STEVEN T. WAX
Federal Public Defender
STEPHEN R. SADY
Chief Deputy Defender
Bryan E. Lessley ▲
Christopher J. Schatz
Ellen C. Pitcher
Craig Weinerman ▲
Mark Bennett Weintraub ▲
Gerald M. Needham
Thomas J. Hester
Ruben L. Iñiguez
Anthony D. Bornstein
Lisa Hay
Tonia L. Moro +
Susan Russell
Patrick Ehlers
Francesca Freccero

FEDERAL PUBLIC DEFENDER
DISTRICT OF OREGON

101 SW Main Street, Suite 1700
Portland OR 97204
503-326-2123 / Fax 503-326-5524

Branch Offices:

859 Willamette Street
Suite 200
Eugene, OR 97401
541-465-6937
Fax 541-465-6975

15 Newtown Street
Medford, OR 97501
541-776-3630
Fax 541-776-3624

C. Renée Manes
Amy Baggio
Nell Brown
Kristina Hellman
Harold DuCloux III
Alison M. Clark
Brian Butler+
Thomas E. Price
Lynn Deffebach ⋆
Michelle Sweet ⋆
Banu Ramachandran ⋆

In memoriam
Nancy Bergeson
1951 - 2009

▲ Eugene Office
+ Medford Office
⋆ Research/Writing Attorney

Recent Supreme Court And Ninth Circuit Habeas Decisions: Why We Need Full Factual Development And Preservation Of Issues In State Court Litigation

Stephen R. Sady, Chief Deputy Federal Defender
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Introduction

Last Term, the Supreme Court decided three cases that underscore the importance of developing the record in state post-conviction proceedings and the extreme deference federal courts give to a state court's denial of relief: *Harrington v. Richter*, 131 S. Ct. 770 (2011), *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), and *Premo v. Moore*, 131 S. Ct. 733 (2011). After these cases, the Ninth Circuit has provided some guidance on the need to establish all the relevant facts and preserve all the federal issues during state court litigation in order for there to be meaningful review in federal court. At the same time, the Ninth Circuit en banc took a solid stand on the petitioner's side of the circuit split over the application of the actual innocence exception to the federal habeas corpus statute's one-year statute of limitations. While the actual innocence issue has not yet made its way to the Supreme Court, there are a number of big cert grants with habeas corpus issues to keep an eye on in the coming Term.

For those of us who litigate federal habeas corpus cases, the judicial landscape can look a bit post-apocalyptic. We seem like survivors desperately trying to keep going despite mindless federal rules intent on destroying our opportunity to redress federal constitutional violations. In such emergency conditions, we have had to develop Rules For Survival that, if internalized and consistently applied, can assure the best chance that a federal constitutional claim will survive the Antiterrorism and Effective Death Penalty Act (AEDPA)'s obstacles to reaching a federal court decision on the merits. For example,

Rule # 1
Double Tap: If The Issue's Worth Raising, It's Worth Federalizing.

We can only litigate federal constitutional issues in federal court, and the failure to raise the federal issue in state court dooms the chances for litigating in federal court. The State will simply argue that the petitioner's procedural default provides an adequate and independent reason for the denial without ever reaching the merits. The attached chart by AFPD Renée Manes sets out federal bases for state violations of rights to help make that double tap second nature. Recent federal opinions have reinforced the need for other AEDPA Rules Of Survival.

A. Last Term's *Richter*, *Moore*, And *Pinholster* Cases Confirmed And Deepened The Courts Determination To Make The State Proceedings The Primary Arena For Protection Of Federal Constitutional Rights.

In *Richter*, *Moore*, and *Pinholster*, the Ninth Circuit granted habeas corpus relief based on ineffective assistance of trial counsel. In each case, the Supreme Court emphatically reversed, invoking the AEDPA's codification of deference to state court decisions, especially those in 28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim **that was adjudicated on the merits in State court proceedings** unless the adjudication of the claim –
>
> (1) resulted in a decision that was **contrary to, or involved an unreasonable application of, clearly established Federal law**, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an **unreasonable determination of the facts in light of the evidence presented in the State court proceeding**.

Although § 2254(d)'s obstacles to federal habeas corpus relief have been in place since 1996, these three cases have emphasized the Supreme Court's determination that "state courts are the principal forum for asserting constitutional challenges to state convictions." *Richter*, 131 S. Ct. at 787.

***Harrington v. Richter*:** Joshua Richter faced charges of burglary, robbery, murder, and attempted murder based on a gun fight at the home of a drug dealer with whom Richter had been smoking marijuana earlier in the evening. After his conviction and direct appeal, Richter sought a state writ of habeas corpus based on his trial counsel's ineffectiveness in failing to obtain a blood evidence expert to support his claim of self defense. The California state court denied relief in a summary decision, providing no explanation for the court's ruling. The Ninth Circuit granted relief en banc, over a four-judge dissent, questioning whether a summary decision should receive deference and holding that, in any event, the denial of relief was unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984).

In reversing, Justice Kennedy started with kind words for the writ of habeas corpus, warning that the writ "stands as a safeguard against imprisonment of those held in violation of law" and that "[j]udges must be vigilant and independent in reviewing petitions for the writ, a commitment that entails substantial judicial resources." *Richter*, 131 S. Ct. at 780. From there it was all downhill as he quickly segued to a harsh scolding of the Ninth Circuit.

The decision creates major danger areas under 28 U.S.C. § 2254(d)(1) for those seeking federal relief. The Court elaborated what it means for a claim to be "adjudicated on the merits" where the state court summarily denies relief, offering no reasoning in support of its decision. In the absence of the state court's reasoning, the federal court can fill in the blanks with any imagined reasonable basis for the decision: "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 131 S. Ct. at 784. In the absence of a reference to state procedural grounds, the decision is presumed to be on the merits assuming no contrary "indication or state-law procedural principles." *Id*. at 784-85. Which leads to:

Rule # 2
Spell It Out: Unless There Is A Darn Good Reason Not To, We Want An Explicit Ruling On Why We Lost.

In the past, we could argue for plenary review based on a vague or under-considered state court decision. Not anymore! We should seek detailed rulings and, where the State proposes factual findings and legal conclusions, we should object to the type of general and boiler-plate rulings often signed without objection. And we are not without support when we ask for reasons. For example, even in civil immigration cases, a statement of reasons is required. *Su Hwa She v. Holder*, 629 F.3d 958, 963 (9th Cir. 2010) ("Due process and this court's precedent require a minimum degree of clarity in dispositive reasoning and in the treatment of a properly raised argument."). Especially in the capital context, the Supreme Court's reasoning on review of sentencing seems to be applicable by analogy:

> [A] statement of reasons is important. The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal

> decisionmaking authority. . . . By articulating reasons, even if brief, the sentencing judge not only assures reviewing courts (and the public) that the sentencing process is a reasoned process but also helps that process evolve.

Rita v. United States, 551 U.S. 338, 356-57 (2007); *see Morrisey v. Brewer*, 408 U.S. 474, 489 (1972) (minimal due process for parole revocation includes a written statement of reasons).

On the merits, the Court in *Richter* found that neither the incompetence nor the prejudice prong of *Strickland* were met. The Court made absolutely clear that, in federal court, state court decisions receive double deference: "Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)." *Richter*, 131 S. Ct. at 788. Under the AEDPA, we lose if "there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id*. Given the relatively weak federal court review:

Rule # 3
Take Your Best Shot: Litigate To Win In State Court Where The Standard For Ineffective Assistance Of Counsel Is Not Hyper-Deferential.

On *Richter*'s claim that counsel acted incompetently in failing to obtain an expert, the Court engaged in broad speculation regarding all the reasons that would justify a decision not to consult an expert and to prepare to cross the government expert. The only helpful language in *Richter* recognizes that there are cases that require expert assistance: "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." 131 S. Ct. at 788. The Court also found that the Ninth Circuit's ruling on prejudice did not apply the *Strickland* standard of "whether it is 'reasonably likely' the result would have been different." *Id*. at 792. The Court reiterated that this standard is different from a preponderance standard (which state post-conviction courts seem to frequently and erroneously apply).

***Premo v. Moore*:** In *Moore*, the Ninth Circuit granted habeas relief over the dissent of six judges who called for rehearing. Randy Moore entered a quick no contest plea to murder without litigating a potential motion to suppress statements

that the Ninth Circuit thought had merit. By failing to litigate, the Ninth Circuit found counsel had provided ineffective assistance when his client pled no contest to the charge. The suppressible statement included admissions regarding kidnaping the victim, which was followed by an accidental discharge of the gun. Justice Kennedy wrote the Court's reversal, largely relying on his contemporaneous opinion in *Richter* for the proposition that reasons could be found for failing to file the motion and that the state court's finding that it was cumulative to other statements should have received more deference. In analyzing incompetence, the question was whether the "attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Moore*, 131 S. Ct. at 740. To make sure this standard is addressed:

Rule #4
Find Normal: Make Sure The State Record Has Any Available Evidence Establishing That Attorney Conduct Violated Prevailing Professional Norms.

The state court record can include expert legal testimony regarding professional norms. If the state court does not want to take evidence, explain why the showing is necessary for adequate consideration of the issue and, if all else fails, proffer what you would have produced.

The Court's opinion in *Moore* found an inadequate showing of prejudice under *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (requiring in the plea context that the petitioner demonstrate that, but for counsel's errors, he would have gone to trial). To avoid this problem:

Rule #5
Tell What Was Lost: If Your Client Gave Up Trial Rights Due To Ineffective Counsel, The Record Should Show How And Why Things Would Have Been Different With Correct Advice.

***Cullen v. Pinholster*:** In a capital case, the Ninth Circuit en banc granted habeas relief, with three judges dissenting, based on trial counsel's failure to prepare the mitigation case during the penalty phase. Scott Pinholster's case relied in part on

psychiatric evidence that was presented for the first time during the federal district court proceedings. Justice Thomas's opinion continued to marginalize the federal courts as a forum for redress of constitutional violations. The Court first addressed the record in reviewing an issue "adjudicated on the merits in State court proceedings," holding that only the evidence introduced in state court could be considered: "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 131 S. Ct. at 1398. The Court held "evidence introduced in federal court has no bearing on § 2254(d)(1) review." *Id*. at 1400. The unmistakable import of this statement leads to:

Rule # 6
Full Facts First: Make Sure The State Factual Record Has Every Possible Evidentiary Support For Your Position (Because Tomorrow Is Too Late).

The Court in *Pinholster* also reminded us that the AEDPA strongly discourages any factual development in federal court through requirements of 1) proof that the factual predicate could not have been previously discovered through due diligence, and 2) proof of clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the petitioner guilty of the offense. 28 U.S.C. § 2254(e)(2). The AEDPA "statutory scheme is designed to strongly discourage" petitioners from submitting new evidence in federal court. *Pinholster*, 131 S. Ct. at 1401. Remember, the petitioner in *Pinholster* did not challenge the adequacy of the state court proceedings, so:

Rule #7
Ask And Ask Again: Layer Your Record With Explicit Showings That Experts, Subpoenas, And Other Needed Resources Or Procedures Were Unreasonably Denied.

Assiduously document your strenuous efforts to establish a full evidentiary record in state court, including proffers and requests for continuances, to provide bases for weakening deference to the state proceedings in federal court.

Justice Thomas addressed the state court's summary denials by referring to *Richter*'s rule that the state decision must be affirmed where "it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with . . . a prior

decision of this Court." *Id*. at 1402. Under the "doubly deferential" review required by the AEDPA, the Court could posit a number of potential theories why counsel could make tactical decisions to not obtain mitigating information and why the mitigation might have been futile. The Court noted that the state standard was whether the petition stated a prima facie case for relief. *Id*. at 1403 n.12. Since the state law might make a difference:

> **Rule #8**
> **Shape Summary Denials: If You Can't Get A Reasoned Ruling, Be Sure Any State Law Standards For Review – Like Assuming All Allegations In A Complaint Are True – Have Been Argued.**

B. Ninth Circuit Cases After *Richter*, *Moore*, And *Pinholster* Identify Unresolved AEDPA Issues.

In the months since these reversals, the Ninth Circuit has wrestled with some of the issues left unresolved by the Supreme Court:

- Does *Pinholster* allow federal courts to consider additional evidence not presented to the state court when a petitioner's inability to develop the facts supporting his claim was the fault of the state court itself? *Woods v. Sinclair*, No. 09-99003, 2011 WL 3487061, *21 n.15 (9th Cir. Aug. 10, 2011); *Rossum v. Patrick*, No. 09-55666, 2011 WL 4069040, *14 (9th Cir. Sept. 13, 2011) (Gertner, J., dissenting) (arguing that *Pinholster* does not restrict the federal courts from holding an evidentiary hearing where the state courts unreasonably denied the petitioner's motion for an evidentiary hearing); *see also Winston v. Kelly*, 592 F.3d 535, 556 (4th Cir. 2010) (deference inappropriate where state foreclosed full factual development); *Wilson v. Workman*, 577 F. 3d 1284, 1291 (10th Cir. 2009) (en banc) (no deference where state court did not consider evidence).

- Even after *Richter*, should the federal court "look through" the summary disposition of a state court to the last reasoned state court decision, or does *Richter* require the court to simply presume all hypothetical justifications for the disposition on the merits? *See Hurles v. Ryan*, No.

08-99032, 2011 WL 2641287, *7 (9th Cir. July 7, 2011); *Williams v. Cavazos*, 646 F.3d 626, 636 (9th Cir. 2011).

- Does *Richter*'s mandate to consider "arguments that would otherwise justify the state court's result" require federal courts to augment the reasoning in reported and well-reasoned state court opinions? *See Sessoms v. Runnels*, No. 08-17790, 2011 WL 2163970, *9-10 (9th Cir. June 3, 2011); *Williams*, 646 F. 3d at 639.

- After *Pinholster*, where should the court draw the line between new claims raised for the first time in federal court (in the rare circumstance that it is proper to do so) and claims adjudicated on the merits by the state courts? *Stokley v. Ryan*, No. 09-99004, 2011 WL 4436268, *6 (9th Cir. Sep. 26, 2011).

- In light of *Pinholster*, what role should new evidence play in federal habeas proceedings when an evidentiary hearing is proper? *Stokley*, 2011 WL 4436268 at *6.

The Ninth Circuit still can support a righteous habeas petition. *See Doody v. Ryan*, No. 06-17161, 2011 WL 1663551, at *18 (9th Cir. May 4, 2011) (en banc) (over three dissenters, holding that, under the *Richter* standard, because the transformation of *Miranda* warnings into "a twelve page rambling commentary that is in alternating part misleading and unintelligible," "there is no possibility fairminded jurists could disagree" regarding the *Miranda* violation). On the other hand, the road to relief has become more difficult. *See Jackson v. Ryan*, No. 10-15067, 2011 WL 3850774 (9th Cir. Sept. 1, 2011) (Judge Gertner granting relief under the *Richter* standard), *vacated*, 2011 WL 4448626 (9th Cir. Sept. 27, 2011) (withdrawing opinion after the State filed for an extension of time to file for rehearing en banc).

C. Ninth Circuits En Banc Ruling On Actual Innocence In *Lee* Provides A Narrow Exception To Dismissal Under The AEDPA Statute Of Limitations.

In *Lee v. Lampert*, No. 09-35276, 2011 WL 3275947, at *5-6 (9th Cir. Aug. 2, 2011) (en banc), the Ninth Circuit sided with the petitioner on an issue that has split the circuits: whether the exception to state procedural requirements for persons who make a showing of actual innocence applies to the AEDPA's one-year statute of

limitations for federal habeas corpus petitions. In *Schlup v. Delo*, 513 U.S. 298, 327 (1995), the Court held that a state procedural obstacle that would otherwise foreclose federal review would be excused where the petitioner made a showing that, in light of all the evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." The trial that resulted in Richard Lee's convictions of sex crimes was notable for obstruction of the defense theory, violation of confrontation rights, and lack of expert consultation and testimony. Despite trial counsel's identification of appellate issues, the direct appeal was a *Balfour* brief and, in post-conviction, no evidence regarding the potential assistance from an expert was adduced. The state defaults remind us of:

Rule #9
Cardio: Develop The Stamina To Raise Federal Issues On Appeal And Petition For Review Because They Must Be Presented To The Highest State Court To Be Exhausted.

In *Lee* the district court initially summarily dismissed the federal habeas corpus petition for violation of the one-year AEDPA statute of limitations in 28 U.S.C. § 2244(d). After a remand and supplementation of the record, Judge Panner held that, especially new expert evidence, viewed with the totality of the trial evidence, met the *Schlup* standard. *Lee v. Lampert*, 607 F. Supp. 2d 1204, 1222 (D. Or. 2010). On the merits, Judge Panner found multiple constitutional violations that prejudiced the defense, requiring a new trial. *Id*. at 1222-26.

On the State's direct appeal to the Ninth Circuit, Judge O'Scannlain wrote for a unanimous court that *Schlup* does not apply to the AEDPA statute of limitations. *Lee v. Lampert*, 610 F.3d 1125, 1134-35 (9th Cir. 2010). Think about it: without betraying a flicker of hesitation, three federal judges would allow one of our capital clients, who made a showing of actual innocence but filed one day late, to be executed without review of demonstrable constitutional errors. Fortunately, the en banc court rejected this position, providing the strongest articulation of the reasons *Schlup* applies to the AEDPA. *Lee*, 2011 WL 3275947, at *2-6. In doing so, the court left an important issue open but gave us the tools to prevail.

In the conflicting judicial decisions on *Schlup* and the AEDPA, some courts have added a diligence requirement to the *Schlup* showing. It seems obvious that *Schlup* exists precisely because the petitioner lacked diligence, so such a requirement

would make no sense. The roots of the diligence language appear to lie in confusion with the distinct but related exception to a statute of limitations for "equitable tolling," which requires a showing of diligence. While leaving the question formally unresolved in footnote 9, Judge Thomas cleared the theoretical underbrush by pointing out the incorrect conflation of *Schlup* and equitable tolling in footnote 5: "[I]n many cases, the phrase 'equitable tolling' is used in describing the use of equitable power to allow the untimely filing of a habeas petition in an actual innocence case. The more accurate characterization is 'equitable exception,' because equitable tolling involves different theoretical underpinnings."

On the merits, the Ninth Circuit reversed Judge Panner. The court did little harm to the general *Schlu*p standards but found the showing in Mr. Lee's individual case insufficient to excuse the statute of limitations violation. So missing the filing deadline trumped Judge Panner's opinion that Mr. Lee received a pathetic excuse for a trial, which reminds us:

Rule #10
No Magical Thinking: Don't Pull Any Punches In State Litigation In The Hope That A Beneficent Federal Judiciary Will Find A Way To Do Justice.

D. The Supreme Court Has Granted Writs Of Certiorari In A Number Of Cases That Will Address Habeas Corpus Issues.

Martinez v. Ryan: Does a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance, but who has a state-law right to raise such a claim in a first post-conviction petition, have a federal constitutional right to effective assistance of counsel on that first post-conviction petition with respect to an ineffective assistance of counsel claim (since that is the first time he could by right raise the claim)?

PREVIEW: The good news is that the Court granted the prisoner's petition and the equities are good. Defense counsel in a rape case failed to object to inadmissible expert testimony could not be raised on the direct appeal. Then post-conviction counsel failed to properly raise ineffective assistance of counsel in the first state collateral challenge to the conviction. Given Oregon's "heads I win, tails you lose" rule (the State argues that a defendant cannot raise issues not preserved in direct

appeal, then claims waiver or default in post-conviction), this case could have a big impact. To win, the petitioner is likely to need a narrow holding that no "adequate" state ground requires deference. The danger is that a broad "cause and prejudice" ruling will be seen as too damaging to the bright line rule that there is no right to effective assistance of counsel in post-conviction proceedings.

Lafler v. Cooper: May a state criminal defendant claim ineffective assistance where his counsel fails to inform him of a plea offer, or deficiently advises him to reject a favorable plea offer, and the defendant is later convicted and sentenced pursuant to a plea or a fair trial? If so, what remedy should be provided?

PREVIEW: The State objects to the Sixth Circuit's finding of ineffectiveness based on bad advice regarding a plea offer, emphasizing the fair trial that ensued and the trial court's discretion not to follow the recommendation of the parties. This case feels a bit like a reverse of *Moore* in trying to reconstruct ineffectiveness in the plea context. This could be a major danger zone on the application of the Sixth Amendment in the context of plea negotiations. There could be a split Court that will recognize plea bargaining as a critical stage, but with a different majority finding inadequate proof of prejudice or otherwise undoing the remedy granted below.

Maples v. Thomas: Where a capital defendant missed the federal habeas filing deadline because letters notifying him of the state court's denial were sent to his "pro bono" lawyers and then returned to the court marked "return to sender – left firm," and the court clerk made no further effort to notify the defendant, was the Eleventh Circuit correct to find that the defendant had nevertheless not shown "cause" for his default?

PREVIEW: This case involves another grant of the prisoner's petition with excellent equities based on the loss of rights through goof-ups of counsel and, arguably, the clerk. There is a reasonable likelihood that the case could generate an opinion like Justice Breyer's treatment of equitable tolling under the AEDPA in *Holland v. Florida*, 130 S. Ct. 7549 (2000), where the sympathetic facts are set out in such detail that the bar is passable but very high. This cert grant reminds us:

Rule #11
Math Counts: Figure Out Your Deadlines, Don't Miss Them, And Beware The Oregon Two-Year Trap.

Over 20 years ago, the State of Virginia executed Charles Coleman without ever hearing his claim of ineffective counsel at trial because his attorney filed the notice of post-conviction appeal three days late. *Coleman v. Thompson*, 501 U.S. 722 (1991). Oregon has a special trap: the two years to file for state post-conviction relief counts against the federal one-year AEDPA statute of limitations, so if you file the state post-conviction on the 366th day, you have already blown the federal deadline. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003). To add to our deadline worries, the Court has previously held that an amended claim did not relate back to the date the original petition was filed. *Mayle v. Felix*, 545 U.S. 644 (2005). So remember:

Rule #12
File Early: Better To Preserve Time To Maximize Opportunities To Amend Than To Risk Default.

Other Habeas-Related Cert Grants

Green v. Fisher: Is law "clearly established" for purposes of federal habeas law when the applicable Supreme Court decision is issued after the trial court conviction but while the defendant's case is still pending before the state supreme court on direct review?

Gonzalez v. Thaler: Whether the one-year limit for filing a federal habeas petition begins to run on the date on which the judgment becomes final by the conclusion of direct review or, in this case, the earlier expiration of time to seek final review (does "expiration time" include the 90 days available to file for certiorari even though the petitioner did not seek review in the highest state court)?

Wood v. Milyard: 1) Does an appellate court have the authority to raise *sua sponte* a 28 U.S.C. § 2244(d) statute of limitations defense? 2) Does the State's declaration before the district court that it 'will not challenge, but [is] not conceding, the timeliness of Wood's habeas petition,' amount to a deliberate waiver of any statute of limitations defense the State may have had?

Martel v. Clair: Is a condemned state prisoner in federal habeas corpus proceedings entitled to replace his court appointed counsel with another court

appointed lawyer just because he expresses dissatisfaction and alleges that his counsel was failing to pursue potentially important evidence?

Smith v. Louisiana: Is there a reasonable probability that, given the cumulative effect of the *Brady* and *Napue*/*Giglio* violations in Smith's case, the outcome of the trial would have been different? Did the Louisiana state courts ignore fundamental principles of due process in rejecting Smith's *Brady* and *Napue*/*Giglio* claims [in what looks like commentary on the Court's reversal last Term of the same New Orleans prosecutor for civil rights violations in *Connick v. Thompson*, 131 S. Ct. 1350 (2011)]?

Perry v. New Hampshire: Do the due process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances, or only when the suggestive circumstances were orchestrated by the police?

Williams v. Illinois: Does a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violate the Confrontation Clause?

Conclusion

In his book *The Check List Manifesto: How To Get Things Right*, surgeon Atul Gawande asserts that, in dealing with complex situations, "There are a thousand ways things can go wrong." By falling back on checklists, doctors avoid simple errors that can have tragic consequences. Attorneys also deal with great complexity, often under time constraints and other stressors that can lead to profound errors. We can minimize those risks by following AEDPA Rules For Survival. Here are the twelve rules set out above that can help to avoid some of the worst AEDPA danger zones and to prevent the destruction of the federal case before the merits are ever reached:

Rule # 1
Double Tap: If The Issue's Worth Raising, It's Worth Federalizing.

Rule # 2
Spell It Out: Unless There Is A Darn Good Reason Not To, We Want An Explicit Ruling On Why We Lost.

Rule # 3
Take Your Best Shot: Litigate To Win In State Court Where The Standard For Ineffective Assistance Of Counsel Is Not Hyper-Deferential.

Rule #4
Find Normal: Make Sure The State Record Has Any Available Evidence Establishing That Attorney Conduct Violated Prevailing Professional Norms.

Rule #5
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Ask And Ask Again: Layer Your Record With Explicit Showings That Experts, Subpoenas, And Other Needed Resources Or Procedures Were Unreasonably Denied.

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File Early: Better To Preserve Time To Maximize Opportunities To Amend Than To Risk Default.

Thanks to Federal Defender Law Clerk John Evans for his work on this article.

CHEAT SHEET ON PRESERVING AND EXHAUSTING FEDERAL CONSTITUTIONAL CLAIMS

EXHAUSTION PRINCIPLES

Federal Constitutional Issues Must Be Explicitly Stated: Mere statement of "due process" is not sufficient to state a federal claim. *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000). Sufficient statement includes the operative facts and the reference to the federal constitutional right at issue.

Federal Constitutional Issues Must Be Fully Exhausted: Constitutional issues must be raised at every level, including in a petition for review to the Oregon Supreme Court. *O'Sullivan v. Boerkel*, 526 U.S. 838 (1999).

Preserving The Issues In A PFR Or In A Post-Conviction Appeal Is Now Easier: Now may exhaust through incorporation by reference to prior briefing. *Farmer v. Baldwin*, 563 F.3d 1042 (9th Cir. 2009); *Farmer v. Baldwin*, 346 Or. 67 (2009).

GENERAL RULES

Counsel Or Self-Representation At Trial And On Appeal: Sixth Amendment guarantees counsel at all critical stages of trial level proceedings. *Faretta v. California*, 422 U.S. 806 (1975); *United States v. Cronic*, 466 U.S. 648, 653-54 (1984). On appeal, Fourteenth Amendment due process. *Douglas v. California*, 372 U.S. 353 (1963).

Competency: Actual incompetency raises substantive due process under the Fourteenth Amendment. *Pate v. Robinson*, 383 U.S. 375 (1966). Failure to adequately inquire is a procedural incompetency claim. *Drope v. Missouri*, 420 U.S. 162 (1975). *Note*: issues may be different on appeal and in post-conviction.

Right To Appropriate Interpretation: Fourteenth Amendment due process, under same theories as *Pate* and *Drope*.

Right To Be Present At All Critical Stages: Sixth Amendment confrontation right and Fourteenth Amendment due process. *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Kentucky v. Stincer*, 482 U.S. 730 (1987).

Right To A Record Of All Critical Stages: Fourteenth Amendment right to due process and equal protection. *Mayer v. City of Chicago*, 404 U.S. 189 (1971).

Right To A Neutral Arbitrater: Fourteenth Amendment due process. *Smith v. Phillips*, 455 U.S. 209 (1982); *Bracy v. Gramley*, 520 U.S. 899 (1997).

Waiver Of Rights: Fourteenth Amendment due process requires a knowing, voluntary and intelligent waiver of all constitutionally protected rights. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Boykin v. Alabama*, 395 U.S. 238 (1969).

PRETRIAL

Searches Without A Warrant Or Probable Cause: Fourth Amendment

Custodial Interrogation Without Warnings, Or Other Involuntary Statements: Fifth Amendment. *Yarborough v. Alvarado*, 541 U.S. 652 (2004) (discussion of custody standards); *Arizona v. Fulminante*, 499 U.S. 279 (1991) (coercion as mental and physical, including false promises). *But see Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010).

Continued Interrogation After Request For Counsel: Sixth Amendment.

Subsequent Comment On The Exercise Of Fifth Amendment Rights During Interrogation: Fifth and/or Sixth Amendments – even if client subsequently takes the stand at trial. *Doyle v. Ohio*, 426 U.S. 610 (1976).

Demurrers/Lack of Notice: Sixth Amendment right "to be informed of the nature and cause of the accusation." *Herring v. New York*, 422 U.S. 853, 857 n.6 (1975) (not really discussed, just noted); *Sheppard v. Rees*, 909 F.2d 1234 (9th Cir. 1989).

Pleading/Pursuing Inherently Contradictory Theories Of Guilt: Sixth Amendment, right to notice and to present a defense, Fourteenth Amendment right to due process and fundamentally fair trial.

Double Jeopardy: Sixth Amendment. *Blockburger v. United States*, 284 U.S. 299 (1932); *Ashe v. Swenson*, 397 U.S. 436 (1970); *Brown v. Ohio*, 432 U.S. 161 (1977).

Vindictive Prosecution: Fourteenth Amendment due process. *United States v. Goodwin*, 457 U.S. 368, 371 (1982).

Ex Post Facto/Bills Of Attainder: Fourteenth Amendment due process and equal protection; Article I, Section 9.

Pre-Indictment Delay: Fourteenth Amendment due process (not speedy trial). *United States v. Lovasco*, 431 U.S. 783 (1977).

Post-Indictment Delay: Sixth Amendment right to a speedy trial.

Discovery Issues: Sixth Amendment rights to notice, confrontation, and to present a defense. Fourteenth Amendment due process precludes prosecutorial misconduct and withholding of exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963). Exculpatory evidence is relevant to guilty *or sentencing*, and includes impeachment. Misconduct does not require bad faith, prosecutors have affirmative duty to obtain information in the custody of all law enforcement agencies assisting prosecution. *Kyles v. Whitley*, 514 U.S. 419 (1995).

Funding Of Defense: Sixth Amendment right to present a defense. *Ake v. Oklahoma*, 470 U.S. 68 (1985). May also implicate the Fourteenth Amendment rights to due process and a fundamentally fair trial.

PLEA ISSUES

Voluntary, Knowing Intelligent Plea: Fourteenth Amendment due process and equal protection, generally must know the nature of the charges and the potential consequences (including collateral) of the guilty plea. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010); *Boykin v. Alabama*, 395 U.S. 238 (1969).

Plea Agreements: Fourteenth Amendment due process right to enforce terms of plea agreement. *Santobello v. New York*, 404 U.S. 257 (1971).

TRIAL ISSUES

Jury Trial Including Representative Cross-Section And Impartial/Not Impacted By Pre-Trial Publicity Or Outside Influences/ Coercion: Sixth Amendment jury trial and confrontation clauses; Fourteenth Amendment due process. *Duren v. Missouri*, 439 U.S. 357 (1979); *Smith v. Phillips*, 455 U.S. 209 (1982).

Unanimous Jury: Sixth, and potentially Fifth, Amendment. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020 (2010).

To Be Free Of Restraints Or Excessive Courtroom Security: Fourteenth Amendment due process. *Holbrook v. Flynn*, 475 U.S. 560 (1986); *Deck v. Missouri*, 544 U.S. 622 (2005) (even after guilt determination). *Note:* use of stun belts may raise additional constitutional issues, such as impeding the Sixth Amendment right to consult with counsel or to present a defense. Restraints can even be viewed as punishment and excessive in violation of the Eighth Amendment.

To Appear In Street Clothes: Fourteenth Amendment due process. *Estelle v. Williams*, 235 U.S. 501 (1976).

To Testify (or Not): Fifth and Sixth Amendment. *Rock v. Arkansas*, 483 U.S. 44 (1987).

Evidentiary Errors – Improper Admission: Sixth Amendment confrontation clause, *Crawford v. Washington*, 541 U.S. 36 (2004); Fourteenth Amendment due process and fundamental fairness. *Cf Estelle v. McGuire*, 502 U.S. 62 (1991). Potentially Fourteenth Amendment equal protection. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

Right To Present A Defense – Improper Exclusion: Sixth Amendment confrontation, compulsory process, ande defense clauses of the Sixth Amendment, due process and fundamental fairness provisions of the Fourteenth Amendment. *Crane v. Kentucky*, 476 U.S. 683 (1986); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (evidentiary rules may not be mechanistically applied in manner the impugns right to present a defense).

Prosecutorial Misconduct – Particularly In Argument: Fourteenth Amendment due process and fundamental fairness. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *United States v. Williams*, 504 U.S. 36, 60 (1992) (J. Stevens, joined by Justices Blackmun, O'Connor and Thomas, *dissenting*) (comparing misconduct to the "the Hydra slain by Hercules, [with] . . . many heads" and summarizing various types.)

Jury Instructions: Fourteenth Amendment due process, fundamental fairness, equal protection. *Cage v. Louisiana*, 498 U.S. 39 (1990).

SENTENCING

Sixth Amendment right to confront evidence relied on, possibly right to jury trial on contested facts. *Blakely v. Washington*, 542 U.S. 296 (2004); *Gardner v. Florida*, 430 U.S. 349 (1979)(*plurality*). Eighth Amendment right to be free from cruel and unusual punishment or excessive fines. Fourteenth Amendment due process and equal protection, including accurate information. *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

DIRECT APPEAL

Right To Counsel: Fourteenth Amendment due process. *Douglas v. California*, 372 U.S. 353 (1963).

Right To Complete Record: Fourteenth Amendment due process and equal protection. *Mayer v. City of Chicago*, 404 U.S. 189, 198 (1971).

Necessity To Review/Raise All Issues: Fourteenth Amendment due process. *Halbert v. Michigan*, 545 U.S. 605 (2005).

Cumulative Error: Fourteenth Amendment due process and fundamental fairness; Eighth Amendment right to be free from cruel and unusual punishment; Sixth Amendment right to effective assistance of counsel *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (*en banc*).

POST-CONVICTION

Right To Counsel, Arguably Under Oregon Procedure: Fourteenth Amendment due process and fundamental fairness, combination of *Douglas v. California*, 372 U.S. 353 (1963), *Anders v. California*, 386 U.S. 738, 744-45 (1967), *Coleman v. Thompson*, 501 U.S. 722 (1991) and *State v. Balfour*, 311 Or. 434, 814 P.2d 1069 (Or. 1991).

Plead All Claims/Not Just Ineffectiveness: Oregon DOJ takes position in federal court the free-standing claims of actual innocence and proscecutorial misconduct are cognizable in state post-conviction proceedings and not barred under *Palmer v. State*, 318 Or. 352, 867 P.2d 1368 (1994) – Contact FPD for briefing containing admissions.

Cumulative Error: Fourteenth Amendment due process and fundamental fairness; Eighth Amendment right to be free from cruel and unusual punishment; Sixth Amendment right to effective assistance of counsel *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (*en banc*).

PAROLE/POST-PRISON SUPERVISION

Fourteenth Amendment due process and equal protection. *Board of Pardons v. Allen*, 482 U.S. 369 (1987). Also check for *ex post facto* or Bill of Attainder violations. Fourteenth Amendment due process and equal protection; Article I, Section 9.

C. Renée Manes, Assistant Federal Public Defender, Federal Public Defender's Office, Portland, Oregon