1992) (requiring reversal of death sentence where two prior convictions for armed robbery and armed assault with intent to murder were introduced at the penalty phase, because one of these convictions was vacated, and another was nolle prossed); *Greene v. State*, 878 S.W.2d 384, 389 (Ark. 1994) (finding that the reversal of a prior North Carolina conviction for murder mandated relief as to sentence); *Sanders v. State*, 824 S.W.2d 353, (Ark. 1992), (reversing the death sentence because the jury found two aggravating circumstances, one of which, the commission of a prior felony, had been overturned, as well as the subsequent reversal of another capital murder conviction); *Rivera v. Dugger*, 629 So. 2d 105, 108-09 (Fla. 1993) (vacating death sentence on Johnson grounds where the prosecution admitted evidence "of a prior violent felony conviction committed against a police officer in Puerto Rico," and that conviction was "subsequently vacated"); *Burr v. State*, 576 So.

2d 278, 280-81 (Fla. 1991) (reversing the death sentence because other crime evidence used to secure the sentence was subsequently dismissed); *Oats v. State*, 446 So. 2d 90, 94-96 (Fla. 1984) (denying defendant's claim that the introduction of testimony of unrelated crimes required reversal); *State v. Shepherd*, 902 S.W.2d 895 (Tenn. 1995) (holding that invalidation of prior conviction required reversal and remanded the death sentence even though two other valid circumstances remained because Johnson focuses on the admission of unconstitutionally obtained evidence);

n199 *Crockett v. McCotter*, 796 F.2d 787, 791 (5th Cir. 1986), (citing *Lyons v. McCotter*, 770 F.2d 529, 533-35 (5th Cir. 1985)); *Jones v. Lockhart*, 851 F.2d 1115, 1116 (8th Cir. 1988) (remanding for a hearing on whether or not counsel was ineffective for failing to investigate defendant's prior felonies); see also *Lewis v. Lane*, 832 F.2d 1446, 1458 (7th Cir. 1987) (finding ineffectiveness of counsel at the penalty phase because counsel stipulated to the existence of four prior convictions which were ultimately determined not to exist); *Cox v. Hutto*, 589 F.2d 394, 396 (8th Cir. 1979) (holding that defendant's due process and equal protection rights were violated when defendant did not agree to stipulations arranged by counsel); *Tolliver v. United States*, 563 F.2d 1117, 1120-21 (4th Cir. 1977) (finding ineffectiveness of counsel where defendant's counsel erroneously advised defendant to plea bargain). The same has been true where the prosecution has made references to prior convictions which should simply not have been admitted at a particular stage of the trial; see, e.g., *Lombard v. Lynaugh*, 868 F.2d 1475, 1479-80 (5th Cir. 1989) (finding ineffective assistance of counsel when counsel failed to object to prosecutor's revelation of defendant's prior felony convictions and judge's reference to defendant as habitual offender).

n200 See, e.g., *Castro v. State*, 419 So. 2d 796, 798 (Fla. Dist. Ct. App. 1982); *Ex parte Scott*, 581 S.W.2d 181, 182 (Tex. Crim. App. 1979).

n201 As the Eleventh Circuit has held, when the conviction is arguably inadmissible, "counsel's failure to object to the introduction of petitioner's 1965 conviction clearly falls outside the range of professionally competent assistance." *Harrison v. Jones*, 880 F.2d 1279, 1281 (11th Cir. 1989).

n202 For example, prior convictions have been challenged for the following reasons:

1. Denial of Counsel: In *Burgett v. Texas*, 389 U.S. 109 (1967), the Supreme Court noted that some errors render a judicial proceeding not voidable, requiring a challenge, but "presumptively void." *Id.* at 114-15. In *Burgett* the fault rested in the total denial of the right to counsel. *Id.* at 115-16 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)); see also *United States v. Tucker*, 404 U.S. 443, 448-49 (1972); *Houser v. State*, 214 S.E.2d 893, 899 (Ga. 1975); *Turner v. Hopper*, 203 S.E.2d 481, 482 (Ga. 1974); *Hopper v. Thompson*, 207 S.E.2d 57, 58 (Ga.

1974); *Clenney v. State*, 192 S.E.2d 907, 909-10 (Ga. 1972). Indeed, an uncounseled prior conviction cannot be used for any reason, even to impeach the accused as a witness. *Loper v. Beto*, 405 U.S. 473, 484 (1972).

2. Invalid Guilty Plea: "When the reason the prior conviction is unconstitutional is that it was based on an involuntary guilty plea" then the conviction may not be used "either to support guilt or enhance punishment for another offense." *United States v. Johnson*, 612 F.2d 305, 306-07 (7th Cir. 1980); see also *Pope v. State*, 345 S.E.2d 831, 844 (Ga. 1986).

3. Invalid Confession: "It has been held that a guilty plea based on a confession [that was illegally obtained] <ellip> was not voluntary." *United States v. Martinez*, 413 F.2d 61, 64 (7th Cir. 1969) (citing *United States ex rel. Collins v. Maroney*, 287 F. Supp. 420 (E.D. Pa. 1968)). Indeed, in *Johnson*, the prior conviction was reversed and remanded for resentencing because prior conviction was based on an involuntary plea. *Johnson*, 612 F.2d at 308-09.

4. Fourth Amendment: In *Beto v. Stacks*, 408 F.2d 313 (5th Cir. 1969), the Fifth Circuit held that a prior conviction that was obtained in violation of the Fourth Amendment could not be used to enhance a subsequent sentence. *Id.* at 316.

5. Prior Acquittal: *People v. Bendit*, 111 Cal. 274, 280 (1896) ("whatever [a defendant's other] misdeeds, he must not suffer for a crime which he has not committed"); see *Burr*, 576 So. 2d at 280-81 (reversing the lower court because the trial court considered three crimes for which the accused was subsequently acquitted). *Hartley v. State*, 384 S.E.2d 204, 204 (Ga. Ct. App. 1989) (holding as error the admittance of evidence of prior burglary for which the accused had been acquitted).

6. Prior Brady Violation: In *United States v. Bagley*, 837 F.2d 371 (9th Cir. 1988), the district court enhanced the accused's sentence by relying on a prior conviction which was tainted by a Brady violation. *Id.* at 376. The appellate court therefore vacated the enhanced sentence and remanded for a new sentencing hearing. *Id.* at 377.

7. Right to Appeal: The accused also has the right to appeal a conviction which must, in turn, be effectively litigated. See *Zant v. Cook*, 379 S.E.2d 780, 781 (Ga. 1989)("[Defendant] was denied his right to appeal his prior conviction by the state's failure to preserve the transcript of his trial and by the failure of his attorneys to advise him of his right to an appeal.").

8. General: This is by no means an exhaustive list. For example, courts have condemned the use of the following: a prior conviction by a non-unanimous six-person jury, *Bourgeois v. Whitley*, 784 F.2d 718, 719-21 (5th Cir. 1986); a conviction where a Grand Juror was seated on the Petit Jury trying the case, *Cook*, 379 S.E.2d at 781; a conviction predicated on a statement taken in

violation of the Fifth Amendment, *United States v. Burt*, 802 F.2d 330, 335 (9th Cir. 1986); and a conviction in violation of the defendant's right to be competent when tried, *Weaver v. McKaskle*, 733 F.2d 1103, 1104 (5th Cir. 1984).

n203 For example, in dealing with a forty-year old conviction for manslaughter, the Georgia Supreme Court held that Cook's 1950 "trial attorneys "fell well below the standard of reasonably effective assistance.'" *Cook*, 379 S.E.2d at 781; see also *Preston v. State*, 564 So. 2d 120, 121 (Fla. 1990); *State v. Cain*, 359 S.E.2d 581, 587 (W. Va. 1987) (finding ineffectiveness with respect to the earlier charge where, "within the space of one court day, the appellant, then a sixteen-year-old juvenile, asked for counsel, had counsel appointed, had his case transferred to juvenile court and subsequently returned to adult criminal court to be tried as an adult, entered a plea of guilty and was sentenced."); see also *United States v. Gray*, 773 F. Supp. 86 (N.D. Ill. 1990).

n204 See *McClendon v. State*, 539 So. 2d 1375, 1376 (Miss. 1989).

n205 In *Herrera v. Collins*, 506 U.S. 390 (1993), the Court held that even assuming that "a truly persuasive demonstration of 'actual innocence' would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim," no claim for federal relief was presented in this case where assertion of innocence was unpersuasive and raised ten years after trial, beyond the state time limitation on newly discovered evidence. *Id.* at 417. Compare *Delo v. Blair*, 509 U.S. 823, 825 (1993) (per curiam) (vacating stay of execution which had been granted in successive petition by court of appeals based on affidavits tending to show innocence because no substantial grounds were alleged, and the court of appeals abused its discretion by interfering with the orderly progress of state proceedings), with *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995) (holding that the standard for a constitutional violation is one which "probably resulted" in conviction of an innocent person, rather than a showing by clear and convincing evidence, governs the miscarriage of justice inquiry when death sentenced prisoner raises claim of actual innocence to avoid procedural default for consideration of merits of an independent constitutional issue).

n206 See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (requiring that the law must look at "all persons convicted of a designated offense <ellip> as uniquely human beings, not as members of a faceless, undifferentiated mass").

n207 See *Amadeo v. Zant*, 486 U.S. 214, 222 (1988) (holding that the issue of jury discrimination was not barred by defendant's failure to challenge jury prior to trial as required by Georgia law because prosecutor's secret directive to jury commissioners to underrepresent blacks and women from the jury pools was not discovered until a year after trial; prosecutor's deception was an "external factor" which prevented the defendant from raising the issue in a timely manner and therefore constituted "cause" to excuse the procedural default).

n208 See *Campbell v. Louisiana*, 523 U.S. 392, 398 (1998) (ordering relief to white petitioner who challenged the exclusion of blacks from the function of grand jury foreperson in Louisiana).

n209 See *Berryhill v. Zant*, 858 F.2d 633, 637 (11th Cir. 1988) (affirming the grant of habeas relief in a capital case on jury challenge because the right to a fair crosssection of women on the jury was violated, where a 13-16% disparity existed between the population and the jury list).

n210 See Miss. Code Ann. § 99-39-7 (1994).

n211 *Jordan v. State*, 577 So. 2d 368, 369 (Miss. 1990); see also *Smith v. State*, 490 So. 2d 860, 860 (Miss. 1986) (dismissing petition for failure to file sufficient supporting affidavits).

n212 See Miss. Code Ann. § 99-39-27(2) (West Supp. 1998); Miss. Code Ann. § 9939-9(1)(e) (West 1994).

n213 See, e.g., *Foster v. State*, 687 So. 2d 1124, 1141 (Miss. 1996) (rejecting ineffectiveness claim where petitioner submitted insufficient factual support); *Conner v. State*, 684 So. 2d 608, 614 (Miss. 1996); *Brooks v. State*, 573 So. 2d 1350, 1353 (Miss. 1990); *Smith v. State*, 490 So. 2d at 860.

n214 See Miss. Code Ann. § 99-39-21(6) (1994).

n215 See 28 U.S.C. §§ 2262-63 (Supp. 1996) ("Anti-Terrorism and Effective Death Penalty Act of 1996").

n216 See *Schlup*, 513 U.S. at 326-27 (holding that the proper standard for an actual innocence claim in habeas proceedings that govern the miscarriage of justice inquiry, when death sentenced prisoner seeks to avoid procedural default, is that the constitutional violation "probably resulted" in conviction of an innocent person); *Sawyer v. Whitley*, 505 U.S. 333, 346-47 (1992) (enunciating the standard that when claiming "innocence of death" the petitioner must show "a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty"); *Gomez v. U.S. District Court*, 503 U.S. 653, 653-54 (1992) (per curiam) (vacating stay on the issue of the unconstitutionality of execution by lethal injection where the issue had not been raised in prior habeas proceedings); *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991) (holding that where petitioner did not file notice of appeal from denial of state post-conviction relief until three days after deadline, state ruling rested on procedural grounds, and, as such, attorney's error in failing to file notice cannot constitute "cause," entitling relief); *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (holding that in order to raise in a successive habeas corpus

petition a claim not raised in the first, a petitioner must satisfy the "cause and prejudice" standard of *Wainwright v. Sykes*, 433 U.S. 72, 9091 (1977)); *Burden v. Zant*, 498 U.S. 433, 438 (1991) (per curiam) (holding that the federal court of appeals, in rejecting conflict-of-interest claim based upon public defender office representing defendant and negotiating immunity for key witness for the state, erred in concluding there was no immunity agreement; the court failed to give the presumption of correctness required by 28 U.S.C. § 2254(d) (1994 & Supp. II 1996) to the finding in trial judge's report to state supreme court that the witness testified under grant of immunity).

n217 See Miss. Code Ann. § 99-39-27(9) (1994 & Supp. 1998).

n218 Miss. Code Ann. § 99-39-5(2) (1994) which states that

Within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the supreme court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction.

n219 See Miss. Code Ann. § 99-39-23(1) (1994) (stating that a "judge may appoint counsel") (emphasis supplied); *Moore v. State*, 587 So. 2d 1193, 1196 (Miss. 1991) (holding that the trial court did not abuse its discretion in failing to appoint counsel, even where an evidentiary hearing had been ordered).

n220 See, e.g., *Lockett v. State*, 614 So. 2d 888, 897 (Miss. 1992) (holding that the state has no authority to appoint counsel).

n221 See Miss. Code Ann. § 99-19-49 (1994).

n222 Miss. Code Ann. § 99-39-29 (1994). It was the court's practice to grant a stay and allow ninety (90) days for the preparation of a petition if an attorney entered the case pro bono publico and promised that a petition would be filed. Absent such a commitment by counsel, however, no stay would be allowed without the filing of a petition. *Id.*

n223 Louisiana's Criminal Code provides that:

When a defendant charged with a capital offense appears for arraignment without counsel, the court shall provide counsel for his defense in accordance with the provisions of R.S. 15:145. Such counsel must be assigned before the defendant pleads to the indictment, but may be assigned earlier. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned as assistant counsel.

La. Code Crim. Proc. Ann. art. 512 (West 1991). *Accord State v. Williams*, 480 So. 2d 721, 728 n.15 (La. 1985) (stating that "the attorney should have at least five years experience at the bar").

n224 The Fourteenth Amendment to the Constitution of the United States provides in pertinent part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

n225 *Giarratano*, 492 U.S. at 11 n.6.

n226 The Eighth Amendment to the Constitution of the United States provides in pertinent part: "Excessive bail shall not be required <ellip> nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

n227 *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (quoted in *Zant v. Stephens*, 462 U.S. 862, 884-85 (1983)) (stating that the the death penalty "is qualitatively different from a sentence of imprisonment, however long <ellip> [creating a] need for reliability in the determination that death is the appropriate punishment in a specific case"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (stating that the finality of the death penalty requires a greater degree of reliability in sentencing).

n228 *Trop v. Dulles*, 356 U.S. 86, 101 (1958). An Eighth Amendment violation also occurs when a punishment is inflicted that would have been "condemned at the time the Bill of Rights was adopted." *Penry v. Lynaugh*, 492 U.S. 302, 351 (1989) (Scalia, J., concurring). That standard is inapplicable here.

n229 This measurement is often termed "national consensus." See *Penry*, 492 U.S. at 334; cf. *Stanford v. Kentucky*, 492 U.S. 361, 372-73 (1989) ("This does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual."). But see *Thompson v. Oklahoma*, 487 U.S. 815, 848-49 (1988) (O'Connor, J., concurring) (stating that "I believe that a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist <ellip> ").

n230 *Penry*, 492 U.S. at 331.

n231 477 U.S. 399 (1986).

n232 *Id.* at 408-10 ("Today, no State in the Union permits the execution of the insane.").

n233 See *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion). At the

time Coker was decided, two other states, North Carolina and Louisiana, made rape a capital crime when the victim was a minor. *Id.* at 595.

n234 See *Enmund*, 458 U.S. at 798.

n235 *Penry*, 492 U.S. at 340 (holding that the Eighth Amendment does not prohibit execution of the mentally retarded, since mental retardation is a mitigating factor to be considered).

n236 See *id.* at 334. Of the 36 states that had the death penalty, only two statutorily prohibited the execution of the mentally retarded. *Id.* "In our view, the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus." *Id.* The Court did concede that this would not put the question to rest forever, since standards may continue to evolve: "A national consensus against the execution of the mentally retarded may someday emerge reflecting the "evolving standards of decency that mark the progress of a maturing society" *Id.* at 340.

n237 492 U.S. 361 (1989).

n238 See *id.* at 370, 380. The law in 15 states did not authorize the death penalty for a 16 year old. The Court found that this was again distinguishable from *Coker*, *Enmund*, and *Ford* because a majority of states that had the death penalty did authorize the punishment for those 16 years of age and above. *Id.* at 371.

n239 See *Giarratano*, 492 U.S. at 12 n.7.

n240 *Id.* at 30 (dissenting opinion).

n241 *Jackson*, 1999 WL 33904 at *2.

n242 See, e.g., Spangenberg Group, American Bar Association Post-Conviction Death Penalty Representation Project: An Updated Analysis of the Right to Counsel and the Right to Compensation and Expenses in State Post-Conviction Death Penalty Cases (June 1996) [hereinafter Spangenberg].

n243 In Alaska, "an indigent person is entitled to representation <ellip> for purposes of bringing a timely application for post-conviction relief." See Alaska Stat. § 18.85.100 (Michie 1998). This statutory right applies only to the first petition. See Alaska Stat. § 18.85.100(c)(1) (Michie 1998).

n244 The statute suggests that counsel is appointed whenever the indigent person has been "arrested for, charged with or convicted of an offense" for which counsel is required. See Haw. Rev. Stat. Ann. § 802-1 (Michie 1994); see

also *Carvalho v. State*, 914 P.2d 1378, 1385 (Haw. Ct. App. 1996) (reflecting the statutorily required need for the appointment of counsel even where the trial court deemed the issues presented to be frivolous).

n245 See Iowa Code Ann. § 822.5 (West 1994) ("If the applicant [for post-conviction relief] is unable to pay court costs and expenses of legal representation <ellip> or other legal services or consultation, these costs and expenses shall be made available to the applicant in the preparation of the application <ellip>."). This right also includes the right to the effective assistance of counsel in post-conviction proceedings. See *Dunbar v. State*, 515 N.W.2d 12, 14-15 (Iowa 1994).

n246 As long as the petitioner is indigent, he has a statutory right to counsel. See Me. Rev. Stat. Ann. tit. 15, § 810 (West 1980 & Supp. 1998).

n247 The Michigan statute guarantees to every accused party the right to be represented by counsel. See Mich. Comp. Laws Ann. § 763.1 (West 1982). The courts have long since held that equal protection requires that counsel be appointed to an indigent postconviction petitioner to satisfy the guarantee of counsel. See *Jensen v. Menominee Circuit Judge*, 170 N.W.2d 836, 838 (Mich. 1969).

n248 See Minn. Stat. Ann. § 590.05 (West Supp. 1999) ("A person financially unable to obtain counsel who desires to pursue [a post-conviction remedy] <ellip> may apply for representation by the state public defender."); see also *Harris v. State*, 470 N.W.2d 167, 168-69 (Minn. Ct. App. 1991).

n249 See N.D. Cent. Code § 29-32.1-05(1) (1991) ("If an applicant requests appointment of counsel and the court is satisfied that the applicant is unable to obtain adequate representation, the court shall appoint counsel to represent the applicant."). While the language of the statute would seem to be mandatory, the Supreme Court of North Dakota has read discretion into the statute. See *State v. McMorrow*, 332 N.W.2d 232, 237 (N.D. 1983). The court has held that " 'shall' is interpreted to mean 'may. ' " *Id.* at 234 n2. However, even though "the appointment of counsel is discretionary <ellip> applications should be read in a light most favorable to the applicant. If a substantial issue of law or fact may exist, counsel should be appointed. Trial judges ordinarily would be well advised to appoint counsel for most indigent post-conviction review applicants." *Id.* at 237.

n250 See R.I. Gen. Laws § 10-9.1-5 (1997) ("An applicant who is indigent shall be entitled to be represented by the public defender."). The denial of this right is reversible error. See *State v. Roberts*, 697 A.2d 1074 (R.I. 1997).

n251 The law provides the right of the indigent accused "to be represented in any other post-conviction proceeding that the attorney or the needy person

considers appropriate." Vt. Stat. Ann. tit. 13, § 5233(a)(3) (1998).

n252 In West Virginia, the trial court may dismiss a petition without a hearing or the appointment of counsel if the court finds it to be without merit. However, if the petition "is not frivolous, the court shall <ellip> appoint counsel for the petitioner." *Perdue v. Coiner*, 194 S.E.2d 657, 659 (W. Va. 1973) (quoting W. Va. Code § 53-4A-4(a) (1994)).

n253 In Massachusetts, "the judge in his discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and presentation of motions filed under [the rule]." Mass. R. Crim. P. 30(c)(5) (emphasis supplied). The commentary makes it clear that counsel is appointed in all cases, even where the claims made are totally without merit.

n254 Rule 6.1 makes appointed counsel mandatory "in any criminal proceeding" except for petty offenses. Ariz. R. Crim. P. 6.1. The comments make clear that this right includes "all phases of the criminal process" from "arrest to <ellip> any post-conviction proceeding <ellip>." *Id.* cmt. a. Additionally, counsel shall be provided to an indigent for his first post-conviction petition as well as for any petition containing the first claim of ineffectiveness of counsel. See Ariz. R. Crim. P. 32.5 commentary (West 1998). Appointment of counsel is mandatory for capital petitioners regardless of which petition it is. *Id.* The state courts have made it clear that the appointment of counsel is mandatory. See *Galaz v. Carruth*, 631 P.2d 523, 525 (Ariz. 1981) (en banc).

n255 Even non-capital criminal defendants are entitled to representation by the public defender at all stages of the case: "Upon request of the defendant or upon order of the court, the public defender shall defend <ellip> at all stages of the proceedings." Cal. Gov't Code § 27706 (West 1988) (emphasis added). The California courts have made it clear that a petition for a writ of habeas corpus falls within this definition. See *Charlton v. Superior Court of San Francisco*, 156 Cal. Rptr. 107, 108 (Cal. Ct. App. 1979) ("A hearing on a petition for a writ of habeas corpus is a proceeding within [sec. 27706]."); see also *Williams v. Superior Court of Los Angeles*, 53 Cal. Rptr.2d 832, 837-38 (Cal. Ct. App. 1996). The right is strengthened in capital cases. Indeed, the California Appellate Project is an extremely effective and well-funded resource for appointed lawyers, earning a fee of \$ 95 per hour, with total fees ranging from \$ 70,000 to \$ 200,000. Spangenberg, *supra* note 242, at 8-9.

n256 Connecticut law provides that "in any criminal action, in any habeas corpus proceeding arising from a criminal matter, <ellip> the court <ellip> shall, <ellip> designate a public defender <ellip>" Conn. Gen. Stat. Ann. § 51-296 (West Supp. 1998). Indeed, in *Lozada v. Warden*, 613 A.2d 818 (Conn. 1992), the court held that state law provides for effective assistance of habeas counsel. *Id.* at 821.

n257 See Ind. Code Ann. § 33-1-7-2(a) (Lexis 1998) ("The state public defender shall represent any indigent person confined in any penal facility <ellip> in any postconviction proceeding.").

n258 See Ky. Rev. Stat. Ann. § 31.110 (Michie 1992). "A needy person who is entitled <ellip> to be represented in any post-conviction proceeding that the attorney and the needy person considers appropriate." Id. § 110(2)(c). "However, if the counsel appointed in such post-conviction remedy, with the court involved, determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense, there shall be no further right to be represented by counsel." Id.

n259 The statute in Maryland provides that "a petitioner is entitled to the assistance of counsel and a hearing on a petition filed under this section." Md. Code Ann. art. 27, § 645A(f)(1) (1996). It is clear that this right includes the right to counsel from the very start of any post-conviction process as well as the right to effective assistance of counsel. See *State v. Flansburg*, 694 A.2d 462, 465 (Md. 1997) (citing Md. Code Ann., Public Defender Act, art. 27A § 4(b)(3) (1997)).

n260 See Mo. Rev. Stat. § 29.15(e) (1995) ("When an indigent movant files a **pro se** motion, the court shall cause counsel to be appointed for the movant."). The jurisprudence has interpreted "petition" to mean just about anything filed **pro se**, including a declaration of indigency. See *Stroud v. State*, 978 S.W.2d 785, 785-86 (Mo. Ct. App. 1998); *State v. Wendleton*, 936 S.W.2d 120, 124 (Mo. Ct. App. 1996).

n261 See N.J. Stat. Ann. § 2a:158A-5 (West Supp. 1998) (requiring the public defender to provide "representation <ellip> that shall include <ellip> such post-conviction proceedings as would warrant the assignment of counsel pursuant to the court rules"). In fact, representation is mandatory on a first petition. See *State v. Clark*, 617 A.2d 286, 287-88 (N.J. Ct. App. 1992) ("We hold it was error for the trial court to dispose of defendant's post-conviction relief application without defense counsel's presence and, at least, a representation that counsel had conferred with defendant and had investigated the merits of the petition." "Assignment of a post-conviction relief matter to the Office of the Public Defender is only an initial requirement of [supreme court] R. 3:22-6. It does not relieve the trial court of its responsibility to monitor compliance with the Rules of Court in their spirit as well as their letter."); Spangenberg, *supra* note 242, at 48.

n262 See Ohio Rev. Code Ann. § 120.06(A)(3) (1998) ("The state public defender may provide legal representation to any person incarcerated <ellip> in any manner in which the person asserts the person is unlawfully imprisoned or detained."). Even in non-capital cases the public defender provides representation unless the office determines that there is no merit to the petition.

See Spangenberg, *supra* note 242, at 57.

n263 See Or. Rev. Stat. § 138.590 (1990) ("In order to proceed as an indigent person, the circuit court shall appoint suitable counsel to represent petitioner.").

n264 See Pa. R. Crim. P. 1500 (West 1989) ("The judge shall appoint counsel to represent the indigent defendant on the defendant's first motion for post-conviction collateral relief."); see also *Commonwealth v. Hampton*, 718 A.2d 1250, 1252-53 (Pa. Super. Ct. 1998) (quoting *Commonwealth v. Kaufman*, 592 A.2d 691, 695 (Pa. Super. Ct. 1991)) ("The supreme court has mandated 'that counsel be appointed in every case in which a defendant has filed a motion for post-conviction collateral review for the first time and is unable to afford counsel.'").

n265 See S.D. Codified Laws § 21-27-4 (Michie 1987) ("If a person <ellip> imprisoned <ellip> and if upon application made in good faith <ellip> for a writ of habeas corpus, <ellip> the court or judge shall appoint counsel for the indigent <ellip>").

n266 See Wash. Super. Ct. Crim. R. 3.1(B)(2) ("A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review . . .").

n267 See 28 U.S.C. § 2254(h) (1994) ("The court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority."); see also *McFarland v. Scott*, 512 U.S. 849, 859 (1994).

n268 In post-conviction, Alabama leaves the appointment to the discretion of the judge. See Ala. Code § 15-12-23 (1995). The court rules, however, provide for mandatory appointment of counsel in cases where "the court does not summarily dismiss the petition." Ala. Sup. Ct., R. Crim. P. 32.7(c) (1996). The attorney fees are theoretically limited to a pittance -- just \$ 600. Ala. Code § 15-12-23(d) (1995). However, in the recent case of *May v. State*, 672 So. 2d 1307, 1308 (Ala. Crim. App. 1993), the court held that the reasonable expenses allowed by Ala. Code § 15-12-21(d) should include the overhead expenses of attorneys, alleviating the unreasonableness of the rule. *Id.* In the non-capital context, the Alabama courts have held that it does not violate the Sixth Amendment to deny appointment of post-conviction counsel. See *Mosley v. State*, 616 So. 2d 362, 364 (Ala. Crim. App. 1993) (citing *Hobson v. State*, 425 So. 2d 511, 514 (Ala. Crim. App. 1982)). It is worth noting, however, that *Hobson* states that "the decision whether to appoint counsel in a collateral procedure <ellip> is discretionary <ellip> and derives from the Due Process Clause rather than the Sixth Amendment." *Hobson*, 425 So. 2d at 514 (citations omitted).

n269 See Del. R. Crim. P. Ct. R. 61 (1998) ("The court will appoint counsel for an indigent movant only in the exercise of discretion and for good cause shown <ellip> "). In capital cases, counsel is appointed and paid \$ 50 per hour, with no cap. Spangenberg, supra note 242, at 15. Reported decisions indicate that counsel is provided in capital cases. See State v. Lawrie, No. 1K92-08-0180, 1994 WL 714030, at *1 (Del. Super. Ct., Nov. 17, 1994) (holding that post-conviction relief would be meaningless absent sufficient time "to appoint counsel and for counsel to have a meaningful opportunity to present a motion for post conviction relief").

n270 While the public defenders represent some non-capital clients in postconviction, in the case of the death penalty, all indigent prisoners sentenced to death are represented by the capital collateral representative. See Fl. St. Ann. § 27.702 (1998).

n271 Until 1993, there was an absolute right to counsel in non-capital, postconviction proceedings, but this right has now been made discretionary. See Follinus v. State, 908 P.2d 590, 595 n.1 (Idaho Ct. App. 1995); Freeman v. State, 963 P.2d 1159, 1161 (Idaho 1998). However, the right is absolute in capital cases. See Idaho Crim. R. 44.2 (1998) (providing for mandatory appointment of counsel after the sentence of death is pronounced to "seek[] any post-conviction remedy sic <ellip> that the defendant may choose to seek <ellip> ").

n272 See 725 Ill. Comp. Stat. Ann. 5/122-2.1 (West 1992) ("The court shall appoint counsel [in all capital cases] if satisfied that the petitioner has no means to procure counsel <ellip>"). The non-capital convict is automatically entitled to counsel only when the initial petition is not dismissed as frivolous. People v. Porter, 521 N.E.2d 1158, 1159 (Ill. 1988).

n273 See Kan. Crim. Proc. Code Ann. § 22-4506 (West Supp. 1998) (stating that, in non-capital cases, counsel shall be appointed where a petition has colorable claims; whereas in capital cases, the court shall appoint counsel upon a showing of indigence and may appoint more than one counsel). Furthermore, although neither of the two men sentenced to death in Kansas have reached post-conviction proceedings, **Death Row**, U.S.A., supra note 5, at 29, the legislature has already provided funding for a Death Penalty Defense Unit. Spangenberg, supra note 242, at 30.

n274 In non-capital convictions the court has some discretion in the decision whether to appoint counsel. See Mont. Code Crim. P. § 46-21-201(2) (1997); see also State v. Peck, 865 P.2d 304, 306 (Mont. 1993). In capital cases, the court is required to appoint counsel. See Mont. Code Ann. § 46-21-201(3)(b)(i) (1997).

n275 See Neb. Rev. Stat. Ann. § 23-3402(1) (Michie 1995) ("Following the

sentencing of any indigent defendant represented by him or her, the public defender may take any direct, collateral, or post-conviction appeals to state or federal courts which he or she considers to be meritorious and in the interest of justice <ellip>. "); see also Spangenberg, supra note 242, at 43 (appointing counsel unless the court finds that the defendant is entitled to no relief). The public defender may represent indigent persons in all such cases, but the law clearly provides for counsel in capital cases. Id.

n276 In the case of a capital petitioner, the court shall appoint counsel for the first petition. See Nev. Rev. Stat. Ann. § 3-34.820 (Michie 1996).

n277 In all post-conviction cases that are not frivolous the court "shall <ellip> appoint local counsel if the prisoner is indigent." N.M. Stat. Ann. § 31-11-6 (Michie Supp. 1991). In practice the Appellate Division of the New Mexico State Public Defender represents all capital defendants. See Spangenberg, supra note 242, at 51.

n278 New York has a "capital defender office" that is authorized to provide representation to capital defendants under all circumstances but for federal habeas corpus review. See N.Y. Jud. L. § 30:35-b(4)(b) (McKinney Supp. 1999). This right does not extend to non-capital cases. See *People v. Richardson*, 603 N.Y.S.2d 700, 702 (N.Y. Sup. Ct. 1993) (holding that neither state nor federal constitution mandates appointment of counsel in a non-capital, collateral motion to vacate judgment).

n279 See N.C. Gen. Stat. § 7A-451 (Supp. 1997). In capital cases, there is a new state center that is supported by a grant, and all counsel involved in capital postconviction are funded at the rate of \$ 85 per hour. See Spangenberg, supra note 242, at 55.

n280 See Okla. Stat. tit. 22, § 1355.6 (West Supp. 1999) ("The Indigent Defense System shall <ellip> be appointed to perfect appeals and to provide representation in capital post-conviction cases."); see also Spangenberg, supra note 242, at 60 (explaining that recent funding has increased the capital post-conviction staff to 12 attorneys). The case law suggests that counsel is available in non-capital cases when properly requested. See *Jones v. State*, 440 P.2d 207, 207 (Okla. Crim. App. 1968) (denying counsel where "petitioner did not <ellip> request <ellip> the appointment of counsel" for his postconviction case).

n281 See S.C. Code Ann. § 17-27-160 (Law Co-op. Supp. 1998) ("If a defendant has been sentenced to death in South Carolina he must file his application for postconviction relief. If the applicant is indigent and desires representation by counsel, two counsel shall be immediately appointed to represent the petitioner <ellip>. "). In noncapital cases counsel must be appointed where the petition is not dismissed as having no merit. See *Whitehead v. State*, 426 S.E.2d 315, 317 (S.C. 1992).

n282 See Tenn. Sup. Ct. R. 13 (1998) (stating that in every criminal case where a petition of habeas corpus, or post-conviction relief has been filed, counsel will be appointed to represent the party if the party so desires and if the party is financially unable to obtain counsel). All capital petitioners automatically receive counsel, and the State has recently created a capital post-conviction office. See Spangenberg, *supra* note 242, at 72. In non-capital cases, the petition may only be dismissed without the appointment of counsel where it is clearly without merit. *Swanson v. State*, 749 S.W.2d 731, 734 (Tenn. 1988).

n283 See Tex. Crim. P. Code Ann. § 11.071(2) (West Supp. 1999) ("An applicant shall be represented by competent counsel <ellip>."). The appointment of counsel in noncapital cases is discretionary. See Tex. Crim. P. Code Ann. § 11.07(d) (West Supp. 1999).

n284 See Utah R. Crim. P. 8(e) (1998) ("The court shall appoint one or more attorneys to represent such petitioner at a post-conviction trial and on a post-conviction appeal <ellip>."). The Utah Supreme Court has indicated that counsel need not be appointed in capital post-conviction cases, no matter what the circumstances, but has left open the trial court's right to do so if it sees fit. *Bruner v. Carver*, 920 P.2d 1153, 115859 (Utah 1996).

n285 See Jackson, 1999 WL 33904 at *3.

n286 See Va. Code Ann. § 19.2-163.7 (Michie 1995) ("In any case in which an indigent defendant [death sentence is affirmed on appeal] <ellip> the court shall <ellip> appoint counsel <ellip> to represent an indigent prisoner under sentence of death in a state habeas proceeding. The Attorney General shall have no standing to object to the appointment of counsel for the petitioner."). In non-capital cases, the right to counsel has been recognized when the issues raised require it. See generally *Darnell v. Peyton*, 160 S.E.2d 749, 751 (Va. 1968).

n287 In non-capital cases the Colorado Supreme Court has recognized a "limited statutory right to counsel in Crim. P. 35 hearing unless the public defender concludes issues raised by the defendant have no arguable merit." *People v. Breaman*, 939 P.2d 1348, 1350 (Colo. 1997) (citing *People v. Duran*, 757 P.2d 1096, 1097 (Colo. App. 1988)); see also *People v. Esquivel-Alaniz*, No. 97CA1272, 1999 WL 3895, at *4 (Colo. App. Jan. 7, 1999) (holding that a statutory right to counsel existed where "the allegations are factually sufficient to warrant a hearing") (citing *People v. Hickey*, 914 P.2d 377, 379 (Colo. App. 1995)).

n288 The law does state that "in order to expedite death penalty appeals, state moneys shall not be used to prosecute any appeal on behalf of the defendant <ellip> where the death penalty has been imposed that is not an appeal as of right in state court." Colo. Rev. Stat. Ann. § 21-1-104(3) (West Supp. 1998).

n289 See **Death Row**, U.S.A., supra note 5, at 22.

n290 See Spangenberg, supra note 242, at 11-12.

n291 Rule 37.5 of the Arkansas Rules of Criminal Procedure provides for the appointment of counsel when the defendant is indigent and needs counsel for an appeal. Ark. Code Ann. § 37.5 (Michie 1998). In an unpublished opinion in *Jones v. State*, No. CR85-118, 1985 WL 1112, at *1 (Ark. Sept. 16, 1985), the supreme court held that appointment was mandatory even in a non-capital case if the applicant was indigent. *Id.* However, in a later opinion the court held that since "post-conviction proceedings are civil in nature, there is no constitutional right to appointment of counsel to prepare a petition under Rule 37. Rule 37.3 provides for the appointment of counsel where a hearing is granted and where petitioner is unable to afford counsel." *Robinson v. State*, 751 S.W.2d 335, 339 (Ark. 1988) (citing *Fretwell v. State*, 718 S.W.2d 109 (Ark. 1986)). The glimmer of good news in Arkansas is that there are two former members of the Resource Center, and three others acting part time, who continue to provide assistance to roughly a dozen persons in state post-conviction proceedings at any given time. See Spangenberg, supra note 242, at 7. Counsel is generally appointed, although the compensation may be derisory. See *id.* at 6-7.

n292 See **Death Row**, U.S.A., supra note 3, at 17.

n293 See Wyo. Stat. Ann. § 7-14-104(c) (Michie 1997) ("An indigent petitioner seeking relief under this act is not entitled to representation by the state public defender or by appointed counsel."); see also Spangenberg, supra note 242, at 80.

n294 See **Death Row**, U.S.A., supra note 3, at 47.

n295 See Spangenberg, supra note 242, at 80.

n296 *Gibson v. Turpin*, 1999 WL 79655, at *9-*10 (Ga. Feb. 22, 1999).

n297 *Hopkins v. State*, 215 S.E.2d 241, 238-39 (Ga. 1975).

n298 *Spencer v. Hopper*, 255 S.E.2d 1, 4-5 (Ga. 1979).

n299 See *Thomas v. Zant*, 697 F.2d 977, 988-89 (11th Cir. 1983) (discussing the right to a hearing in federal habeas corpus proceedings and remanding for a hearing on ineffective assistance of counsel).

n300 See *Davis v. Thomas*, 471 S.E.2d 202, 206-08 (Ga. 1996) (Carley & Hines, JJ., dissenting) (dissenting justices would have found a right to counsel in capital habeas proceedings); *In re Wellons*, No. S97-446 (Ga. Dec. 12, 1996)

(dissenting three justices from denial of a stay concluded that state habeas is meaningless without competent counsel).

n301 **Death Row**, U.S.A., supra note 3, at 26-27.

n302 See Case of Exzavious Gibson, supra note 16, at 1119-20.

n303 Gibson, 1999 WL 79655, at *10-*13 (Fletcher, Benham & Sears, JJ., dissenting).

n304 Id. at *8. One expert felt that his "IQ was in the 80s" while another tested him at "76, which is borderline intelligence <ellip>. " Id.

n305 Id. at *10. The petition raised the issue of ineffective assistance of counsel, and no other claim was cognizable in post-conviction. Id. Astoundingly enough, as the dissent noted, the court reached and disposed of this issue on appeal, despite the fact that "the Court had not granted the certificate for probable cause to appeal [on the ineffectiveness issue], nor given the parties the courtesy of an opportunity to submit briefs on the constitutional errors during the trial <ellip>. " Id. at *13 (dissenting opinion).

n306 Id. at *1.

n307 Id.

n308 Id.

n309 Id. at *9.

n310 Id.

n311 Id. at *4.

n312 Id.

n313 Indeed, the dissent harked that "the majority's response to the reality that "death is different' is to focus on the facts of this case and make the subjective determination that Gibson deserves the death penalty." Id. at *13 (dissenting opinion). The dissent further remarked that acting as a super-jury is not the court's role in postconviction proceedings. Id.

n314 "A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible or inhuman.'" Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980) (reversing for failing to align the application of the aggravating circumstance with the Eighth Amendment).

n315 See, e.g., *Gibson v. State*, 404 S.E.2d 781, 784 (Ga. 1991). In Mr. Gibson's direct appeal, as is the Georgia Supreme Court's practice in every capital appeal, the court addressed the sufficiency of the evidence, holding that "the evidence supports the conviction on both counts." *Id.*

n316 *Id.* at 786. On Mr. Gibson's direct appeal, the court conducted its mandatory proportionality review, Ga. Code Ann. § 17-10-35(c)(3) (1997), and held that the death sentence was not "disproportionate to sentence imposed in similar cases, considering both the crime and the defendant." *Id.*

n317 It is worth noting that of "the similar cases listed in the Appendix that support the imposition of a death sentence in this case," *Gibson*, 404 S.E.2d at 786, the overwhelming majority have never been executed, and many had either their convictions or sentences overturned in post-conviction proceedings for constitutional error. See *Davis v. State*, 340 S.E.2d 869 (Ga. 1986), *rev'd sub nom. Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994); *Finney v. State*, 320 S.E.2d 147 (Ga. 1984), *rev'd sub nom. Finney v. Zant*, 709 F.2d 643 (11th Cir. 1983); *Roberts v. State*, 314 S.E.2d 83 (Ga. 1984), *rev'd* 438 S.E.2d 905 (Ga. 1994); *Jones v. State*, 293 S.E.2d 708 (Ga. 1982), *rev'd sub nom. Jones v. Kemp*, 706 F.Supp. 1534 (N.D. Ga. 1989); *Berryhill v. State*, 291 S.E.2d 685 (Ga. 1982), *rev'd sub nom. Berryhill v. Zant*, 858 F.2d 633 (11th Cir. 1988); *Dick v. State*, 273 S.E.2d 124 (Ga. 1980), *rev'd sub nom. Dick v. Kemp*, 833 F.2d 1448 (11th Cir. 1987); *Amadeo v. State*, 255 S.E.2d 718 (Ga. 1979), *rev'd sub nom. Amadeo v. Zant*, 486 U.S. 214 (1988); *Corn v. State*, 240 S.E.2d 694 (Ga. 1977), *rev'd sub nom. Corn v. Kemp*, 772 F.2d 681 (11th Cir. 1985); *Young v. State*, 230 S.E.2d 287 (Ga. 1976), *rev'd sub nom. Young v. Zant*, 677 F.2d 792 (11th Cir. 1982); *Birt v. State*, 225 S.E.2d 248 (Ga. 1976), *rev'd sub nom. Birt v. Hopper*, 265 S.E.2d 276 (Ga. 1980); *Pulliam v. State*, 224 S.E.2d 8 (Ga. 1976), *rev'd sub nom. Pulliam v. Balkcom*, 263 S.E.2d 123 (Ga. 1980); *Dobbs v. State*, 224 S.E.2d 3 (Ga. 1976), *rev'd sub nom. Dobbs v. Turpin*, 142 F.3d 1383 (11th Cir. 1998); *Goodwin v. State*, 223 S.E.2d 703 (Ga. 1976), *rev'd sub nom. Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982).

n318 *Gibson*, 1999 WL 79655, at *6 (citations omitted).

n319 See *supra* note 6-38 and accompanying text.

n320 See *Stanford*, 492 U.S. at 377 ("A revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and application of laws) that the people have approved."); see also *supra* note 230.

n321 *Gibson*, 1999 WL 79655, at *13 (dissenting opinion).

n322 See **Death Row**, U.S.A., *supra* note 3, at 30.

n323 See *id.* at 14.

n324 La. Code Crim. Proc. Ann. art. 930 (West Supp. 1998).

n325 See *Landry v. State*, 605 So. 2d 1355, 1355 (La. 1992); *State ex rel. Lindon v. State*, 592 So. 2d 1309, 1309 (La. 1992).

n326 See *Davis v. Cain*, 662 So. 2d 453, 454 (La. 1995) (finding an absolute right to appointment of a particular counsel in a court appointed case when counsel had already established a relationship with the client).

n327 See *State v. Mitchell*, No. 98-KP-2445 (La. filed Sept. 19, 1998). The trial court judge was not unsympathetic with Mr. Mitchell's plight but simply could not find the funds with which to provide for counsel. *Id.* While he denied counsel, the judge nonetheless stayed all proceedings in perpetuity until the State found a source of funding. See *Mitchell*, No. 98-KP-2445 (pending before the Louisiana Supreme Court).

n328 See *Bourque*, No. 138,657, at 1.

n329 *Id.* at 2.

n330 Two other men on Louisiana's **death row** have likewise been found incompetent to proceed, posing an intractable barrier to any suggestion that they could represent themselves.

n331 See *Glover v. State*, 660 So. 2d 1189, 1194 (La. 1995).