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## **SIGNIFICANT U.S. SUPREME COURT DECISIONS IN CAPITAL CASES SINCE 1970**

(Last updated August 2011)

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**AGGRAVATING CIRCUMSTANCES**

- Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (death sentence not constitutionally impaired by invalidity of one of several statutory aggravating circumstances found by jury where improper circumstance did not involve any constitutionally protected behavior and the evidence submitted in support of improper circumstance (prior criminal history of defendant) was otherwise properly before jury, was constitutionally admissible and was not misleading or inaccurate.)
- Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983) (death sentence did not violate the Constitution despite trial court's consideration of accused's prior record in violation of state law)
- Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983) (even if state judge relied upon factor not available under state law in sentencing the defendant to death, the state procedures did not produce an arbitrary or freakish sentence forbidden by the Eighth Amendment)
- Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (no constitutional defect where the sole aggravating circumstance found by the jury at the penalty phase duplicates an element of the underlying capital crime since, under Louisiana's capital sentencing scheme, the narrowing function constitutionally required was performed by the jury at the guilt phase)
- Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) (Eighth Amendment requires reversal of death sentence where one of aggravating factors considered at sentencing was prior New York conviction that was subsequently invalidated by New York Court of Appeals)
- Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (where judge makes written findings of aggravating and mitigating circumstances, Sixth Amendment does not require that jury which renders advisory sentencing verdict to specify which aggravating circumstances justify imposition of death penalty)
- Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 114 L.Ed.2d 720 (1991) (victim impact evidence is admissible at sentencing phase of a capital trial so long as it does not violate fundamental fairness protected by due process clause [Note: overruling Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989)])
- Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) (per curiam) (because trial court indirectly considered constitutionally invalid aggravating circumstance when it gave great weight to sentencing jury's advisory verdict, which weighed invalid aggravating circumstance, sentence violated Eighth Amendment)
- Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) (state's introduction of penalty phase evidence that defendant belonged to white supremacist group violated his First and Fourteenth Amendment rights because his association was not introduced to rebut mitigating evidence and was irrelevant to proceedings)
- Romano v. Oklahoma, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994) (admission of evidence, during sentencing phase of capital murder trial, of imposition of death sentence in previous trial on another murder offense not error because evidence did not affirmatively mislead jury regarding its role or diminish its responsibility, was not false at the time it was admitted, and did not pertain to the jury's role in the sentencing process; jury's consideration of prior death sentence did not render sentencing proceeding unreliable)
- Tuggle v. Netherland, 516 U.S. 10, 116 S.Ct. 283, 133 L.Ed.2d 251 (1995) (where jury found both future dangerousness and vileness aggravators and sentenced petitioner to death but future dangerousness aggravator set aside based on Ake

violation, Zant v. Stephens does not ensure the death sentence was based on a valid aggravator where evidence in support of the invalidated aggravator should not have been considered by the jury; under Zant v. Stephens, death sentence may be saved by existence of valid aggravator even after invalidation of other aggravator if evidence on which invalid aggravator was based was properly before the jury, but where such evidence was not properly before the jury, existence of valid aggravator will not necessarily insulate death sentence)

Brown v. Sanders, 546 U.S. 212, 126 S. Ct. 884, 163 L. Ed. 2d 723 (2006) (inmate was not entitled to habeas relief when jury considered two invalid aggravating factors; an invalid sentencing factor will render the sentence unconstitutional unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances)

Kansas v. Marsh, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006) (Kansas statute that directed the imposition of the death penalty when aggravating and mitigating factors are in equipoise is constitutional)

### **AGGRAVATING CIRCUMSTANCES -- VAGUE AND OVERBROAD**

Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) (aggravating circumstance provision of Oklahoma death penalty statute, referring to “especially heinous, atrocious, or cruel” murders held to be unconstitutionally vague under the Eighth Amendment as applied)

Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) (definition of “heinous, atrocious or cruel” inadequate; remanded for reweighing by state supreme court)

Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) (definition of “heinous, atrocious or cruel” inadequate; remand under Clemons v. Mississippi; concurrence on disjunctive quality of instruction, where one of three elements inadequately defined, the aggravating circumstance is invalid)

Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (death sentence invalid because of the failure of the state court to provide a constitutional limiting construction to the aggravating circumstance providing for the death penalty for a murder “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.” “There is no way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.”)

Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (“especially heinous, cruel or depraved” aggravating factor, as construed by the Arizona Supreme Court, furnishes sufficient guidance to the sentencer to satisfy the Eighth and Fourteenth Amendments)

Lewis v. Jeffers, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) (“especially heinous, cruel or depraved” circumstance upheld where state supreme court applied its constitutionally narrow construction of this aggravating factor; federal courts of appeals was in error in conducting a case-by-case analysis of how Arizona courts had construed this aggravating factor; instead, federal habeas review is limited to determining whether the state’s finding was so arbitrary and capricious as to violate due process or the Eighth Amendment)

Sochor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) (where state supreme court found insufficient evidence to support the aggravating factor of “committed in a cold, calculated and premeditated manner,” it was error for court to affirm the death sentence without either independently reweighing the aggravating factors against the mitigating factors or engaging in a harmless error analysis; with respect to challenge to “especially wicked, evil,

atrocious or cruel” aggravating factor, defense lawyer failed to object and thus waived the issue and trial judge’s consideration of the factor was properly informed by Florida case law which narrowed its scope)

Richmond v. Lewis, 506 U.S. 40, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992) (because sentencer relied on an unconstitutionally vague aggravating factor and three of the five justices on the Arizona Supreme Court failed to reweigh the aggravating and mitigating factors, death sentence must be vacated unless Arizona corrects the constitutional error or imposes a lesser sentence)

Arave v. Creech, 507 U.S. 463, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1992) (aggravating circumstance that defendant “exhibit utter disregard for human life, as interpreted by Idaho Supreme Court to refer to “cold-blooded, pitiless slayer,” is neither vague or over inclusive; in reviewing state court’s narrowing construction of aggravating factor, federal court may consider state court *formulations* of a limiting construction to ensure that they are consistent, but federal courts are not to determine whether limiting construction has been *applied* consistently)

Tuilaepa v. California, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) (and Proctor v. California) (under California law, a person is eligible for the death penalty if found guilty of first-degree murder accompanied by one or more statutorily enumerated “special circumstances;” at the penalty phase, the jury is instructed to consider other statutory factors -- including the circumstances of the crime, the defendant’s prior record, and the defendant’s age -- in deciding whether to impose death; the Court holds that neither the wording of nor the fact that the three challenged sentencing factors were open-ended renders the sentencing scheme unconstitutionally vague; nor does the fact that the jury is not instructed how to weigh the sentencing factors render them unconstitutional)

Jones v. United States, 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) (rejecting claim in this federal death penalty case that non-statutory aggravating factors found and considered by the jury were vague and overbroad; factors related to qualities of victim)

### **APPELLATE REVIEW**

Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (upon invalidation of one aggravating circumstance in non-weighting state, appellate court need not remand for re-sentencing if at least one other valid aggravating circumstance remains)

Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1992) (the harmless error standard to be applied by federal courts, in assessing on habeas review the impact of trial error (in this case, the use of defendant’s post-*Miranda*-warnings silence for impeachment) is whether the error “had substantial and injurious effect or influence in determining the jury’s verdict,” not whether the error was harmless beyond a reasonable doubt)

O’Neal v. McAninch, 513 U.S. 432, 130 L.Ed.2d 947, 115 S.Ct. 992 (1995) (where constitutional error is found in federal habeas proceeding, the error is not harmless and relief must be granted if the court is in grave doubt about whether the error had a substantial and injurious effect or influence in determining the jury’s verdict)

Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) (proportionality review not constitutionally required)

Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) (in weighing state, upon invalidation of one aggravating circumstance relied upon by the jury, appellate court may constitutionally reweigh and determine whether death sentence is nevertheless appropriate; appellate court may also apply harmless error analysis; automatic affirmance of death sentence based on finding that one or more valid aggravators remain would, however,

be unconstitutional in violation of Lockett in a weighing state; case remanded because it is unclear what exactly the Mississippi Supreme Court did when it upheld the death sentence)

Dobbs v. Zant, 506 U.S. 357, 113 S.Ct. 835, 122 L.Ed.2d 103 (1993) (per curiam) (remanded for determination of whether issue of ineffective assistance of counsel should be reconsidered under manifest injustice exception to law of the case requirement to take into account a transcript of closing argument that was not discovered until after district court had denied the claim; transcript was highly relevant and delay in its discovery was due to state's inaccurate statements to state and federal courts that arguments were not transcribed)

Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991) (constitutional error where Florida Supreme Court did not consider nonstatutory mitigating evidence in determining whether trial court had properly overridden jury's recommendation of life sentence)

Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) (per curiam) (where one of the 4 aggravating circumstances was the "heinousness" one, with instructions even less specific than found unconstitutional in other cases, it does not matter that the judge weighed no invalid circumstances, because the jury did)

Richmond v. Lewis, 506 U.S. 40, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992) (death sentence could not be upheld where sentencer relied on an unconstitutionally vague aggravating factor and three of the five justices on the Arizona Supreme Court failed to reweigh the aggravating and mitigating factors)

Calderon v. Thompson, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998) (where a federal court of appeals *sua sponte* recalls its mandate to revisit merits of earlier decision denying habeas relief to state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by habeas corpus jurisprudence)

Calderon v. Coleman, 525 U.S. 141, 119 S.Ct. 500, 142 L.Ed.2d 521 (1998) (Brecht harmless error standard applies to consideration of whether jury instruction containing misinformation about California's commutation process requires reversal)

Fry v. Pliler, 551 U.S. 112, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007) (on federal habeas review of state court criminal judgments, courts assess the prejudicial impact of the state court's constitutional error under Brecht's "substantial and injurious effect" standard, not Chapman's "harmless beyond a reasonable doubt" standard)

Corcoran v. Levenhagen, \_\_\_ U.S. \_\_\_, 130 S.Ct. 8, 175 L.Ed.2d 1 (2009) (per curiam) (upon reversing the district court's grant of federal habeas relief on one of five grounds raised by prisoner in support of his habeas petition, the Court of Appeals should have permitted the district court to consider defendant's unresolved challenges on remand, or should have explained why such consideration was unnecessary)

## **CLEMENCY**

Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998) (no due process violation in Ohio's clemency procedures; no Fifth Amendment violation in making voluntary inmate interview part of clemency procedure; five justices find that some minimal procedural safeguards are constitutionally required of clemency process, by due process clause)

Harbison v. Bell, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1481, 173 L.Ed.2d 347 (2009) (certificate of appealability is required to appeal a final order that disposes of the merits of a habeas corpus proceeding, but it is not required to appeal an order that

“merely denies a motion to enlarge the authority of appointed counsel”; the statutory language and legislative history of 18 U.S.C. § 3599 demonstrate that federally appointed counsel are authorized to represent their clients in state clemency proceedings and entitled to compensation for that representation)

### ***CLOSING ARGUMENT***

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (prosecutor’s closing argument to jury at penalty phase which suggested that the responsibility for determining the appropriateness of a sentence of death rested not with the jury but with the Mississippi Supreme Court which would review the case on automatic appeal rendered the sentencing inconsistent with Eighth Amendment’s heightened need for reliability in the determination that death is the appropriate punishment in a specific case)

Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (prosecutor’s improper closing argument, which reflected an emotional and personal reaction to the case and contained references to the defendant as an “animal” who should have been let out of prison only on a leash, did not so infect the trial with unfairness as to deny due process)

South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989) (death sentence was obtained in violation of the constitution where prosecutor, during closing argument, read from prayer found in victim’s possessions and argued personal characteristics of victim based upon prayer and voter registration card also found among victim’s possessions) [Note: overruled by Payne v. Tennessee, 501 U.S. 808 (1991)]

Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (plurality opinion reverses death sentence and holds that if state rests its arguments at sentencing in part on future dangerousness, due process requires that defendant be allowed to rebut with evidence that he will not be eligible for parole and may request appropriate jury charge)

### ***COMPETENCY TO BE EXECUTED***

Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (Eighth Amendment prohibits execution of person who is “insane” or mentally incompetent to be executed; Powell, J., concurring, defines “insane” as being “unaware of the punishment they are about to suffer and why they are to suffer it”; 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)

Whitmore v. Arkansas, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (where death row inmate refused to appeal, another death row inmate did not have standing to pursue to appeal for him as “next friend” to litigate whether Eighth Amendment requires an automatic direct appeal in a capital cases; also, the defendant had knowingly, intelligently, and voluntarily waived his right to appeal his conviction and death sentence)

Demosthenes v. Baal, 495 U.S. 731, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990) (state court's finding of condemned prisoner's competency to waive post-conviction litigation is entitled to a presumption of correctness; here federal court lacked jurisdiction to entertain next friend petition from parents of condemned where state court had found her competent)

Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998) (claim of incompetency to be executed may be raised in second federal habeas petition after competency claim raised in first federal habeas petition was dismissed as premature. Claim in second habeas petition will not be treated as a successor)

Panetti v. Quarterman, 551 U.S. 930, 127 S. Ct. 2842; 168 L. Ed. 2d 662 (2007) (emphasizes that adequate state procedures must be followed in determining a petitioner's competency to be executed; a standard that considers only whether petitioner was aware that he was going to be executed and why, without considering delusions that may have prevented him from comprehending the meaning of the punishment, was too restrictive)

#### **COMPETENCY TO STAND TRIAL AND TO PLEAD GUILTY**

Medina v. California, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) (no due process bar to placing the burden of proving competency to stand trial on the accused)

Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) (competency standard for waiving counsel and pleading guilty, even to capital offense, is same as standard for competency to stand trial; no higher competency required to waive right to counsel though waiver must also be intelligent and voluntary)

Riggins v. Nevada, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (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 antipsychotic drugs during trial violates Sixth and Fourteenth Amendments; a presumption of prejudice arises from this drugging)

Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996) (while states may place the burden of proof with regard to establishing incompetency to stand trial on a criminal defendant, that burden may not, consistent with due process, be as high as clear and convincing evidence; such a high burden would impose a significant risk of an erroneous decision with regard to the jealously guarded right to stand trial only when competent)

Schiro v. Smith, 546 U.S. 6, 126 S. Ct. 7, 163 L. Ed. 2d 6 (2006) (per curiam) (states can develop their own means of determining inmate's mental competency and cannot be compelled to conduct a jury trial with regards to the issue of mental retardation)

#### **COMPETENCY TO WAIVE POST-CONVICTION PROCEEDINGS**

Whitmore v. Arkansas, 495 U.S. 149, 116 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (where inmate under death sentence did not

pursue appeal, another death row inmate lacked standing to be “next friend” for inmate wishing to tie; here the inmate who was not appealing had also been found to have intelligently waived his right to appeal)

Demosthenes v. Baal, 495 U.S. 731, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990) (per curiam) (federal court lacked jurisdiction to entertain *amicus* habeas corpus petition from parents of condemned where state court had found him competent and state court finding entitled to presumption of correctness)

### **CONFESSIONS**

Arizona v. Mauro, 481 U.S. 520, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987) (police conduct in allowing suspect in custody to talk to his wife in the presence of police officer held not to constitute “interrogation” for purposes of the Fifth Amendment privilege against self-incrimination)

Minnick v. Mississippi, 498 U. S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990) (after accused expresses his desire to deal with law enforcement officers through counsel, police may not re-initiate interrogation in the absence of counsel)

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (admission of involuntary confession may be harmless, where defendant made subsequent voluntary confession, but is not in this case)

Stansbury v. California, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (officer’s subjective view that defendant was not a suspect was irrelevant to determination under Miranda of whether defendant was in custody; custody for Miranda purposes to be determined based on objective circumstances of the interrogation)

Powell v. Nevada, 511 U.S. 79, 114 S.Ct. 1280, 128 L.Ed.2d 1 (1994) (even assuming it announced a new rule, Riverside v. McLaughlin applies retroactively to case pending on direct appeal when Riverside was decided; Court remands without expressing opinion on the possible remedies for violation of Riverside indicating that suppression would not necessarily be the correct remedy)

Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (violation of confrontation clause in admission of non-testifying accomplice’s entire confession, rejecting state’s reliance upon admission against accomplice’s penal interest hearsay exception)

Texas v. Cobb, 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001) (for purposes of assessing admissibility of confession given after criminal proceedings have begun, Sixth Amendment right to counsel held to be “offense specific,” applying narrow interpretation of offense; Sixth Amendment does encompass offenses that, even if not formally charged, would be considered the same offense under Blockberger test)

Missouri v. Siebert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (Miranda warnings given mid-interrogation, after defendant gave unwarned confession, were ineffective, and thus confession repeated after warnings were given was inadmissible at trial)

Fellers v. United States, 540 U.S. 519, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004) (officers violated Sixth Amendment by deliberately eliciting information from petitioner during visit to his home in absence of waiver of counsel, regardless of whether discussion constituted “interrogation”)

Montejo v. Louisiana, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (defendant must actually request a lawyer or otherwise assert his Sixth Amendment right to counsel (i.e., affirmatively accept the appointment of counsel) to preclude future police interrogation in the absence of the attorney) [*Note: overruling the holding of Michigan v. Jackson, 475 U.S. 625 (1986), that, following a critical stage, a criminal defendant’s waiver of the right to counsel in response to police-initiated interrogation is presumptively invalid*]

### **CONSTITUTIONALITY OF THE DEATH PENALTY – IN GENERAL**

Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Death penalty statutes then in existence declared unconstitutional)

Callins v. Collins, 510 U.S. 1141, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994) (*Blackmun, J., dissenting from denial of certiorari*) (Justice Blackmun concludes that the death penalty cannot be fairly imposed and enforced and announces that he will from henceforth vote to grant sentencing relief in all death cases)

#### ***Sentencing schemes upheld***

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (Georgia’s guided discretion death penalty statute, allowing imposition of death where certain aggravating circumstances established, upheld)

Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (Florida’s guided discretion death penalty statute, allowing imposition of death based upon weighing of aggravating and mitigating circumstances, upheld)

Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (Texas’ guided discretion death penalty statute, allowing imposition of death penalty upon determination of various factors including future dangerousness, upheld)

Baldwin v. Alabama, 472 U.S. 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985) (Alabama death penalty statute, now repealed, that required jury to impose non-binding death sentence upon finding defendant guilty of certain aggravated crimes, but allowed trial judge to decide punishment after independent consideration of defendant and crime did not violate Eighth and Fourteenth Amendments )

Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (Florida law allowing judge to override the jury’s recommendation of a life sentence is constitutional, does not constitute double jeopardy, and does not violate the constitutional requirement of reliability in capital sentencing)

Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990) (mandatory imposition of a death sentence if jury unanimously finds at least one aggravating circumstance and no mitigating circumstances, or that the aggravating circumstances outweigh the mitigating circumstances constitutional as long as jury is able to consider and give effect to all relevant mitigating evidence)

Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (Arizona death penalty scheme upheld including provisions that judge sentence based upon a findings of aggravating and mitigating factors made without a jury, that place burden upon defendant to prove mitigating circumstances by a preponderance of the evidence, that require judge to impose death if the judge finds that there are no mitigating circumstances sufficiently substantial to call for leniency, and that define as one aggravating factor that the murder was created in an “especially heinous, cruel or depraved manner”)

Tuilaepa v. California, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) (and Proctor v. California) (under California law, a person is eligible for the death penalty if found guilty of first-degree murder accompanied by one or more statutorily enumerated “special circumstances;” at the penalty phase, the jury is instructed to consider other statutory factors -- including the circumstances of the crime, the defendant’s prior record, and the defendant’s age -- in deciding whether to impose death; the Court holds that neither the wording of nor the fact that the three challenged sentencing factors were open-ended renders the sentencing scheme unconstitutionally vague; nor does the fact that the jury is not instructed how to weigh the sentencing factors render them unconstitutional)

Harris v. Alabama, 513 U.S. 504, 130 L.Ed.2d 1004, 115 S.Ct. 1031 (1995) (where jury sentencing verdict is advisory and final sentencing authority is vested in the trial judge, the Eighth Amendment does not require the state to define the weight the trial judge must give to the jury verdict before overriding it)

Loving v. United States, 517 U.S. 748, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996) (delegation by Congress to the president the power properly to implement the military death penalty statute was constitutional; the president’s proscription, via executive order, of aggravating circumstances and procedural safeguards for military death penalty trials upheld)

#### ***Mandatory statutes held unconstitutional***

Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (statute making death penalty mandatory for first degree murder, which includes any willful, deliberate, and premeditated killing and any murder committed in perpetrating or attempting to perpetrate a felony, held unconstitutional)

Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) (statute making death penalty statute mandatory for first degree murder held unconstitutional)

Roberts (Harry) v. Louisiana, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977) (mandatory death penalty for killing a police officer held unconstitutional)

Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987) (mandatory death penalty statute for prison inmate convicted of murder while serving a life sentence without possibility of parole is unconstitutional)

#### **CONSTITUTIONALITY OF DEATH PENALTY – INSANE AT TIME OF EXECUTION**

Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (Eighth Amendment prohibits execution of person who is “insane” or mentally incompetent to be executed; J. Powell, concurring, defines “insane” as being “unaware of the punishment they are about to suffer and why they are to suffer it”)

#### **CONSTITUTIONALITY OF DEATH PENALTY – JUVENILES**

Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (Eighth Amendment bars imposition of death penalty for offenders who are under the age of 18 at the time of commission of crime)

Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (Eighth Amendment does not prohibit imposition of death penalty on a person who was sixteen or seventeen years old at the time of the crime)

Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality concludes that the “cruel and unusual punishment” clause of Eighth Amendment bars execution of a person who was under 16 years of age at the time of his or her offense; O’Connor concurring, does not accept this conclusion because evidence of a national consensus on the evolving standard for execution of 16 year-olds is incomplete, but finds that absence of a minimum age in the Oklahoma capital statute does not satisfy compliance with Eighth Amendment’s requirement for “special care and deliberation” in imposing death sentence thus making execution of 15 year-old unconstitutional)

#### **CONSTITUTIONALITY OF DEATH PENALTY – MENTALLY RETARDED OFFENDER**

Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (execution of mentally retarded offenders does not comport with “evolving standards of decency” and therefore violates the Eighth Amendment’s prohibition against cruel and unusual punishment, overruling Penry v. Lynaugh, 492 U.S. 302 (1989))

Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (Eighth Amendment does not prohibit execution of mentally retarded; mental retardation is a mitigating factor to be considered) [*Note: overruled by Atkins v. Virginia, 536 U.S. 304 (2002)*]

Bobby v. Bies, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2145, 173 L.Ed.2d 1173 (2009) (where borderline mental retardation was considered as a mitigating factor at trial pre-Atkins v. Virginia, double jeopardy does not bar state courts from later conducting a full hearing on a defendant’s mental capacity to determine whether defendant qualifies as mentally retarded under

Atkins; nor does issue preclusion doctrine because determinations of his mental capacity were not necessary to the ultimate imposition of the death penalty)

### **CONSTITUTIONALITY OF DEATH PENALTY – RAPE**

Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (death penalty disproportionate for rape of an adult woman where the victim is not killed)

Kennedy v. Louisiana, \_\_\_ U.S. \_\_\_, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) (death penalty for the rape of a child is unconstitutional under the Eighth and Fourteenth Amendments because it is disproportionate to the crime where the crime did not result, and was not intended to result, in the death of the child) [*Note: petition for rehearing denied on Oct. 1, 2008. 129 S.Ct. 1 (2008)*]

### **CONSTITUTIONALITY OF DEATH PENALTY – FOR ONE WHO DOES NOT KILL**

Tison v. Arizona, 481 U.S. 137, 109 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (Eighth Amendment does not prohibit imposition of the death penalty based on the felony-murder doctrine if the defendant participated in the crime a major way and with reckless indifference to human life in a felony that resulted in murder)

Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (death penalty 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)

Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986) (fact finding required by the Eighth Amendment as a prerequisite to imposing the death penalty, that defendant killed, attempted to kill or intended that a killing take place or that lethal force be used, need not be made by fact finder at trial and sentencing, but can be made by trial court or state reviewing court)

### **COUNSEL – AVAILABILITY FOR POST-CONVICTION REVIEW**

Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) (states are not required to provide counsel to indigent death row prisoners seeking state post-conviction relief; “meaningful access” to the courts can be satisfied in various ways by the states)

Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (there is no constitutional right to counsel for pursuing state postconviction remedies)

McFarland v. Texas, 512 U.S. 849, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994) (federal court must appoint counsel to an eligible capital defendant and has jurisdiction to stay his execution even though a petition for relief pursuant to 26 U.S.C. §2254 has not yet been filed; 21 U.S.C. §848(q)(4)(B), providing for appointment of counsel in capital cases, includes the right to legal assistance in preparing a petition; a case is pending, and thus court has jurisdiction to grant a stay of execution, once the capital petitioner has invoked his right to appointed counsel pursuant to §848(q)(4)(B))

Harbison v. Bell, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1481, 173 L.Ed.2d 347 (2009) (certificate of appealability is required to appeal a final order that disposes of the merits of a habeas corpus proceeding, but it is not required to appeal an order that “merely denies a motion to enlarge the authority of appointed counsel”; the statutory language and legislative history of 18 U.S.C. § 3599 demonstrate that federally appointed counsel are authorized to represent their clients in state clemency proceedings and entitled to compensation for that representation)

### ***COUNSEL – EFFECTIVENESS***

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (ineffective assistance of counsel decided by determination of whether defendant received reasonably effective assistance and, if not, whether counsel’s errors resulted in a reasonable probability that the outcome would have been different)

Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (relying on ABA Standards, Court finds counsel’s failure to present certain mitigating evidence constituted ineffective assistance at the penalty phase; Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to defense counsel’s sentencing strategy but rather that strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitation on investigation; in assessing the reasonableness of an attorney’s investigation, a court must consider not only the quantum of evidence already known to counsel but also whether the known evidence would lead a reasonable attorney to investigate further)

Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (counsel’s failure to present certain mitigating evidence constituted ineffective assistance at the penalty phase; even when capital defendant and his family have stated that no mitigating evidence is available, defense counsel had duty to make reasonable efforts to obtain and review court file of prior conviction that counsel knew would probably be relied upon as evidence of aggravation at penalty phase; in this case, court file contained significant mitigating evidence and counsel’s inadequate investigation constituted ineffective assistance)

Williams (Terry) v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (counsel was ineffective for failing to adequately investigate and present mitigating evidence and the defendant was prejudiced by counsel’s ineffectiveness; Strickland test for ineffectiveness was not modified by Lockhart; while in a few cases a Lockhart analysis may be needed to dispose of an ineffectiveness claim, most ineffective assistance of counsel claims are still governed by Strickland;) )

Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (representation of defendant by counsel whose law partner represented codefendant did not so infect representation as to constitute an active representation of competing interests; actual conflict was not established by the fact that counsel prepared appellate briefs for both defendant and

codefendant; failure to develop and present mitigating evidence at sentencing phase was supported by reasonable professional judgment and thus was not ineffective assistance of counsel)

Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (trial counsel's preparation for the sentencing phase was reasonable and defendant did not overcome presumption that challenged action may have been trial strategy)

Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (constitutional claim regarding admission of psychiatrist's testimony at sentencing phase waived because it was not raised on direct appeal)

Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1992) (where counsel failed to object to "double counting" based on then existing interpretation of Eighth Amendment in Circuit, nevertheless no prejudice shown for ineffectiveness purposes where the precedent was subsequently overruled by the Supreme Court)

Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (Strickland, not United States v. Cronin, 466 U.S. 648 (1984), governed appeal challenging specific aspects of counsel's representation; state court determination that defense counsel had not been ineffective during sentencing hearing - in which counsel failed to present mitigating evidence and waived closing argument - did not amount to an unreasonable application of clearly established federal law, pursuant to 28 U.S.C. § 2254(d)(1))

Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002) (in order to establish a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known, defendant must, at a minimum, show that the conflict of interest adversely affected counsel's performance)

Schiro v. Landrigan, 550 U.S. 465, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) (federal district court did not abuse its discretion in denying petitioner an evidentiary hearing on his ineffective assistance of counsel claim; the Court found reasonable the questionable state court determination that petitioner would not have allowed counsel to present any mitigation evidence and therefore that he would not be able to show prejudice under Strickland and overcome AEDPA's bar to federal habeas relief)

Porter v. McCollum, \_\_\_ U.S. \_\_\_, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam) (penalty-phase counsel provided ineffective assistance by failing to investigate any mitigating evidence regarding defendant's mental capacity, family background, or military service)

Wong v. Belmontes, \_\_\_ U.S. \_\_\_, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009) (per curiam) (where penalty-phase counsel presented substantial mitigating evidence, including testimony from nine witnesses regarding the defendant's terrible childhood and the abuse he suffered, and defendant's religious conversion, defendant was not prejudiced for purposes of Strickland)

Bobby v. Van Hook, \_\_\_ U.S. \_\_\_, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009) (per curiam) (counsel for the defendant did not perform deficiently with regard to his penalty-phase investigation and met the constitutional minimum of competence as it

existed at the time of his client's trial; it was inappropriate for Court of Appeals to rely on ABA guidelines, which were announced 18 years after defendant's trial)

Sears v. Upton, \_\_\_ U.S. \_\_\_, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010) (per curiam) (proper prejudice standard for evaluating ineffective assistance in the context of a penalty phase mitigation investigation requires a "probing and fact-specific analysis" of the totality of the available mitigation evidence, including reliable hearsay evidence; the standard requires speculation as to the effect of new mitigation evidence)

Wood v. Allen, \_\_\_ U.S. \_\_\_, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010) (state court's factual determination that defense counsel made strategic decision not to pursue or present evidence of defendant's mental deficiencies was not unreasonable)

Smith v. Spisak, \_\_\_ U.S. \_\_\_, 130 S.Ct. 676, 175 L.Ed.2d 595 (2010) (capital defense attorney's closing argument did not prejudice defendant for purposes of ineffective assistance of counsel; instructions and jury forms at penalty phase did not unconstitutionally require jury to consider in mitigation only those factors that jury unanimously found to be mitigating)

Premo v. Moore, \_\_\_ U.S. \_\_\_, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011) (state court's conclusion that defense counsel's performance was not deficient, nor was the defendant prejudiced by trial counsel's performance, where counsel advised client to enter a quick no-contest plea without having filed a motion to suppress one of the defendant's confessions was not an unreasonable application of clearly established federal law)

### ***COUNSEL – RIGHT TO COUNSEL***

Texas v. Cobb, 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001) (defendant's uncounseled statements regarding offenses for which he had not been charged are admissible against him notwithstanding attachment of his Sixth Amendment right to counsel on other charged offenses)

Fellers v. United States, 540 U.S. 519, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004) (officers violated Sixth Amendment by deliberately eliciting information from petitioner during visit to his home in absence of any waiver of counsel, regardless of whether this discussion constituted "interrogation")

Montejo v. Louisiana, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (defendant must actually request a lawyer or otherwise assert his Sixth Amendment right to counsel (i.e., affirmatively accept the appointment of counsel) to preclude future police interrogation in the absence of the attorney) [*Note: overruling the holding of Michigan v. Jackson, 475 U.S. 625 (1986), that, following a critical stage, a criminal defendant's waiver of the right to counsel in response to police-initiated interrogation is presumptively invalid*]

### ***"DEATH ROW PHENOMENON" – Length of time on death row***

Lackey v. Texas, 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995) (*Stevens, J., respecting denial of cert.*) (after petitioner spent 17 years on death row, execution would arguably be impermissible under Eighth Amendment because the additional deterrent effect would be negligible and the state's interest in retribution has largely been satisfied because of the long period of uncertainty that petitioner has spent awaiting his execution)

### ***DOUBLE JEOPARDY***

Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003) (the touchstone for double jeopardy protection in capital sentencing proceedings is whether there has been an "acquittal"; a life sentence that was imposed for procedural reasons—such as a hung jury during the sentencing phase—does not constitute an acquittal and thus the State is not precluded from pursuing the death penalty in a subsequent retrial)

Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) (imposition of death sentence at second capital trial of defendant sentenced to life imprisonment at first trial held barred by the Fifth Amendment double jeopardy clause)

Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984) (double jeopardy clause prohibits state from sentencing defendant to death after life sentence was set aside on appeal because the trial judge had committed error of law in interpreting the statute governing aggravating circumstances)

Heath v. Alabama, 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985) (successive prosecution, resulting in death sentence, by Alabama for conduct for which defendant had been convicted of murder and sentenced to life in prison in Georgia is not prohibited by dual sovereignty doctrine of the double jeopardy protection of the Fifth Amendment)

Poland v. Arizona, 476 U.S. 82, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986) (double jeopardy clause does not bar a second capital sentencing when, on appeal from first sentencing, reviewing court finds the evidence insufficient to support the only aggravating factor on which the sentencer relied but does not find the evidence insufficient to support the death penalty)

Ricketts v. Adamson, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987) (double jeopardy clause does not bar retrial of defendant and imposition of death penalty, where previous sentence and conviction, obtained pursuant to plea agreement, was vacated due to breach of agreement by defendant's failure to testify at retrial of other persons involved in murder)

Schiro v. Farley, 510 U.S. 222, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994) (where defendant was charged with intentional murder and felony murder and jury convicted only of felony murder, finding of intent to kill, necessary to impose death, at penalty phase did nevertheless not violate double jeopardy clause; collateral estoppel also did not apply since defendant failed to show that jury's verdict necessarily meant that jury found no intent)

Bobby v. Bies, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2145, 173 L.Ed.2d 1173 (2009) (where borderline mental retardation was considered as a mitigating factor at trial pre-Atkins v. Virginia, double jeopardy does not bar state courts from later conducting a full hearing on a defendant's mental capacity to determine whether defendant qualifies as mentally retarded under Atkins; nor does issue preclusion doctrine because determinations of his mental capacity were not necessary to the ultimate imposition of the death penalty)

#### ***DUE PROCESS / EIGHTH AMENDMENT PROCEDURAL PROTECTIONS***

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (reliance on confidential presentence report by court violated the Eighth and Fourteenth Amendments; right to reliable procedures at sentencing phase of a capital trial)

Presnell v. Georgia, 439 U.S. 14, 99 S.Ct.235, 58 L.Ed.2d 207 (1978) (death penalty reversed where no jury finding of an aggravating circumstance necessary to impose a death sentence)

Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) (exclusion of evidence at sentencing phase based upon Georgia's hearsay rule held unconstitutional)

Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (testimony of psychiatrist based upon court-ordered psychiatric examination where defendant was not advised of the constitutional rights violates the Fifth, Sixth and Fourteenth Amendments)

Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988) (admission of testimony by psychiatric expert concerning capital defendant's future dangerousness, based upon expert's post-indictment examination of defendant who neither consulted with counsel before examination nor waived right to counsel, held not harmless error under the circumstances)

Lankford v. Idaho, 500 U.S. 110, 111 S.Ct. 1723, 114 L.Ed.2d 173 (1991) (death sentence, imposed by judge after state gave written notice that it did not intend to seek death penalty and presented no evidence in support thereof, is unconstitutional)

Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) (in trial of white defendant for killing white woman, evidence of his association in the Aryan Brotherhood presented in aggravation violated his 1<sup>st</sup> A right to freedom of association, where evidence has no relevance to the issues to be decided by the jury)

Dobbs v. Zant, 506 U.S. 357, 113 S.Ct. 835, 122 L.Ed.2d 103 (1993) (per curiam) (finding due process violation where Court of Appeals denied petitioner's motion to supplement record with transcript of penalty phase closing argument which had not been discovered earlier due to state's assertion that transcript did not exist; lower court had relied upon trial counsel's postconviction testimony in rejecting petitioner's IAC claim but closing argument transcript contradicted that testimony)

Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (where future dangerousness is at issue and state law prohibits parole if defendant sentenced to life in prison, due process requires that jury be informed – either by instruction or argument of counsel – that only alternative to death sentence is sentence of life without parole)

Gray v. Netherland, 519 U.S. 1301, 117 S.Ct. 632, 136 L.Ed.2d 602 (1996) (a due process rule requiring that the state give notice to the defense of any evidence it intends to use to show future dangerousness at penalty phase of capital case would be new for Teague purposes and thus is not considered; case remanded to determine whether claim that petitioner was misled with regard to what the state intended to do was raised in lower federal courts)

Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998) (Ohio's clemency procedures did not violate due process safeguards; inclusion of voluntary inmate interview in clemency procedures does not violate Fifth Amendment protection against self-incrimination)

Ramdass v. Angelone, 530 U.S. 156, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000) (in the context of Virginia's three-strike law, the Simmons rule – which requires that the jury be informed if the only alternative to a death sentence is life without parole – does not apply where, even though a separate jury had entered a guilty verdict on the third felony charge, the trial judge in that case had not entered a final judgment at the time the jury rendered the death sentence in the present case)

Shafer v. South Carolina, 532 U.S. 36, 121 S.Ct. 1263, 149 L.Ed.2d 178 (2001) (interpreting Simmons, Court holds that trial court errs, in case in which state offers evidence of future dangerousness, in refusing to instruct jury that sentence of life imprisonment, under circumstances of case and state law, means life without eligibility for parole)

Deck v. Missouri, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005) (Constitution forbids the use of visible shackles during capital trial's penalty phase, as it does during the guilt phase, unless that use is "justified by an essential state interest," such as courtroom security that is specific to the defendant on trial)

### ***EX POST FACTO***

Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) (*ex post facto* challenge to imposition of death sentence rejected where at time of offense state had a constitutionally infirm statute but defendant was convicted and sentenced under newly adopted constitutional statute)

### ***EVIDENCE – EXCULPATORY***

Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (Brady violation established based on failure to disclose evidence casting doubt on certainty and reliability of eye witness testimony, prior statements of state's key witness, and evidence showing that state's investigation was less than thorough; Bagley materiality established when there is reasonable probability that had evidence been disclosed, different result would have been obtained)

Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (application of Brady and progeny to particular facts, with close analysis of issue of materiality, with commentary on meaning of Kyles; evaluation of whether cause and prejudice exists to excuse procedural default; court finds withheld information not material, and therefore no prejudice to excuse the procedural default)

Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (petitioner entitled to new sentencing trial where state, in violation of Brady v. Maryland, 373 U.S. 83 (1963), intentionally withheld evidence that could have discredited two essential prosecution witnesses; suppression of evidence concerning the first witness met Brady standard for materiality; Fifth Circuit should have issued COA as to suppression of evidence concerning second witness)

Oregon v. Guzek, 546 U.S. 517, 126 S. Ct. 1226, 163 L. Ed. 2d 1112 (2006) (nothing in the Eighth and Fourteenth Amendments granted petitioner the right to present additional alibi evidence at the sentencing stage; evidence contradicting guilt does not have to be considered at the sentencing stage of a capital trial)

Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L.Ed.2d 503 (2006) (state evidence rule excluding evidence of third-party guilt in a capital murder case denied defendant of a fair trial and violated his federal constitutional rights)

Connick v. Thompson, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1350, 179 L.Ed.2d 417 (2011) (per curiam) (a district attorney's office cannot be held liable under Section 1983 for failure to train its prosecutors based on a single Brady violation)

### ***EVIDENCE – GENERALLY***

Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) (Eighth Amendment requires reexamination of death sentence where one factor considered in aggravation was prior New York conviction, which was subsequently invalidated by New York Court of Appeals)

Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) (First and Fourteenth Amendments were violated where evidence of defendant's membership in white supremacist group introduced by state against him at penalty phase hearing; Court found evidence irrelevant to facts of case and not introduced to rebut defendant's mitigating evidence)

Romano v. Oklahoma, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994) (Court holds admission of evidence at penalty phase regarding defendant's capital conviction and death sentence in unrelated case did not violate Caldwell v. Mississippi, 472 U.S. 320 (1985), because it did not affirmatively mislead jury regarding its role in sentencing process and evidence was accurate at time presented)

Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (defendant's capital murder conviction violated Confrontation Clause where non-testifying accomplice's confession was admitted at trial)

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (overruling Ohio v. Roberts, 448 U.S. 56 (1980), and holding admission of out-of-court testimonial statements cannot be admitted at trial under Confrontation Clause unless witness was unavailable to testify and defense had prior opportunity to cross-examine witness)

### ***EXPERTS***

Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (denial of 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)

Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (admission of psychiatric testimony at penalty phase based upon court-ordered psychiatric examination where defendant was not advised of constitutional rights violates Fifth, Sixth and Fourteenth Amendments)

Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) (psychiatric testimony regarding future dangerousness admissible at sentencing hearing at capital trial under Texas law)

Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988) (use in capital sentencing of psychiatric evidence obtained in violation of accused's Sixth Amendment right to have counsel receive advance notice of examination held not harmless error under circumstances)

Powell v. Texas, 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989) (per curiam) (admission of psychiatric testimony on issue of future dangerousness violated Sixth Amendment where there was no notice to defense counsel that defendant's statements during court-ordered competency evaluation would be used to establish aggravating circumstances' Sixth Amendment right to notice of examination not waived by introduction of psychiatric testimony in support of insanity defense)

### ***FEDERAL DEATH PENALTY***

Loving v. United States, 517 U.S. 748, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996) (delegation by Congress to the president the power properly to implement the military death penalty statute was constitutional; the president's proscription, via executive order, of aggravating circumstances and procedural safeguards for military death penalty trials upheld)

Jones v. United States, 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) (no need to instruct jury as to effect of jury deadlock; no reasonable likelihood that jury was led to believe that defendant would receive sentence less than life imprisonment if jury could not reach agreement on punishment; no error in allowing jury to consider two non-statutory aggravating factors)

United States v. Bass, 536 U.S. 862, 122 S.Ct. 2389, 153 L.Ed.2d 769 (2002) (per curiam) (statistics regarding nationwide racial disparities in charging and plea bargaining practices in federal capital cases do not alone demonstrate both discriminatory effect and intent to entitle defense to discovery on claim of selective prosecution because such statistics say nothing about charges brought against similarly-situated defendants)

Massaro v. United States, 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003) (an ineffective assistance of counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal)

### **HABEAS CORPUS**

Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1992) (the harmless error standard to be applied by federal courts, in assessing on habeas review the impact of trial error (in this case, the use of defendant's post-*Miranda*-warnings silence for impeachment) is whether the error "had substantial and injurious effect or influence in determining the jury's verdict," not whether the error was harmless beyond a reasonable doubt)

Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992) (when failure to develop evidence in state court proceedings is attributable to petitioner, federal evidentiary hearing will be granted only when petitioner can show cause and prejudice, or that "fundamental miscarriage of justice" will occur) [*Note: AEDPA subsequently codified threshold showing of diligence required by this case but superseded cause and prejudice test governing evidentiary hearings in federal court*]

Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1992) (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 relief presented in this case where assertion of innocence is unpersuasive and raised ten years after trial and beyond the state time limitation on newly discovered evidence; Texas' failure to allow consideration of newly discovered evidence of innocence did not violate fundamental fairness)

Dobbs v. Zant, 506 U.S. 357, 113 S.Ct. 835, 122 L.Ed.2d 103 (1993) (per curiam) (remanded for determination of whether issue of ineffective assistance of counsel should be reconsidered under manifest injustice exception to law of the case requirement to take into account a transcript of closing argument that was not discovered until after district court had denied the claim; transcript was highly relevant and delay in its discovery was due to state's inaccurate statements to state and federal courts that arguments were not transcribed)

McFarland v. Texas, 512 U.S. 849, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994) (federal court must appoint counsel to an eligible capital defendant and has jurisdiction to stay his execution even though a petition for relief pursuant to 26 U.S.C. §2254 has not yet been filed; 21 U.S.C. §848(q)(4)(B), providing for appointment of counsel in capital cases, includes the right to legal assistance in preparing a petition; a case is pending, and thus the court has jurisdiction to grant a stay of execution, once the capital petitioner has invoked his right to appointed counsel pursuant to §848(q)(4)(B))

Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (standard of Murray v. Carrier, that constitutional violation “probably resulted” in conviction of an innocent person, rather than Sawyer v. Whitley, requiring but for showing by clear and convincing evidence, governs miscarriage of justice inquiry when death sentenced prisoner raises claim of actual innocence to avoid procedural default to consideration of merits of constitutional issue)

O’Neal v. McAninch, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995) (where constitutional error is found in federal habeas proceeding, the error is not harmless and relief must be granted if the court is in grave doubt about whether the error had a substantial and injurious effect or influence in determining the jury’s verdict)

Lonchar v. Thomas, 517 U.S. 314, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996) (federal court may not dismiss a first petition for ad hoc equitable reasons but only if authorized to do so by the rules; Rule 9(a) permits dismissal based on delay in filing only where state has been prejudiced by the delay, a finding not made in this case; where a district court cannot dismiss a first federal petition on the merits before a scheduled execution, it must dispose of the petition on its merits and grant a stay if necessary to enable it to do so before the petitioner is executed)

Felker v. Turpin, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) (barriers to federal relief on successive petitions placed on state prisoners by the Anti-terrorism and Effective Death Penalty Act do not violate constitution or improperly infringe on the jurisdiction of the Supreme Court; the Court retains jurisdiction under 28 U.S.C. §2241 and 2254 to hear habeas petitions filed as original matters)

Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (general provisions of AEDPA do not apply retroactively to cases which have already been filed in federal district court before act was passed)

Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (after petitioner’s trial, trial judge convicted of taking bribes; petitioner sought discovery in federal habeas action, rule 6(a) alleging that in this case judge was biased against him; petitioner alleged that as judge took bribes in certain cases, in those cases judge was biased in favor of defendants; simultaneously, in order to camouflage misconduct, judge would have “compensatory” bias against those defendants, such as petitioner, who did bribe not him; this allegation was “good cause” to entitle petitioner to discovery under Rule 6(a); presumption that public officials properly have discharged their duties has been rebutted in this case by judge’s conviction of bribery and proffer by state which also showed that petitioner’s counsel, former associate of judge’s, was appointed precisely to cooperate in swift movement of petitioner’s case which would assist in covering up for bribery negotiations in other cases; while it would be abuse of discretion on these facts to deny discovery, scope of same is in District Court’s discretion)

Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998) (petitioner’s claim that he was incompetent to be executed, raised for second time after his first claim was dismissed by district court as premature, was not second or successive petition under AEDPA and had to be considered)

Calderon v. Ashmus, 523 U.S. 740, 118 S.Ct. 1694, 140 L.Ed.2d 970 (1998) (vehicle of class action seeking declaratory relief may not be used to challenge state’s claim to be entitled to benefit of Ch. 154 opt-in provisions of AEDPA, because no case or controversy exists)

Williams (Michael) v. Taylor, 529 U.S.420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) (AEDPA does not bar evidentiary hearings in federal court unless there was lack of diligence, or some greater fault, attributable to defendant or his counsel that led to failure to develop claim's factual basis; this is similar showing to that required by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992), prior to enactment of AEDPA)

Williams (Terry) v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (the AEDPA's "contrary to" clause means a state court decision that is either opposite to a conclusion reached by a U.S. Supreme Court case on a question of law or is different from a U.S. Supreme Court decision on a set of materially indistinguishable facts; the AEDPA's "unreasonable application" clause is an objective, not subjective test, that means a state court decision that, while identifying the correct governing legal principle from U.S. Supreme Court decisions, unreasonably applies that principle to the facts of the defendant's case; the Court does not decide whether "unreasonable application" also means improper extension of a legal principle to a new context or the unreasonable failure to extend a legal principle to a new context)

Carey v. Saffold, 536 U.S. 214, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002) (an application for state collateral review is "pending," within the meaning of 28 *U.S.C.* § 2244(d)(2), in the state courts so as to toll time period for seeking federal habeas relief during the time between a lower state court's decision and the filing of a notice of appeal to a higher state court)

Woodford v. Visciotti, 537 U.S. 19, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (under 28 *U.S.C.* §2254(d), petitioner must do more than convince a federal habeas court that state court applied the appropriate legal test incorrectly; the federal habeas scheme leaves primary responsibility for these judgments with the state courts, authorizing federal court intervention only when a state court decision is objectively unreasonable)

Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (as per Slack v. McDaniel, 529 U.S. 473 (2000), a prisoner seeking a certificate of appealability after denial of federal habeas relief need only demonstrate "a substantial showing of the denial of a constitutional right"; this standard is satisfied by demonstrating that reasonable jurists could debate whether (or agree that) the petition should have been resolved in a different manner; the court of appeals should engage only in a threshold inquiry—the question is the debatability of the underlying constitutional claim, not the resolution of that debate)

Mitchell v. Esparza, 540 U.S. 12, 124 S.Ct. 7, 157 L.Ed.2d 263 (2003) (decision to apply harmless error review to trial court's failure to comply with state sentencing procedures did not result in a decision that was "contrary to" or an "unreasonable application of clearly established federal law"; federal court was thus barred from granting habeas relief by the AEDPA)

Nelson v. Campbell, 541 U.S. 637, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004) (42 *U.S.C.* §1983 appropriate vehicle for petitioner's Eighth Amendment claim seeking temporary stay of execution and permanent injunction against use of procedure wherein 2-inch incision would be made into his arm or leg in order to give access to his veins for lethal injection; claim was not functional equivalent of "second or successive" habeas petition subject to limitations imposed by AEDPA)

Tennard v. Dretke, 524 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004) (COA should have issued where “reasonable” jurists could disagree with district court’s assessment that petitioner’s evidence of low IQ was not relevant mitigating evidence)

Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (5<sup>th</sup> Cir. Erred in denying petitioner COA on Brady claim where petitioner established cause and prejudice even where petitioner did not raise claim in petition but did present evidence of claim before magistrate)

Rhines v. Weber, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005) (district court has discretion to stay mixed petition to allow petitioner to present unexhausted claims in state court and then to return to federal court where district court determines good cause was shown for petitioner’s failure to exhaust claims first in state court)

Allen v. Siebert, 552 U.S. 3, 128 S.Ct. 2, 169 L.Ed.2d 329 (2007) (state postconviction petition that is rejected as untimely by a state court is not “properly filed” within the meaning of the Antiterrorism and Effective Death Penalty Act; accordingly, the AEDPA 1-year statute of limitations is not tolled)

Magwood v. Patterson, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2788, \_\_\_ L.Ed.2d \_\_\_ (2010) (under §2244(b) as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the bar on second or successive habeas corpus applications does not apply to applications challenging a new judgment for the first time)

Holland v. Florida, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010) (the one-year statute of limitations on petitions for federal habeas relief is subject to equitable tolling under extraordinary circumstances – i.e., serious attorney misconduct)

Cullen v. Pinholster, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) reh’g denied, 131 S.Ct. 2951 (2011) (review under 28 U.S.C. § 2254(d)(1) is limited to the record before the state court that ruled on the claim on the merits; when deciding claims that were not adjudicated on the merits in state court, § 2254(e)(2), at a minimum, still restricts the discretion of federal habeas courts to consider new evidence)

Harrington v. Richter, \_\_\_ U.S. \_\_\_, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (28 U.S.C. § 2254(d) applies even when a state court issues a summary opinion that does not explain its decision; federal appeals court failed to show deference to state court’s denial of an ineffective assistance claim by completing a *de novo* review rather than addressing state court’s reasonableness in reaching its decision)

Wall v. Kholi, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1278, 179 L.Ed.2d 252 (2011) (motion to reduce sentence that state prisoner filed in accordance with state law, as post-conviction motion that was not part of direct review process, and which required a reexamination of sentence, qualified as one for “collateral review,” thereby tolling AEDPA’s one-year statute of limitations)

**HABEAS CORPUS – ABUSE OF THE WRIT**

McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) (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 (1977); here discovery of factual basis for a claim under Massiah v. United States, 377 U.S. 201 (1964), because the petitioner had enough information to put the claim in his first petition even though he did not know at that time about the critical witness who established the constitutional violation)

Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992) (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, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992) (per curiam) (vacating stay, over two dissents, of Robert Alton Harris execution in California on issue of unconstitutionality of execution by lethal gas where the issue had not been raised in prior habeas proceedings)

Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (standard of Murray v. Carrier, that constitutional violation “probably resulted” in conviction of an innocent person, rather than Sawyer v. Whitley, requiring but for showing by clear and convincing evidence, governs miscarriage of justice inquiry when death sentenced prisoner raises claim of actual innocence to avoid procedural default to consideration of merits of constitutional issue)

Lonchar v. Thomas, 517 U.S. 314, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996) (federal court may not dismiss a first petition for ad hoc equitable reasons but only if authorized to do so by the rules; Rule 9(a) permits dismissal based on delay in filing only where state has been prejudiced by the delay, a finding not made in this case; where a district court cannot dismiss a first federal petition on the merits before a scheduled execution, it must dispose of the petition on its merits and grant a stay if necessary to enable it to do so before the petitioner is executed)

Felker v. Turpin, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) (barriers to federal relief on successive petitions placed on state prisoners by the Anti-terrorism and Effective Death Penalty Act do not violate constitution or improperly infringe on the jurisdiction of the Supreme Court; the Court retains jurisdiction under 28 U.S.C. §2241 and 2254 to hear habeas petitions filed as original matters)

***HABEAS CORPUS – PRESUMPTION OF CORRECTNESS***

Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983) (per curiam) (federal court must accord deference to Florida Supreme Court's factual finding that sentencing judge did not improperly consider future dangerousness as an aggravating factor; where Florida Supreme Court independently reweighed aggravating and mitigating circumstances, there was not Eighth Amendment violation)

Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991) (federal court must accord deference to state appellate court determination of trial court's factual findings unless state court's conclusions are not fairly supported by record)

Burden v. Zant, 498 U.S. 433, 111 S.Ct. 862, 112 L.Ed.2d 962 (1991) (federal court of appeals, in rejecting conflict-of-interest claim based upon public defender office representing defendant and negotiating immunity for key witness for 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) to the finding in trial judge's report to state supreme court that the witness testified under grant of immunity)

Burden v. Zant, 510 U.S. 132, 114 S.Ct. 654, 126 L.Ed.2d 611 (1994) (per curiam) (after remand from Supreme Court, the court of appeals again denied relief; Supreme Court holds that decision of court of appeals was grounded on manifest mistake as district court order did not contain finding relied upon by court of appeals and evidence strongly supported petitioner's contention that immunity had been granted to testifying codefendant)

Greene v. Georgia, 519 U.S. 145, 117 S.Ct. 578, 136 L.Ed.2d 507 (1996) (per curiam) (state appellate courts not required to accord presumption of correctness to trial courts' findings of juror bias, deference standard is applied only in federal habeas review)

Woodford v. Visciotti, 537 U.S. 19, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam) (federal court may grant relief only if state court applied federal law in objectively unreasonable manner and not simply because it finds state court applied federal law incorrectly)

Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (holding that state court applied federal ineffectiveness standard from Strickland "objectively unreasonably" and that an attorney's strategic judgments are reasonable only to extent supported by investigation)

Mitchell v. Esparza, 540 U.S. 12, 124 S.Ct. 7, 157 L.Ed.2d 263 (2003) (per curiam) (federal court may not overrule state court simply for holding view different from its own when Supreme Court precedent on issue is ambiguous. State court's

finding not “contrary to” clearly established Supreme Court precedent when neither reasoning nor result of state decision contradicts it)

Bell v. Cone, 543 U.S. 447, 125 S.Ct. 847, 160 L.Ed.2d 881 (2005) (per curiam) (finding state supreme court properly applied state’s narrowed construction of “heinous, atrocious or cruel” aggravating circumstance because although court did not explicitly cite to state case that contained narrowed definition, state supreme court had applied definition numerous times before and its reasoning in this case closely tracked its rationale for applying HAC in other cases)

Jefferson v. Upton, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2217, 176 L.Ed.2d 1032 (2010) (per curiam) (during a federal habeas corpus proceeding, the state habeas court’s findings do not automatically warrant a presumption of correctness)

### *INNOCENCE*

Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1992) (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 relief presented in this case where assertion of innocence is unpersuasive and raised ten years after trial and beyond the state time limitation on newly discovered evidence; Texas’ failure to allow consideration of newly discovered evidence of innocence did not violate fundamental fairness)

Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992) (petitioner who claims actual innocence of death penalty must show by clear and convincing evidence that but for constitutional error, no reasonable juror would have found petitioner eligible for death penalty under applicable state law)

Delo v. Blair, 509 U.S. 823, 113 S.Ct. 2922, 125 L.Ed.2d 751 (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; Court holds no substantial grounds were alleged upon which relief could be granted and that it was an abuse of discretion for the court of appeals to interfere with orderly progress of state proceedings when the case was virtually indistinguishable from Herrera v. Collins)

Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (standard of Murray v. Carrier, that constitutional violation “probably resulted” in conviction of an innocent person, rather than Sawyer v. Whitley, requiring but for showing by clear and convincing evidence, governs miscarriage of justice inquiry when death sentenced prisoner raises claim of actual innocence to avoid procedural default to consideration of merits of constitutional issue)

House v. Bell, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (evidence of actual innocence need not conclusively establish petitioner's innocence to overcome procedural default in habeas corpus proceedings – i.e., standard for invoking actual innocence exception is not equivalent to the standard which governs insufficient evidence; also, AEDPA standard of review has not displaced Schlup inquiry)

In re Davis, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1, 174 L.Ed.2d 614 (2009) (Court grants petition for an original writ of habeas corpus and remands to district court to hold an evidentiary hearing to determine whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence)

### ***INTERNATIONAL LAW***

Breard v. Greene, 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 259 (1998) (per curiam) (rules of procedural default apply to Vienna Convention on Consular Relations; very doubtful, even if timely raised, that claim based on Convention would result in overturning of conviction absent some showing treaty violation affected trial)

Federal Republic of Germany v. United States, 526 U.S. 111, 119 S.Ct. 1016, 143 L.Ed.2d 192 (1999) (denying motion of Federal Republic of Germany to file complaint seeking stay of execution of German national by Arizona; court notes tardiness of complaint and the lack of likely merit in support of denial; motion relied upon pending action in International Court of Justice and the Vienna Convention)

Medellin v. Dretke, 544 U.S. 660, 125 S.Ct. 2088, 161 L.Ed.2d 982 (2005) (per curiam) (certiorari review of defendant's habeas corpus petition, alleging that his rights under the Vienna Convention were violated, was improvidently granted where Texas state courts may provide defendant with the relief he seeks)

Garcia v. Texas, \_\_\_ U.S. \_\_\_, 131 S.Ct. 2866 (2011) (per curiam) (stay of execution due to proposed legislation regarding the right to consular assistance for foreign nationals was not warranted)

### ***JURISDICTION***

Lawrence v. Florida, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2006) (statute of limitations is not tolled under AEDPA while a request for a writ of certiorari that challenged a state court's denial for collateral review is pending in the Supreme Court)

Panetti v. Quarterman, 551 U.S. 930, 127 S. Ct. 2842; 168 L. Ed. 2d 662 (2007) (habeas petitioner's new Ford claim not barred by AEDPA's limitations on "second or successive" federal habeas petitions when the claim was not ripe until petitioner's date of execution was set and there was a possibility that the petitioner's mental capacity had diminished during his incarceration)

Skinner v. Switzer, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011) (federal courts have subject matter jurisdiction over Section 1983 lawsuits seeking DNA testing of evidence to challenge a state conviction; such claims need not be confined to habeas corpus petitions)

### ***JURY INSTRUCTIONS – GUILT PHASE – BURDEN-SHIFTING***

Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) (jury instructions that the acts of a person of sound mind and discretion are presumed to be the product of a person's will, but the presumption may be rebutted created a mandatory rebuttable presumption that shifted the burden of persuasion on the element of intent to the defendant in violation of the due process clause; not harmless)

Yates v. Aiken, 484 U.S. 211, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988) (the Court's holding in Francis v. Franklin held to be retroactively applicable to South Carolina state habeas petitioner who received a similar burden-shifting charge at his 1981 capital trial, the holding in Francis did not announce a "new rule" and therefore is not precluded from retroactive application)

Yates v. Evatt, 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991) (where jury instructed to presume malice from use of a deadly weapon, South Carolina applied erroneous standard in finding that Sandstrom error was harmless in light of court's failure to consider defendant's defense or jury's likely interpretation of unconstitutional instruction; error not harmless)

### ***JURY INSTRUCTIONS – GUILT PHASE – LESSER INCLUDED OFFENSES***

Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (Alabama's preclusion of consideration of lesser included offenses at guilt phase where evidence would support such an instruction held unconstitutional)

Hopper v. Evans, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982) (Alabama's preclusion of consideration of lesser included offenses did not violate constitutional rights of defendant where evidence was insufficient to require lesser included offense instruction)

Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (trial judge did not err in refusing to instruct on lesser included offenses after defendant refused to waive the statute of limitations as to those lesser offenses in exchange for jury instructions regarding those offenses)

Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (Beck not violated when state law does not provide for lesser included offense of robbery where jury instructed on second degree murder)

Hopkins v. Reeves, 524 U.S. 88, 118 S.Ct. 1895, 141 L.Ed.2d 76 (1998) (constitution does not require that instructions on lesser offenses be given in capital case unless state law recognizes those lesser offenses as lesser included offenses of capital charge)

#### ***JURY INSTRUCTIONS – GUILT PHASE – REASONABLE DOUBT***

Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) (instruction defining reasonable doubt in terms of “grave” or “substantial” uncertainty and of need for “moral certainty” held to violate due process clause)

Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (constitutionally deficient reasonable doubt instruction, *see* Cage v. Louisiana, 498 U.S. 39 (1990), cannot be harmless error)

Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (capital conviction obtained on verdict form allowing either intentional or felony murder conviction does not violate unanimity requirement, since state constitutionally permitted to allow combination of paths to same verdict)

Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (and Sandoval v. California) (trial court does not have to define concept of “reasonable doubt” or use particular terms in doing so; use of term “moral certainty” while not condoned was not error because it was conjoined with reference to “abiding conviction”; use of terms “substantial doubt” and “strong possibilities” did not lessen state’s burden of proof when taken in context of entire charge)

***JURY INSTRUCTIONS – SENTENCING PHASE***

California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) (California law requiring instruction as to governor's power to commute life sentence without possibility of parole held not to violate the Constitution)

California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) (jury instruction, given at the penalty phase, stating that jurors "must not be swayed by mere . . . sympathy" or by mere sentiment, conjecture, passion, prejudice, public opinion or public feeling does not violate the Eighth and Fourteenth Amendment requirement that sentencer be allowed to consider any relevant mitigating evidence regarding the defendant's character or record and the circumstances of the offense)

Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) (death sentence unconstitutional where advisory jury was instructed to consider only mitigating factors set out in state statute and sentencing judge refused to consider nonstatutory mitigating factors)

Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) (Maryland death penalty sentencing instructions which a reasonable juror could interpret as requiring unanimous findings by jury on absence as well as presence of mitigating factors held to be unconstitutional)

Franklin v. Lynaugh, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (trial court's refusal to give jury instructions concerning nature of mitigating evidence upheld on facts of this case because the only evidence introduced, which concerned Franklin's prison disciplinary record, could be considered in answering Texas' three statutory questions and any limitations created by the failure to instruct had no practical or constitutional effect)

Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 256, 106 L.Ed.2d 256 (1989) (death sentence vacated because trial court's instructions to the jury, which required the jury to answer the three special questions under Texas death penalty scheme, did not allow jury to consider as a mitigating factor evidence of the defendant's mental retardation and childhood abuse)

Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990) (instruction that jury could consider whether defendant was under influence of "extreme" duress or "substantially" impaired did not unconstitutionally preclude jury consideration of lesser degrees of duress or impairment where jury also instructed that it could consider "any other matter")

Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (Eighth Amendment not violated by penalty phase instruction that if jury concludes aggravating circumstances outweigh mitigating circumstances, it "shall" impose a sentence of death; in light of other instructions also given there was no "reasonable likelihood" jurors construed

penalty phase instruction to consider circumstances which “extenuate gravity of crime” in way that prevented its consideration of relevant mitigation evidence)

McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990) (North Carolina’s death penalty statute which requires sentencing jury to find a mitigating factor unanimously before it can consider it violates Mills v. Maryland, 486 U.S. 367 (1988))

Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) (per curiam) (limiting instruction defining “especially heinous, atrocious, or cruel” aggravating circumstance as “extremely wicked,” “outrageously wicked and vile” and “designed to inflict a high degree of pain” not constitutionally deficient)

Delo v. Lashley, 507 U.S. 272, 113 S.Ct. 1222, 122 L.Ed.2d 620 (1993) (per curiam) (constitution does not require instruction that lack of criminal history could be considered in mitigation, where neither defendant or prosecution offered evidence on defendant’s criminal history or lack thereof)

Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (where future dangerousness is at issue and state law prohibits parole if defendant sentenced to life in prison, due process requires that jury be informed – either by instruction or argument of counsel – that only alternative to death sentence is sentence of life without parole)

Tuilaepa v. California, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) (and Proctor v. California) (under California law, a person is eligible for death penalty if found guilty of first-degree murder accompanied by one or more statutorily enumerated “special circumstances;” at the penalty phase, the jury is instructed to consider other statutory factors – including the circumstances of the crime, the defendant’s prior record, and the defendant’s age – in deciding whether to impose death; Court holds that the fact that jury is not instructed how to weigh the sentencing factors does not render them unconstitutional)

O’Dell v. Netherland, 521 U.S. 151, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) (during penalty phase, state introduced evidence, *inter alia*, of petitioner’s crimes committed while he was on parole; request for instruction that if sentenced to life in this case, petitioner would not be eligible for parole was denied; jury found and relied on future dangerousness as aggravating factor; Simmons v. South Carolina is new rule which is Teague barred from application to this case which became final before Simmons was decided)

Buchanan v. Angelone, 522 U.S. 269, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998) (Eighth Amendment does not require that capital jury be instructed on concept of mitigating evidence generally, nor that any definitional instruction be given on particular statutory mitigating circumstances)

Hopkins v. Reeves, 524 U.S. 88, 118 S.Ct. 1895, 141 L.Ed.2d 76 (1998) (state trial courts are not constitutionally required to instruct capital juries on offenses that are not lesser-included offenses of charged crime under state law)

Jones v. United States, 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) (no requirement in federal death case of jury instruction on consequence of jury deadlock, though reaffirming that deadlock results in life sentence; rejects claim that jury wrongly led to believe that failure to agree would result in sentence less than life imprisonment)

Weeks v. Angelone, 528 U.S. 225, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000) (Where jurors asked the court during deliberations whether they were required to impose the death penalty if they found that an aggravating factor had been proved beyond a reasonable doubt, the trial court did not err in referring the jury to a relevant portion of a constitutionally valid jury instruction and there was no duty to give additional clarifying instructions)

Ramdass v. Angelone, 530 U.S. 156, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000) (in the context of Virginia's three-strike law, the Simmons rule – which requires that the jury be informed if the only alternative to a death sentence is life without parole – does not apply where, even though a separate jury had entered a guilty verdict on the third felony charge, the trial judge in that case had not entered a final judgment at the time the jury rendered the death sentence in the present case)

Shafer v. South Carolina, 532 U.S. 36, 121 S.Ct. 1263, 149 L.Ed.2d 178 (2001) (interpreting Simmons, Court holds that trial court errs, in case in which state offers evidence of future dangerousness, in refusing to instruct jury that sentence of life imprisonment, under circumstances of case and state law, means life without eligibility for parole)

Penry v. Johnson, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (Texas three question sentencing format, in light of jury instructions and all circumstances of case, did not adequately allow the jury to consider mitigating evidence of mental retardation)

Kelly v. South Carolina, 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002) (trial court violated Simmons by failing to instruct jury on defendant's parole ineligibility)

Ayers v. Belmontes, 549 U.S. 7, 127 S. Ct. 469, 166 L. Ed. 2d 334 (2006) (California's "factor (k)" jury instruction upheld as valid because there was not a reasonable likelihood that sentencing jurors interpreted the instruction to preclude consideration of petitioner's forward-looking mitigating evidence, namely, that he would lead a constructive life if imprisoned rather than executed)

Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (a judge's failure to submit to the jury a sentencing factor that enhanced the defendant's sentence was not structural error and thus the defendant's sentence was not required to be vacated)

Abdul-Kabir v. Quarterman, 550 U.S. 233, 127 S. Ct. 1654, 167 L. Ed. 2d 585 (2007) (Texas jury instructions (a.k.a. "special issues") improperly precluded sentencing jurors from considering and giving meaningful effect to petitioner's mitigating evidence of neurological damage and childhood neglect and abandonment; therefore, petitioner was entitled to habeas relief under AEDPA)

Brewer v. Quarterman, 550 U.S. 286, 127 S. Ct. 1706, 167 L. Ed. 2d 622 (2007) (Texas "special issues" did not provide petitioner's sentencing jury with an adequate opportunity to decide whether constitutionally relevant mitigating evidence that functions as a "double edged sword" might provide a legitimate basis for imposing a sentence other than death)

Smith v. Texas, 550 U.S. 297, 127 S. Ct. 1686, 167 L. Ed. 2d 632 (2007) (petitioner's claim that the Texas "special issues" prevented the jury from adequately considering mitigating evidence was properly preserved, requiring application of harmless error standard; the trial court's failure to submit adequate jury instruction allowing capital sentencing jury to consider mitigating evidence was not harmless error)

Smith v. Spisak, \_\_\_ U.S. \_\_\_, 130 S.Ct. 676, \_\_\_ L.Ed.2d \_\_\_ (2010) (capital defense attorney's closing argument did not prejudice defendant for purposes of ineffective assistance of counsel; instructions and jury forms at penalty phase did not unconstitutionally require jury to consider in mitigation only those factors that jury unanimously found to be mitigating)

Bobby v. Mitts, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1762, 179 L.Ed.2d 819 (2011) (per curiam) (penalty phase jury instructions did not improperly influence the jury to impose a death sentence, violating due process, because there was no risk that jury was forced to choose between finding guilt of a capital offense and declaring defendant innocent)

### ***JURY'S ROLE IN CAPITAL SENTENCING***

Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (Florida law allowing judge to override the jury's recommendation of a life sentence is constitutional, does not constitute double jeopardy, and does not violate the constitutional requirement of reliability in capital sentencing)

Cabana v. Bullock, 474 U.S. 106 S.Ct. 689, 88 L.Ed.2d 704 (1986) fact-finding required by Eighth Amendment as prerequisite to imposing death penalty, that defendant killed, attempted to kill or intended killing, may be made by trial court or state appellate court) [Note: *abrogated by* Pope v. Illinois, 481 U.S. 497 (1987), and *implicitly overruled by* Ring v. Arizona, 536 U.S. 584 (2002)]

Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (Sixth Amendment does not require jury which renders advisory sentencing verdict under Florida death penalty statute specify which aggravating circumstances justify imposition of death penalty)

Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (Arizona death penalty scheme which provides that judge sentence based upon a findings of aggravating and mitigating factors made without jury does not violate Sixth Amendment) [Note: *overruled in relevant part by* Ring v. Arizona, 536 U.S. 584 (2002)]

Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) (where state scheme provides for weighing of aggravating and mitigating factors, upon invalidation of one aggravating circumstance relied upon by the jury, appellate court may constitutionally reweigh and determine whether death sentence is nevertheless appropriate)

Tuggle v. Netherland, 516 U.S. 10, 116 S.Ct. 283, 133 L.Ed.2d 251 (1995) (where jury found both future dangerousness and vileness aggravators and sentenced petitioner to death but future dangerousness aggravator set aside based on Ake violation, Zant v. Stephens does not ensure the death sentence was based on a valid aggravator where evidence in support of the invalidated aggravator should not have been considered by the jury; under Zant v. Stephens, death sentence may be saved by existence of valid aggravator even after invalidation of other aggravator if evidence on which invalid aggravator was based was properly before the jury, but where such evidence was not properly before the jury, existence of valid aggravator will not necessarily insulate death sentence)

Harris v. Alabama, 513 U.S. 504, 130 S.Ct. 1004, 115 L.Ed.2d 1031 (1995) (upholding constitutionality of Alabama's override scheme by concluding that Eighth Amendment does not "require the state to define the weight the sentencing judge must give to an advisory verdict")

Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (Arizona's death penalty sentencing statute, which allowed a judge, sitting without a jury, to find aggravating circumstances necessary for imposition of the death penalty violates the Sixth Amendment right to a jury trial which requires that any finding necessary to enhance punishment be made by a jury, Apprendi v. New Jersey, 530 U.S. 466 (2000); *overruling* in relevant part Walton v. Arizona, 497 U.S. 639 (1990).

Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) (Ring v. Arizona, does not apply retroactively to cases on collateral review)

***JURY SELECTION – “DEATH QUALIFICATION”***

Wainwright v. Witt, 469 U.S. 810, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (standard for determining when a prospective juror in a capital case may be excluded for cause because of view on capital punishment is whether the juror’s views would prevent or substantially impair the performance of his duties in accordance with his instructions and oath; state court’s determination of excuse juror for cause is a finding of fact subject to presumption of correctness accorded by 28 U.S.C. 2254(d))

Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) (“a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”)

Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) (removal of jurors merely because of general scruples against capital punishment denies due process right to impartial jury; juror may be excluded for cause only if he makes it “unmistakably clear” that he would automatically vote against the death penalty or that he could not be impartial as to guilt)

Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (voir dire on “reverse-Witherspoon” issue of jurors’ inability to consider a life sentence constitutionally required)

Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988) (trial judge’s error in not removing for cause a prospective juror who stated that he would automatically vote for the death penalty if he found the defendant guilty did not require reversal in this case because the defense attorney exercised a peremptory strike against juror, and therefore the jury finally seated was impartial)

Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) (removal for cause at guilt phase of persons whose attitudes toward capital punishment would prevent or substantially impair the performance of their duties at the punishment phase does not violate Sixth Amendment right to impartial jury or to jury drawn from fair cross-section of community)

Greene v. Georgia, 519 U.S. 145, 117 S.Ct. 578, 136 L.Ed.2d 507 (1996) (summary reversal; state supreme court erroneously thought itself bound by standard of review in Wainwright v. Witt, requiring deference to trial court findings, as that standard is required only on federal habeas not on direct appeal)

Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (exclusion of juror because of attitudes about the death penalty upheld under Witt)

Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) (erroneous exclusion of juror because of attitudes regarding the death penalty is not subject to harmless error analysis even when prosecutor has unexercised peremptory challenge at the end of jury selection; nor can improper exclusion serve as remedy for the erroneous denial of prosecution's challenge of another juror)

Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976) (death penalty cannot stand where one juror excluded in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968))

Uttecht v. Brown, 551 U.S. 1, 127 S. Ct. 2218, 167 L. Ed. 2d 1014 (2007) (even where a potential juror offers no objection to the death penalty and states clearly that he will follow the applicable law, it is not contrary to clearly established federal law to exclude the juror for cause under the Witherspoon-Witt "substantially impaired" standard)

#### ***JURY SELECTION – PRETRIAL PUBLICITY***

Mu'Min v. Virginia, 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991) (voir dire procedures not constitutionally inadequate where jurors asked whether they had been exposed to media coverage of the case, and whether they could put what they had seen aside, but not what they had seen)

#### ***JURY SELECTION – RACIAL BIAS***

Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) (defendant in a capital case accused of an interracial crime is entitled under the Sixth and Fourteenth Amendments to have jurors informed of race of victim and questioned on issue of racial bias question; here refusal to do so requires death sentence be vacated, but not conviction)

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (under Equal Protection Clause, a prosecutor's use of peremptory challenges may not be used to exclude potential jurors solely on account of their race; Batson's three-step analysis: first, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the

juror in question; third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination)

Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (prosecution's striking of African-American prospective jurors were contrary to Batson v. Kentucky because petitioner presented clear and convincing evidence that state's explanations for its peremptory strikes to remove ten of eleven black venire members were pretextual)

Amadeo v. Zant, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988) (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 memorandum directing jury commissioners to underrepresent blacks and women from jury pools was not discovered until a year after trial)

Snyder v. Louisiana, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (prosecution's strike of a black juror was contrary to Batson v. Kentucky because one reason for striking was not supported by the record (trial court not owed deference where there is no specific finding made as to juror's demeanor) and the other reason was deemed pretextual, giving rise to an inference of discriminatory intent; in light of all the circumstances, the record did not show that the prosecution would have preemptively challenged the juror based on its proffered race-neutral explanation alone)

Thaler v. Haynes, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1171, \_\_\_ L.Ed.2d \_\_\_ (2010) (per curiam) (in rejecting a demeanor-based explanation for a peremptory challenge under Batson, a judge need not have personally observed the aspect of the juror's demeanor on which the explanation is based)

Felkner v. Jackson, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1305, 179 L.Ed.2d 374 (2011) (per curiam) (no basis for the federal appeals court to hold that the state appellate court's decision to deny relief under Batson was unreasonable)

### **MEANS OF EXECUTION**

Gomez v. Fierro, 519 U.S. 918, 117 S.Ct. 285, 136 L.Ed.2d 204 (1996) (summary reversal of Ninth Circuit which had held execution by cyanide gas *per se* violative of Eighth Amendment prohibition against cruel and unusual punishment; Stevens and Breyer dissenting, court's order serves only to delay punishment as execution by lethal injection had been approved and could have proceeded)

Nelson v. Campbell, 541 U.S. 637, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004) (capital prisoner could challenge "cut-down"

procedure for lethal injection in civil rights action which did not constitute a “successive petition”)

Hill v. McDonough, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006) (inmates can file a §1983 action to challenge the method of execution – a habeas petition is not the only avenue to challenge an execution by lethal injection; in this case, inmate’s lethal injection was cognizable under §1983 and thus was not subject to dismissal as a second or successive habeas petition)

Baze v. Rees, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (Kentucky’s three-drug lethal injection protocol does not violate the Eighth Amendment as “cruel and unusual” because it does not pose a “substantial” or “objectively intolerable” risk of severe harm and Kentucky employs sufficient safeguards to ensure that the protocol is followed properly; nor does Kentucky’s failure to adopt proposed alternatives violate the Eighth Amendment since other states have not adopted such protocols and the comparative efficacy of those alternative methods has not been established)

### ***MITIGATING CIRCUMSTANCES***

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (death penalty schemes must allow consideration “*as a mitigating factor*, any aspect of the defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”)

Bell v. Ohio, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978) (death penalty reversed because statute precluded consideration of facts and circumstances proffered as mitigating circumstances)

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (sentencing court’s conclusion that it could not consider the defendant’s turbulent family history as a mitigating factor in deciding punishment was constitutional error)

Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (exclusion of evidence that defendant has adjusted well to incarceration between arrest and trial violates Lockett v. Ohio)

Truesdale v. Aiken, 480 U.S. 527, 107 S.Ct. 1394, 94 L.Ed.2d 539 (1987) (per curiam) (Court’s holding in Skipper is retroactive)

Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) (death sentence unconstitutional where advisory jury was instructed to consider only mitigating factors set out in state statute and sentencing judge refused to consider nonstatutory mitigating factors)

Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct 2934, 106 L.Ed.2d 256 (1989) (death sentence vacated because trial court's instructions to the jury did not allow jury to consider as a mitigating factor evidence of the defendant's mental retardation and childhood abuse)

Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (*Scalia, J., concurring*) (Justice Scalia announces that he will no longer vote to uphold a claim based upon Lockett v. Ohio, 438 U.S. 586 (1978), and its progeny that sentencer may not be precluded from considering any mitigating factor because he finds that line of decisions irreconcilable with the requirement that the sentencer's discretion be constrained by specific standards to prevent random and capricious imposition of the death penalty; Justice Stevens, in dissent, demonstrates that the approach followed by the Court since 1976 "is not only wiser, but far more just, than the reactionary position espoused by Justice Scalia")

Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991) (Florida Supreme Court erred in failing to consider nonstatutory mitigating evidence in determining whether trial court had properly overridden jury's recommendation of life sentence)

Johnson v. Texas, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (Texas statute does not unconstitutionally fail to provide capital sentencing jury with vehicle for giving effect to defendant's youth and other mitigating evidence; constitution requires that jury be allowed to consider all mitigation but states may shape consideration in order to obtain more rational and equitable imposition of death penalty)

Delo v. Lashley, 507 U.S. 272, 113 S.Ct. 1222, 122 L.Ed.2d 620 (1993) (per curiam) (constitution does not require instruction that lack of criminal history could be considered in mitigation, where neither defendant or prosecution offered evidence on defendant's criminal history or lack thereof)

Williams (Terry) v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (counsel was ineffective for failing to adequately investigate and present mitigating evidence and the defendant was prejudiced by counsel's ineffectiveness)

Penry v. Johnson, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (Texas three question sentencing format, in light of jury instructions and all circumstances of case, did not adequately allow the jury to consider mitigating evidence of mental retardation)

Tennard v. Dretke, 542 U.S. 274, 108 S.Ct. 1981, 100 L.Ed.2d 575 (2004) (COA should have issued where "reasonable jurists" could conclude evidence of petitioner's low IQ was relevant mitigating evidence and that state court's application of Penry v. Lynaugh, to facts of case was unreasonable)

Kansas v. Marsh, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006) (Kansas statute that directed the imposition of the death penalty when aggravating and mitigating factors are in equipoise is constitutional)

### ***PROCEDURAL DEFAULT***

Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (constitutional claim regarding admission of psychiatrist's testimony at sentencing phase procedurally defaulted because it was not raised on direct appeal; failure to raise the claim was not ineffective assistance of counsel and did not constitute "cause" since other similar claims were percolating in the lower courts at the time of the appeal; there was no "fundamental miscarriage of justice" where the constitutional error neither precluded the development of true facts nor resulted in the admission of false ones)

Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) (state procedural rule is not adequate for purposes of barring federal review unless it is "strictly or regularly followed")

Amadeo v. Zant, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988) (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 constitute "cause" to excuse the procedural default)

Dugger v. Adams, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989) (federal habeas corpus review of trial judge's statements that diminished jury's sense of responsibility for its sentencing decision precluded because defense lawyer did not object at trial or raise the issue on appeal; "cause" for the procedural default not provided by the Supreme Court's subsequent decision in Caldwell v. Mississippi because the judge's statements could have been challenged at trial or direct appeal on state law grounds but were not)

Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (where petitioner did not file notice of appeal from denial of state post-conviction relief until 3 days after deadline, state ruling "fairly appears" to rest on procedural ground, and federal habeas court must make determination that claims are procedurally barred under state law; to avoid default, petitioner must show cause and prejudice; since there is no right to counsel in post-conviction proceedings, attorney's error in failure to file notice cannot constitute "cause")

Ylst v. Nunnemaker, 501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) (if last state court to which federal claim is presented ignores state procedural default and addresses merits of claim, federal habeas courts do not have to enforce state default)

Ford v. Georgia, 498 U.S. 411, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991) (pretrial motion's reference to a pattern of excluding black venire members on basis of race was adequate to assert equal protection claim; Georgia Supreme Court could not bar consideration of Batson v. Kentucky claim based on procedural rule not announced until three years after defendant's trial)

Stewart v. LaGrand, 526 U.S. 115, 119 S.Ct. 1018, 143 L.Ed.2d 196 (1999) (claim challenging constitutionality of execution by gas waived because defendant given a choice of method and because claim not raised at earliest opportunity)

Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (court inquires into existence of cause and prejudice to excuse default of Brady claim; finds cause, but no prejudice)

Stewart v. Smith, 536 U.S. 856, 122 S.Ct. 2578, 153 L.Ed.2d 762 (2002) (per curiam) (state court's denial of prisoner's successive postconviction petition due to his failure to comply with state procedural rules was independent of federal law and thereby barred federal habeas review)

Massaro v. United States, 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003) (an ineffective assistance of counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal)

Evans v. Chavis, 546 U.S. 189, 126 S. Ct. 846, 163 L. Ed. 2d 684 (2006) (AEDPA's one-year limitation period tolls only if an appeal of a state habeas petition is timely; unreasonable delay of three years to the California Supreme Court is untimely, and a California Supreme Court order denying a petition on the merits does not automatically indicate that the petition was timely filed)

Day v. McDonough, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006) (district courts are permitted, but not required, to consider, sua sponte, the timeliness of a state prisoner's habeas petition; before acting on its own initiative to dismiss the petition as untimely, the court must accord the parties fair notice and an opportunity to present their positions)

House v. Bell, 547 U.S. 518, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (evidence of actual innocence need not conclusively establish petitioner's innocence to overcome procedural default in habeas corpus proceedings – i.e., standard for invoking actual innocence exception is not equivalent to the standard which governs insufficient evidence; also, AEDPA standard of review has not displaced Schlup inquiry)

Cone v. Bell, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009) (state court's rejection of petitioner's Brady claim did not procedurally bar federal habeas review because the rejection was based on the ground that the claim had been previously determined rather than on petitioner's failure to raise the claim)

Beard v. Kindler, \_\_\_ U.S. \_\_\_, 130 S.Ct. 612, 175 L.Ed.2d 417 (2009) (a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review because nothing inherent in such a rule renders it inadequate for purposes of the adequate state ground doctrine)

Wellons v. Hall, \_\_\_ U.S. \_\_\_, 130 S.Ct. 727, \_\_\_ L.Ed.2d \_\_\_ (2010) (per curiam) (habeas petitioner's claims of judge, juror, and bailiff misconduct during trial were not procedurally barred from federal habeas review when the state court declined to review the merits of the claim on the ground that it had done so already)

Walker v. Martin, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1120, 179 L.Ed.2d 62 (2011) (California's time limitation on applications for habeas corpus relief, which requires prisoners to seek relief without substantial delay, was independent and adequate state law ground for the state court's denial of state habeas petition that prisoner filed nearly five years after his conviction became final)

#### ***PROPORTIONALITY REVIEW***

Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) (comparative proportionality review not constitutionally required where not part of state's statutory scheme for imposition of the death penalty)

#### ***PSYCHIATRIC TESTIMONY***

Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (testimony of psychiatrist based upon court-ordered psychiatric examination where defendant was not advised of the constitutional rights violates the Fifth, Sixth and Fourteenth Amendments)

Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) (psychiatric testimony regarding future dangerousness admissible at sentencing hearing at capital trial)

Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988) (use, in capital sentencing, of psychiatric evidence obtained in violation of accused's Sixth Amendment right to have counsel receive advance notice of examination, held not harmless error under circumstances)

Powell v. Texas, 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989) (State's use of psychiatric testimony on issue of future dangerousness violated the Sixth Amendment where no notice to defense counsel that examination by psychiatrist)

would be for that purpose; defendant did not waive his Sixth Amendment right to notice of the examination by introducing psychiatric testimony in support of insanity defense; error was not harmless beyond a reasonable doubt)

Penry v. Johnson, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (distinguishing Estelle where defendant did raise issues involving mental health, and where evidence used against unadvised defendant was developed by defendant's own expert)

### ***RACIAL DISCRIMINATION***

Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) (defendant in a capital case accused of an interracial crime is entitled under Sixth and Fourteenth Amendments to have jurors informed of race of victim and questioned on issue of racial bias question; here refusal to do so requires death sentence be vacated, but not conviction)

McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (statistical evidence which demonstrates disparity in imposition of death penalty due to race of victim and race of defendant held insufficient to show denial of equal protection or violation of Eighth Amendment; to prevail under the equal protection clause, a defendant must prove that the decision makers in his case acted with discriminatory purpose)

Amadeo v. Zant, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988) (habeas corpus relief granted where prosecutor conspired with jury commissioners to underrepresent women and black people in the jury venires)

United States v. Bass, 536 U.S. 862, 122 S.Ct. 2389, 153 L.Ed.2d 769 (2002) (statistics regarding nationwide racial disparities in charging and plea bargaining practices in capital cases do not, alone, satisfy the requirement of United States v. Armstrong, 517 U.S. 456 (1996) that in order to be entitled to discovery on a claim of selective prosecution the defendant must show some evidence of both discriminatory effect and discriminatory intent)

Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (prosecution's striking of African-American prospective jurors were contrary to Batson v. Kentucky because petitioner presented clear and convincing evidence that state's explanations for its peremptory strikes to remove ten of eleven black venire members were pretextual)

**RETROACTIVITY OF NEW DECISIONS**

Yates v. Aiken, 484 U.S. 211, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988) (per curiam) (holding Francis v. Franklin, retroactive to cases that were final when it was decided)

Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (rule announced would be retroactively applied because it was dictated by Lockett)

Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (if the Court were to agree that a sentencing instruction that the jury must avoid “any influence of sympathy” violated the Eighth Amendment would be a new constitutional rule, not compelled by Lockett and Eddings and not within either of the two exceptions in Teague v. Lane, and therefore inapplicable to petitioner in this case; state requirement that sentencing decision be based on “reasoned moral response” rather than emotions would not violate Eighth Amendment)

Sawyer v. Smith, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990) (Supreme Court’s decision in Caldwell v. Mississippi, 472 U.S. 320 (1985), that prosecutorial argument at penalty phase that diminishes the jury’s sense of responsibility for its decision, is a new rule and it not to be retroactively applied to a conviction that became final before Caldwell was announced)

Butler v. McKellar, 494 U.S. 347, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990) (Supreme Court decision in Arizona v. Roberson, 486 U.S. 675 (1988), which held that police may not question an accused a second time once he has invoked his right to counsel in connection with another crime, created a “new” rule of constitutional law and did not fit into either of the two exceptions under Teague v. Lane, 489 U.S. 288 (1989))

Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) (rules of Maynard v. Cartwright and Clemons v. Mississippi held to be retroactively applicable to cases where the direct appeal had been final prior to their decision; Maynard was controlled by Godfrey, even if the language of the instructions was a little different; difference between a weighing state and the Georgia scheme only lends significance to the Maynard error; where the Mississippi Supreme Court had construed its statutory scheme as similar to Florida’s, the federal courts should not disagree; thus, Mississippi was subject to the same rule against automatic affirmance as Florida)

Graham v. Collins, 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1992) (retroactivity principles of Teague v. Lane, 489 U.S. 288 (1989), prevent consideration of claim that the questions posed to the sentencing jury as part of the Texas capital sentencing scheme unconstitutionally limited the jury’s consideration of mitigating evidence, including age of 17 at time of crime; because claim that jury was limited in considering mitigating evidence, not that it was prevented from giving mitigating effect to the evidence, it depends upon announcement of a new rule of law)

Powell v. Nevada, 511 U.S. 79, 114 S.Ct. 1280, 128 L.Ed.2d 1 (1994) (even assuming it announced a new rule, Riverside v. McLaughlin applies retroactively to case pending on direct appeal when Riverside was decided; Court remands without expressing opinion on the possible remedies for violation of Riverside indicating that suppression would not necessarily be the correct remedy)

Goeke v. Branch, 514 U.S. 115, 115 S.Ct. 1275, 131 L.Ed.2d 152 (1995) (per curiam) (state's Teague argument held preserved in courts below because state mentioned nonretroactivity defense in its appellate brief)

Gray v. Netherland, 519 U.S. 1301, 117 S.Ct. 632, 136 L.Ed.2d 602 (1996) (a due process rule requiring that the state give notice to the defense of any evidence it intends to use to show future dangerousness at penalty phase of capital case would be new for Teague purposes and thus is not considered; case remanded to determine whether claim that petitioner was misled with regard to what the state intended to do was raised in lower federal courts)

Lambrix v. Singletary, 520 U.S. 518, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (although courts should normally decide questions of procedural bar before evaluating whether question is barred by Teague, Court goes directly to Teague question in order to avoid time consuming remand; rule announced in Espinosa is Teague barred from application to cases, such as this, which became final before Espinosa was decided)

O'Dell v. Netherland, 521 U.S. 151, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) (during penalty phase, state introduced evidence, *inter alia*, of petitioner's crimes committed while he was on parole; request for instruction that if sentenced to life in this case, petitioner would not be eligible for parole was denied; jury found and relied on future dangerousness as aggravating factor; Simmons v. South Carolina is new rule which is Teague barred from application to this case which became final before Simmons was decided)

Horn v. Banks, 536 U.S. 266, 122 S.Ct. 2147, 153 L.Ed.2d 301 (2002) (federal court in habeas proceeding must apply Teague analysis as a threshold inquiry before considering the merits, when the issue is properly raised by the state, even when the state court reached the merits without applying Teague; Court re-affirms that Teague and AEDPA are distinct and that petitioner must satisfy both in order to win relief)

Beard v. Banks, 542 U.S. 406, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (the rule in Mills v. Maryland, 486 U.S. 367 (1988), which held invalid a state jury instruction requiring juries to disregard any mitigating factors that they did not find unanimously, was new for purposes of retroactivity analysis under Teague v. Lane, 489 U.S. 288 (1989), was not a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" that would trigger an exception to Teague, and petitioner's sentence was final before Mills was decided; therefore, habeas petition denied)

Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) (the rule in Ring v. Arizona, 536 U.S. 584 (2002), which held invalid a state sentencing scheme that permitted a judge rather than a jury to find an aggravating factor, and did not require that the factor be found beyond a reasonable doubt, was a procedural rule, not a substantive

one; was new for purposes of retroactivity analysis under Teague v. Lane, 489 U.S. 288 (1989); was not a “watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding” that would trigger an exception to Teague; and petitioner’s sentence was final before Ring was decided; therefore, habeas petition was properly denied)

### ***SENTENCING – COERCED VERDICT***

Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (Court finds no coerced verdict where trial court orders further deliberation after jury deliberates until late in the evening, resumes deliberations the next day and then sends a note stating that it is unable to reach a verdict)

### ***SENTENCING HEARING***

Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) (exclusion of evidence at sentencing phase based upon Georgia’s hearsay rule held unconstitutional)

Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) (Eighth Amendment requires re-examination of Mississippi death sentence where one factor considered aggravation was a prior New York conviction, which was subsequently invalidated by the New York Court of Appeals)

Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) (per curiam) (where jury weighed invalid aggravator in rendering advisory death verdict, and trial court gave great weight to verdict in sentencing defendant to death, trial court’s indirect weighing of invalid aggravating factor violated Eighth Amendment)

Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) (evidence of defendant’s membership in white supremacist group introduced by state at penalty phase hearing was inadmissible and irrelevant to facts of case and not properly introduced to rebut defendant’s mitigating evidence)

Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (death sentence reversed on due process grounds where state rested its penalty phase argument in part on future dangerousness and court refused to give jury instruction that defendant would be ineligible for parole)

Tennard v. Dretke, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004) (test for relevance of mitigating evidence is the same as in any other context – namely, whether it makes any fact in controversy more or less likely; low IQ is inherently mitigating; jury instructions in sentencing phase were insufficient for jury in this case to consider and give effect to evidence of petitioner’s low IQ in violation of Eighth Amendment)

*See also cases under “Aggravating Circumstances,” “Mitigating Circumstances” and “Victim Impact”*

### **STAY / EXPEDITION OF EXECUTION**

Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) (expedited procedures in consideration of appeal of denial of habeas corpus relief in the federal court “tolerable”)

Delo v. Stokes, 495 U.S. 320, 110 S.Ct. 2162, 109 L.Ed.2d 325 (1990) (Supreme Court vacates stay granted by district court and upheld by court of appeals for consideration of whether equal protection violated by selective application of rules governing lesser included offenses instructions; Kennedy, concurring, invites states to apply to Court to vacate stays when federal courts of appeals fail to protect them “from the consequences of a stay entered without an adequate basis”)

In re Blodgett, 502 U.S. 236, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992) (state’s writ of mandamus for order requiring 9<sup>th</sup> Circuit to expedite decision of appeal on successor habeas denied, where state had failed to object to 9<sup>th</sup> Circuit’s order delaying decision in second petition challenging death sentence; court indicates that another writ may be allowed)

Delo v. Blair, 509 U.S. 823, 113 S.Ct. 2922, 125 L.Ed.2d 751 (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; Court holds no substantial grounds were alleged upon which relief could be granted and that it was an abuse of discretion for the court of appeals to interfere with orderly progress of state proceedings when the case was virtually indistinguishable from Herrera v. Collins)

McFarland v. Texas, 512 U.S. 849, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994) (federal court must appoint counsel to an eligible capital defendant and has jurisdiction to stay his execution even though a petition for relief pursuant to 26 U.S.C. §2254 has not yet been filed; 21 U.S.C. §848(q)(4)(B), providing for appointment of counsel in capital cases, includes the right to legal assistance in preparing a petition; a case is pending, and thus the court has jurisdiction to grant a stay of execution, once the capital petitioner has invoked his right to appointed counsel pursuant to §848(q)(4)(B))

Lonchar v. Thomas, 517 U.S. 314, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996) (federal court may not dismiss a first petition for ad hoc equitable reasons but only if authorized to do so by the rules; Rule 9(a) permits dismissal based on delay in filing only where state has been prejudiced by the delay, a finding not made in this case; where a district court cannot dismiss a first federal petition on the merits before a scheduled execution, it must dispose of the petition on its merits and grant a stay if necessary to enable it to do so before the petitioner is executed)

Bowersox v. Williams, 517 U.S. 345, 116 S.Ct. 1312, 134 L.Ed.2d 494 (1996) (per curiam) (vacating stay of execution granted by Eighth Circuit, which also scheduled oral argument, on third federal petition, because appellate court gave no explanation for the necessity of the “drastic measure” to grant a stay and oral argument on a successive petition and court could discern no substantial grounds meriting such action from the record)

Nelson v. Campbell, 541 U.S. 637, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004) (capital prisoner properly requested temporary stay of execution to challenge “cut-down” procedure officials planned to use to access his veins before carrying out lethal injection)

#### **VICTIM IMPACT**

Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (victim impact evidence is admissible at the sentencing phase of a capital trial so long as it does not violate fundamental fairness protected by the due process clause (partially overruling Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989))

Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) (introduction of a victim impact statement or evidence describing personal characteristics of the victim, the emotional impact of the crime on the victim’s family violates Eighth Amendment (*this part of decision overruled in Payne v. Tennessee above*); admission of family members’ opinions and characterizations of the crimes and the defendant violates Eighth Amendment)

South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989) (prosecutor reading of prayer found in victim’s possessions and argument about personal characteristics of victim in closing argument violated Eighth Amendment (*this holding overruled in Payne v. Tennessee*))

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*Please notify Lauren Sudeall Lucas (404-688-1202 or lslucas@schr.org) at the*

*Southern Center for Human Rights of any mistakes in, or omissions from, this list.*