CHAPTER 10

FEDERAL HABEAS CORPUS
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[10.1.] Introduction

The writ of *habeas corpus* is a writ or order directing the person with custody of another to produce the "body" to the court so that the court can determine the legal sufficiency of the detention. The writ has noble and historic roots and is protected by the United States Constitution[1442] and federal law. The U.S. Supreme Court has referred to the writ as "a vital instrument [for securing] freedom from unlawful restraint" and has emphasized that the "privilege of *habeas corpus* was one of the few safeguards of liberty" provided for directly in the Constitution.[1443] Notwithstanding these descriptions, the vitality of the writ has been reduced significantly by judicial interpretations and by the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Despite the many barriers to relief, those sentenced to death will almost always apply to a federal court for *habeas corpus* relief.

[10.2.] Federal *Habeas Corpus* Proceedings

Although the writ of *habeas* is referred to as the "Great Writ of Liberty" and is protected against suspension by the United States Constitution,[1444] the substantive and procedural requirements are provided for by statutes and rules, as well as the many federal decisions that interpret the statutory provisions. Originally, the writ extended only to those in federal custody,[1445] but with the passage of a new judiciary act in 1867, the writ was extended to "state prisoners in custody in violation of Constitution or laws of the United States."[1446]

[10.3.] Purpose

A *habeas corpus* proceeding is a civil proceeding brought by a prisoner against the government official responsible for the prisoner's custody. Although civil in nature, the availability of the writ provides a check on the fairness of the criminal process. Thus, the purpose of a petition for *habeas corpus* is to provide a means by which a prisoner may challenge the legality of his or her detention. The *habeas* prisoner contests the process by which liberty has been restrained. The

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[1442] U.S. Const., art. I, § 9 provides that the "privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."
[1443] Boumediene v. Bush, 128 S.Ct. 2229, 2244 (2008).
[1444] LaFave & Israel, CRIMINAL PROCEDURE 1178 (2d ed. 1992); U.S. Const. art I., §9, cl. 2.
[1445] Ex parte Dorr, 44 U.S. (3 How.) 103 (1845).
[1446] 28 U.S.C. § 2254(a) (1996).

proceeding does not revisit the issue of guilt or innocence, but rather addresses issues of procedural correctness. The proceeding is separate and distinct from the criminal trial, the direct appeal, and the state post-conviction proceeding, but it is very much affected by all three.

[10.4.] Applicable Law

Federal *habeas corpus* proceedings are governed by federal law. The two primary statutes, 28 U.S.C. § 2254 and § 2255 were significantly changed in 1996 when Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA) which was designed to curtail and expedite federal *habeas* review. The various federal courts' interpretations of these federal statutes creates a very substantial body of *habeas* case law and makes federal *habeas corpus* practice one of the most complex and challenging areas of the law.

[10.5.] Procedure

Procedure in federal *habeas corpus* proceedings is governed not only by the federal statutes, but by the Federal Rules of Civil Procedure, special procedural rules promulgated solely for *habeas corpus* proceedings, local rules of court, and, as referenced above, a very substantial body of case law.

[10.6.] Application, Contents, and Filing

A prisoner in state custody[1447] is authorized by federal statute, 28 U.S.C. § 2254, to file an "application" for a writ of *habeas corpus* on the ground that the custody is "in violation of the Constitution or laws or treaties of the United States."[1448] The party sued is the person responsible for the custody of the applicant, which may be the prison warden or administrator or the commissioner of corrections for the state.

The written application must be "signed and verified by the person for whose relief it is intended or by someone acting in his behalf."[1449] The verification requires a statement that the application is signed under the penalty of perjury.

The application must include "the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claims or authority, if known."[1450] A form similar to that

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[1447] This chapter concentrates only on the procedure used to challenge state sentences and does not discuss the separate and somewhat different statutory proceeding for challenging federal sentences, immigration detention, and military convictions. *See* 28 U.S.C. §§ 2241, 2255.

[1448] 28 U.S.C § 2254(a) (1996). The statute uses the word "application" but many practitioners and the rules governing proceeding refer to the application as a "petition."

[1449] 28 U.S.C. § 2242 (1948).

[1450] *Id.*

annexed to the federal *habeas corpus* rules must also be filed.[1451] The application may be amended or supplemented as provided in the Federal Rules of Civil Procedure.[1452]

In practice, the application is generally far more detailed than the statute suggests. It usually describes (1) the prisoner's custodial status, including the specifics of the judgment and sentence that are being challenged; (2) the method by which the prisoner has exhausted the claims raised in the application; (3) the legal and factual basis for all claims asserted; (4) the basis for entitlement to relief on each claim; and (5) a prayer for relief. The application must contain *all* colorable claims for relief since only one application is ordinarily allowed. If previous applications have been filed, a description of those applications is required along with an explanation as to why the present claims were not asserted therein.

A memorandum of law supporting the legal claims in the application and refuting likely defenses may be filed with the application or at a later time subject to the court's scheduling order. An application must be accompanied by either the appropriate filing fee or an affidavit of indigency and a request to proceed *in forma pauperis*.

[10.7.] Stays and Motions

The federal statute authorizes the federal court to "stay any proceeding against the person detained" in any state.[1453] Often, a motion for a stay of execution is filed with the application for the writ of *habeas corpus*. When a *pro se* capital defendant files an application and requests appointment of counsel, the federal court has jurisdiction to enter a stay of execution "where necessary" to give effect to the statutory right to counsel.[1454]

In addition, motions necessary to allow an applicant to develop the facts upon which the claims are based will likely be filed with the application or at a later time. These include motions for evidentiary hearings as provided in Rule 8 of the Rules Governing Section 2254 Cases in the United States District Court (hereinafter in this chapter referred to as "Rules"), and for discovery as provided in Rule 6 of the Rules.

[10.8.] Jurisdiction and Venue

Federal courts in the state where the applicant's custodian resides have personal jurisdiction over the parties regardless of the place of detention. The district court in the jurisdiction where the applicant is incarcerated and the district court containing the state court that convicted and sentenced the applicant have

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[1451] Rule 2(d), Rules Governing Section 2254 Cases in the United States District Court.
[1452] 28 U.S.C. § 2242 (1948).
[1453] 28 U.S.C. § 2255 (2006).
[1454] McFarland v. Scott, 512 U.S. 849, 859 (1994).

concurrent jurisdiction over the application.[1455] An application may be filed originally in the U.S. Supreme Court or in a U.S. Court of Appeals but, in all but the most exceptional case, the application will be transferred to a district court.

The most important aspect of federal *habeas* jurisdiction is one of the most recent procedural limitations added by the Antiterrorism and Effective Death Penalty Act.[1456] Under the AEDPA, the statute of limitations for federal *habeas* actions is one year. This one-year statute of limitations is jurisdictional. The date from which the statute begins to run is discussed in Section 10.12.

[10.9.] Prerequisites to Relief

Federal statutes and case decisions create nine prerequisites to federal *habeas* relief, discussed more fully in the sections below. Generally speaking, the petitioner must first be in custody and, second, raise a cognizable claim. Third, the application must be filed within the applicable statute of limitations. Fourth, the claims raised must have been exhausted in state court; and, fifth, the claims must not be procedurally defaulted. Sixth, the claims must be based on violations of the Constitution, federal law, or treaties. Seventh, if the constitutional right upon which the violation is based is newly recognized, issues of retroactivity must be considered. Eighth, if the constitutional right is not new, it will form the basis for relief only if the state court decision was contrary to or an unreasonable application of clearly established law. Finally, the error must have had a substantial and injurious effect or influence on the jury's verdict.

[10.10.] "In Custody"

Courts may entertain *habeas* applications only if a person is "in custody" in violation of the Constitution, laws, or treaties of the United States.[1457] The "custody" requirement is satisfied so long as the person is "subject to restraints not 'shared by the public generally.'"[1458]

[1455] 28 U.S.C. § 2241(d) (2008) (courts with concurrent jurisdiction may transfer the application); *see generally* Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973) (broadly construing 28 U.S.C. § 2241 phrase "district courts . . . within their respective jurisdictions" to allow Alabama prisoner to seek *habeas* relief in Kentucky district court).

[1456] AEDPA became effective April 24, 1996, and applies to petitions filed after that date. Lindh v. Murphy, 521 U.S. 320 (1997).

[1457] 28 U.S.C. § 2241(c)(3) (2008).

[1458] Hensley v. Municipal Court, 411 U.S. 345, 351 (1973) (quoting Jones v. Cunningham, 371 U.S. 236, 240 (1963)); *see* Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984) (petitioner was in "custody" even though his conviction was vacated when he applied for trial *de novo* and he had been released on personal recognizance).

[10.11.] Cognizable Claims

An application for *habeas corpus* must allege violations of federal law.[1459] Claims may be based upon a violation of the U.S. Constitution, federal laws, or treaties.[1460] The most frequently litigated *habeas* claims arise under constitutional provisions, including the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments,[1461] but these are not exclusive. A claim based on a statutory violation exists if the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice and present[s] exception circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent."[1462] Claims based on violations of international treaties have become more frequent in applications brought on behalf of alien residents.[1463]

Issues that are cognizable in a *habeas corpus* case may arise out of any stage of the case. For example, in the investigative stage, a claim may be based on issues related to arrest, searches, warrants, confessions, pretrial identifications, and the right to counsel. In the pre-trial stage, relief may be based on issues related to the charging document, discovery, *Brady* information, double jeopardy, and preliminary proceedings. Trial issues related to jury selection, pre-trial publicity, constitutional evidentiary issues at both the guilt and penalty phases, including confrontation violations, prosecutorial misconduct, discovery violations, and jury instructions at both the guilt and penalty phases may form the basis for *habeas* relief. At the appellate and post-conviction stage, claims may relate to newly discovered evidence or ineffective assistance of counsel. Claims of actual innocence may also be raised on federal *habeas corpus*.

[10.12.] Statute of Limitations

Under AEDPA, an application for federal *habeas* relief must be filed within one year of the latest of four dates. The four dates are: (1) the date on which the judgment became final by the conclusion of direct appellate review or the expiration of time for seeking such review; (2) the date on which any impediment to filing caused by illegal government action was removed; (3) the date on which any new constitutional right was recognized and made

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[1459] 28 U.S.C. § 2254(a) (1996).
[1460] *Id.*
[1461] For an exhaustive summary of the variety of claims cognizable under these amendments, *see* J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, Appendix C, 709-728 (1988). *Habeas* relief is limited for Fourth Amendment claims. *See* Stone v. Powell, 428 U.S. 465, 494 (1976).
[1462] Hill v U.S., 368 U.S. 424, 428 (1962) (quoting Bowen v. Johnston, 306 U.S. 19, 27 (1939)).
[1463] *See e.g.,* Medellin v. Texas, 128 S.Ct. 1346 (2008); Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006); Breard v. Greene, 523 U.S. 371 (1998); Cuero v. McFadden, 154 Fed. Appx. 755 (11th Cir. 2005), *cert. denied*, 547 U.S. 1138 (2005); Reid v. Apker, 150 Fed. Appx. (3d Cir. 2005).

retroactively applicable by the U.S. Supreme Court; or (4) the date on which facts supporting the claim could have been discovered through due diligence.[1464]

The date which most often triggers the limitation period is the first – "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."[1465] However, because the time period during which a properly filed petition for state post-conviction or other collateral review is pending is excluded, the statute of limitations generally begins to run when the state court decides or declines to hear an appeal from the denial of state post-conviction relief.

[10.13.] Procedural Prerequisites

In addition to complying with the one-year statute of limitations, a *habeas* petitioner must establish that state-court remedies have been exhausted and that the *habeas* claims were raised in the state courts before the merits of the petition will be considered. Each of these procedural prerequisites is considered below.

[10.14.] Exhaustion of State Court Remedies

Another demanding prerequisite to habeas claims is the exhaustion of state court remedies.[1466] The exhaustion rule is based on concerns of comity which are satisfied when a state has a full and fair opportunity to address and resolve claims in state courts.[1467] The *habeas* statute requires exhaustion of available state court remedies unless "there is an absence of available [s]tate corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant."[1468] While these exceptions to the exhaustion requirement exist, they are rarely applied.

The exhaustion requirement means that the applicant must have first presented the claims in state court.[1469] In order to exhaust a claim, the applicant must have presented both the factual and theoretical bases of the claim in the state court. The applicant may not rely on different factual grounds in federal court that fundamentally alter the claim.[1470] As a result, it is very important that

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[1464] 28 U.S.C. § 2244(d) (1996).
[1465] *Id*.
[1466] 28 U.S.C. § 2254(b) (1996).
[1467] Keeney v. Tamayo-Reyes, 504 U.S. 1, 9-10 (1992). "In a federal system, the states should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." Coleman v. Thompson, 501 U.S. 722, 731 (1991). "The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." Rose v. Lundy, 455 U.S. 509, 518 (1982).
[1468] 28 U.S.C. § 2254 (b)(1)(B)(i), (ii) (1996).
[1469] 28 U.S.C. § 2254 (c) (1996).
[1470] *See* Vasquez v. Hillery, 474 U.S. 254, 257-60 (1986). Supplementation and clarification of the factual record in federal court is allowed and does not defeat exhaustion.

state courts conclusively adjudicate all claims raised at trial and on state post-conviction. State courts should aim to issue clear and unambiguous findings of fact and conclusions of law adjudicating all federal constitutional issues raised in state court proceedings.

A claim is exhausted when the highest state court has had a fair opportunity to rule on it, either on direct appeal or through the post-conviction process.[1471] The U.S. Supreme Court holds that a claim is not exhausted unless it has been pursued and adjudicated through the highest state court with jurisdiction, including courts with jurisdiction to conduct a discretionary review.[1472] A claim may be exhausted when a state court considers it *sua sponte.*

Applications based on exhausted claims must be dismissed. Applications that contain both unexhausted and exhausted claims, often referred to as "mixed petitions," may be dismissed without prejudice upon request or held in abeyance until exhaustion is completed. After exhaustion, the application may be reinstated. Alternatively, the court may require counsel to file an amended petition that includes only exhausted claims.

The exhaustion requirement may be waived by the state but only by express waiver.[1473] If an unexhausted claim is unmeritorious, the state may choose to waive exhaustion nonetheless in order to secure a dismissal on the merits.

[10.15.] Absence of Procedural Default

Another hurdle to successful *habeas* claims is procedural default, a judicially created doctrine that bars federal claims that were not raised in state court as required by state law.[1474] In order for procedural default to apply, the state court's rulings must be based on an adequate and independent state law ground rather than on federal law.[1475] When applicable, state courts should resolve issues on state law grounds and issue findings and conclusions that make the court's reliance on state law abundantly clear.

[1471] Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 302 (1984).

[1472] O'Sullivan v. Boerckel, 526 U.S. 842, 847 (1999) ("state prisoners [are required] to file petitions for discretionary review when that review is part of the ordinary appellate procedure in the State").

[1473] 28 U.S.C. § 2254 (b)(3) (1996) ("A state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the state, through counsel, expressly waives the requirement.").

[1474] Wainwright v. Sykes, 433 U.S. 72 (1977).

[1475] In the *habeas* context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in *habeas* what this court could not do on direct review; *habeas* would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this court's jurisdiction and a means to undermine the state's interest in enforcing its laws.
Coleman v. Thompson, 501 U.S. 722, 730-31 (1991).

To support a defense of procedural default, the state procedural rule (1) must be in effect at the time of the alleged default;[1476] (2) must be clear and regularly followed;[1477] (3) must serve a state interest and not merely frustrate asserted federal rights;[1478] and, (4) must not violate due process or result in a waiver of a fundamental right. Default is inappropriate when the state rule is discretionary or when compliance with the rule has been lacking in some highly technical sense.[1479] When a state court relies on a state procedural rule, the court should recite in its order the effective date of the rule, the purposes for the rule, and the regularity of enforcement of the rule.

Federal courts presume the absence of an independent and adequate state ground for a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law."[1480] Thus, if the state decision relies upon a "firmly established and regularly followed state practice" as an independent state grounds for the decision, it should cite to the state rule only and should not include parallel citations to federal authority.[1481]

Procedural default is waived unless timely and specifically asserted by the state as a defense. Moreover, procedural default is inappropriate in circumstances in which state courts have not enforced a state procedural rule.[1482]

[1476] Reed v. Ross, 468 U.S. 1, 16-17 (1984).

[1477] *See e.g.,* Johnson v. Mississippi, 486 U.S. 578, 587-89 (1988) (state court denial of post-conviction relief based on waiver was inadequate because state court previously allowed similar challenge despite omission); James v. Kentucky, 466 U.S. 341, 348-49 (1984) (state court denial of relief disallowed when based on distinction that is not clear or closely hewn); County Court of Ulster County v. Allen, 442 U.S. 140, 150-51 (1979) (default defense rejected because state had no clear contemporaneous-objection rule in force).

[1478] James v. Kentucky, 466 U.S. 341, 348-49 (1984).

[1479] *Id*. at 351.

[1480] Harris v. Reed, 489 U.S. 255, 266 (1989). In *Coleman*, the U.S. Supreme Court declined to require specific language in state court opinions to reflect reliance on independent state grounds. "We encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim – every state appeal, every denial of state collateral review – in order that federal courts might not be bothered with reviewing state law and the record in the case." Coleman v. Thompson, 501 U.S. 722, 739 (1991).

[1481] Ford v. Georgia, 498 U.S. 411, 423-24 (1991).

[1482] *See* Rice v. Marshall, 816 F.2d 1126, 1129 (6th Cir. 1987) (citing McBee v. Grant, 763 F.2d 811, 813 (6th Cir. 1985) ("The cause and prejudice standard is not applied, however, when the state court overlooks the procedural default and instead disposes of the issue on the merits.")); Raper v. Mintzes, 706 F.2d 161, 163 (6th Cir. 1983) ("In such a case, the rationale of *Sykes* is inapplicable since the state itself has chosen not to apply its procedural rules so as to bar the claim and the state has had the first opportunity to address the constitutional question."); Hockenbury v. Sowders, 620 F.2d 111, 115 (6th Cir. 1980), *cert. denied,* 450 U.S. 933 (1981) ("the failure to comply with a state's contemporaneous objection requirement cannot be deferred to as a separate and independent procedural ground precluding federal review if the state itself did not preclude review on the basis of that requirement.").

Thus procedural default is arguably waived when the state courts consider the claim on the merits despite the procedural failure.

If procedural default is established, an applicant can only avoid default by demonstrating one of two exceptions: the "cause and prejudice" exception or the "miscarriage of justice" exception.[1483]

The "cause and prejudice" test requires that the applicant show cause for and prejudice resulting from the default.[1484] Generally, cause exists if an objective factor external to the defense excuses counsel's failure to comply with the state procedural rule.[1485] Examples of cause include the existence of novel constitutional claims that were not reasonably available to counsel;[1486] the discovery of factual predicates that were unknown and undiscoverable by the use of due diligence;[1487] the presence of circumstances in which the procedural context in which default occurred made it difficult for counsel to perceive the need to raise the claim[1488] or in which official interference made compliance with the procedural rule impractical;[1489] and the presence of circumstances in which counsel rendered ineffective assistance by failing to comply with the procedural rule.[1490]

To demonstrate prejudice, the applicant must show that the constitutional violation "worked to his [or her] actual and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions."[1491] To establish prejudice, the applicant will have to establish that but for the error, the outcome would have likely been different.[1492]

The second exception to procedural default, the "miscarriage of justice" exception, requires a court to excuse default if the failure to consider the claims will result in a fundamental miscarriage of justice.[1493] Claims of actual innocence

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[1483] Coleman v. Thompson, 501 U.S. 722 (1991).
[1484] Wainwright v. Sykes, 433 U.S. 72, 77 (1987); *see also* Engle v. Isaac, 456 U.S. 107, 135 (1982); Murray v. Carrier, 477 U.S. 478, 495-96 (1986).
[1485] *See generally* Coleman v. Thompson, 501 U.S. 722, 749-750 (1991).
[1486] Reed v. Ross, 468 U.S. 1, 16 (1984). But *Teague* casts doubt on the viability of a claim that meets this standard. If a claim is *so* novel that its legal basis was not reasonably available, it is probably based on a "new rule" which, under *Teague,* affords no retroactive relief; if the claim is not based on a "new rule," then it probably was not *so* novel that its legal basis was not reasonably available.
[1487] Amadeo v. Zant, 486 U.S. 214, 223-24 (1988).
[1488] *See* Wainwright v. Sykes, 433 U.S. 72, 95-96 (1997) (Stevens, J., concurring).
[1489] Brown v. Allen, 344 U.S. 443, 486 (1953).
[1490] Edwards v. Carpenter, 529 U.S. 446, 451 (2000) (but also recognizing that an ineffective assistance of counsel claim used to satisfy the cause and prejudice standard can also be procedurally defaulted).
[1491] U.S. v. Frady, 456 U.S. 152, 170 (1982).
[1492] *Cf.* Brecht v. Abrahamson, 507 U.S. 619, 622 (1993) (defining *habeas* standard for relief as requiring a showing of a "substantial and injurious effect or influence in determining the jury's verdict").
[1493] Keeney v. Tamayo-Reyes, 504 U.S. 1, 11 (1992) ("A *habeas* petitioner's failure to develop a claim in state court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."); Murray v. Carrier, 477 U.S. 478, 496 (1986).

fall under the miscarriage of justice exception to procedural default. An applicant may raise a claim of actual innocence based on innocence of the crime or based on ineligibility for the death penalty. Both may be grounds for avoiding procedural default on miscarriage of justice grounds but different standards apply.

When an applicant raises a claim of actual innocence of the crime to avoid a procedural bar under the miscarriage of justice exception, the applicant must show that the "constitutional violation has probably resulted in the conviction of one who is actually innocent."[1494] When the application is based on the discovery of new evidence of innocence of the crime, the applicant must show that it is "more likely than not that no juror viewing the record as a whole would lack reasonable doubt" in light of the new evidence.[1495]

If instead, the applicant claims innocence of, or ineligibility for, the death penalty, as a mean of establishing a miscarriage of justice exception to the procedural default rule, the applicable standard is higher. The applicant must establish innocence of the death penalty by clear and convincing evidence. "[T]o show 'actual innocence' [of the death penalty] one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[1496]

[10.16.] Constitutional Violations, Retroactivity, and *Stone v. Powell*

Habeas petitioners who raise claims based upon new constitutional rules must also meet the standard of *Teague v. Lane* [1497] which governs retroactivity. Petitioners whose *habeas* claims are based on Fourth Amendment grounds must scale the formidable hurdle of *Stone v. Powell*.[1498] Both *Teague* and *Powell* are discussed below.

[10.17.] *Teague v. Lane* and "New" Constitutional Claims

In *Teague v. Lane*, the U.S. Supreme Court held that new constitutional rules of criminal procedure generally should not be applied retroactively to cases on collateral review.[1499] Under *Teague*, an old constitutional rule or interpretation

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[1494] Schlup v. Delo, 513 U.S. 298, 326 (1995) (applying standard in Murray v. Carrier, 477 U.S. 478 (1986) requiring petitioner to show that a constitutional violation has probably resulted in the conviction of one who is actually innocent rather than the standard in Sawyer v. Whitley, 505 U.S. 333 (1992), when actual innocence claim is raised to avoid procedural bar to consideration of the merits of a constitutional claim)).

[1495] House v. Bell, 547 U.S. 518 (2006).

[1496] Sawyer v. Whitley, 505 U.S. 333, 336 (1992).

[1497] Teague v. Lane, 489 U.S. 288 (1989).

[1498] Stone v. Powell, 428 U.S. 465 (1976).

[1499] Teague v. Lane, 489 U.S. 288 (1989). The interest in leaving concluded litigation in a state of repose . . . may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a *habeas*

applies on both direct and collateral review, but a new rule or interpretation generally applies only to cases on direct review. As a result, *Teague* requires a three-step inquiry to determine whether a constitutional rule of criminal procedure applies to a habeas application.

First, the U.S. Supreme Court must determine when the applicant's conviction became final. Next, the U.S. Supreme Court must consider whether, under the "legal landscape" existing at that time, the Constitution required the rule relied upon by the applicant.[1500] If the rule was not required at the time of the conviction, it is considered a "new rule" of criminal procedure, which will not be applied retroactively unless an exception to the general rule of non-retroactivity applies.

Only two exceptions to the general rule of non-retroactivity are recognized. The first exception applies to substantive rules forbidding punishment of "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or prohibiting a certain category of punishment for a class of defendants because of their status or offense.[1501] The second exception is for rules that require observance of the principles implicit in the concept or ordered liberty – so-called "watershed" rules of criminal procedure implicate the "fundamental fairness and accuracy of the criminal proceeding."[1502]

A rule is a watershed rule of criminal procedure if it is necessary to prevent "an impermissibly large risk" of inaccurate convictions and if it "alter[s] our understanding of the bedrock procedural elements essential to the fairness of the proceeding."[1503] The U.S. Supreme Court emphasized that the risk of accuracy must be to criminal proceedings in general, not to the specific case at issue.[1504] Such watershed rules are extremely narrow – so narrow that the U.S. Supreme Court has never fully recognized one.[1505]

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petition is filed. . . . Given the "broad scope of constitutional issues cognizable on *habeas*,". . . it is "sounder, in adjudicating *habeas* petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [*habeas*] cases on the basis of intervening changes in constitutional interpretation." . . . "[T]he threat of *habeas* serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function, . . . the *habeas* court need only apply the constitutional standards that prevailed at the time the original proceeding took place." 489 U.S. at 306 (citations omitted).

[1500] Graham v. Collins, 506 U.S. 461, 468 (1993).

[1501] Teague v. Lane, 489 U.S. 288, 311-15(1989).

[1502] Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting Teague v. Lane, 489 U.S. 288, 311 (1989)).

[1503] Schiro v. Summerlin, 542 U.S. 348, 356 (2004).

[1504] Whorton v. Bockting, 549 U.S. 406, 417-18 (2007).

[1505] "[I]t should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception. . . . In providing guidance as to what might fall within this exception, we have repeatedly referred to the rule of Gideon v. Wainwright." Beard v. Banks, 542 U.S. 406, 417 (2004).

The unlikelihood that either of the two exceptions to non-retroactivity will be found to apply leads *habeas* applicants to argue that the rule relied upon is not a new rule of constitutional criminal procedure and, thus, is not subject to the *Teague* limitation. A "new rule" is one that "breaks new ground or imposes a new obligation on the state or federal government."[1506] A case announces a new rule if the result was not dictated by precedent existing at the time the applicant's conviction became final. A result is not dictated by precedent if the outcome was "susceptible to debate among reasonable minds."[1507] Once a federal court concludes that a constitutional rule is a new rule, the rule is not applied retroactively under *Teague*.[1508] Thus, only constitutional rules that existed when the applicant's conviction became final will provide a basis for *habeas* relief.

[10.18.] *Stone v. Powell* and Fourth Amendment Claims

Most claims based on Fourth Amendment violations are not cognizable in *habeas corpus* actions because of the rule set forth in *Stone v. Powell*.[1509] In that case, the U.S. Supreme Court barred applicants from pursuing relief based on Fourth Amendment claims in *habeas* proceedings when the applicant was represented by competent counsel and had a full and fair opportunity to litigate the claim in state court.[1510] The rationale behind *Stone* is that the purpose of the Fourth Amendment's exclusionary rule – primarily the deterrence of future unlawful police conduct – would not be furthered by applying the rule on

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[1506] Penry v. Lynaugh, 492 U.S. 302, 314 (1989).
[1507] Butler v. McKellar, 494 U.S. 407, 415 (1990).
[1508] *See e.g.,* Whorton v. Bockting, 549 U.S. 406, 417 (2007) (rule of Crawford v. Washington, 541 U.S. 36 (2004) establishing new analysis for confrontation violation is a new rule); Beard v. Banks, 542 U.S. 406, 408 (2004) (rule in Mills v. Maryland, 486 U.S. 367 (1988) invalidating capital sentencing scheme that required juries to disregard mitigating circumstances not found unanimously is a new rule); Schiro v. Summerlin, 542 U.S. 348, 352 (2004) (rule of Ring v. Arizona, 536 U.S. 584 (2002) that invalidated judicial findings of aggravating circumstances necessary for imposition of death penalty is a new rule); O'Dell v. Netherland, 521 U.S. 151, 153 (1997) (rule of Simmons v. South Carolina, 512 U.S. 154 (1994) that allowed evidence of accurate information regarding parole eligibility when prosecutor argues future dangerousness is a new rule); Saffle v. Parks, 494 U.S. 484, 489 (1990) (rule that the Eighth Amendment prohibits jury instruction in penalty phase requiring jury to avoid influence of sympathy is a new rule): Butler v. McKellar, 494 U.S. 407, 415 (1990) (holding in Arizona v. Roberson, 486 U.S. 675 (1988) that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation is a new rule); Hill v. Black, 920 F.2d 249, 250 (5th Cir. 1990) (holding in Clemons v. Mississippi, 494 U.S. 738 (1990) that a rule in a weighing state that automatically affirms death sentence when one or more valid aggravating circumstances remain after appellate review is a new rule); McDougall v. Dixon, 921 F.2d 518, 539 (4th Cir. 1990) (rule announced in McKoy v. North Carolina, 494 U.S. 433 (1990) prohibiting jury instruction requiring unanimity on mitigation circumstances is a new rule); Bassette v. Thompson, 915 F.2d 932, 938 (4th Cir. 1990) (holding in Ake v. Oklahoma, 470 U.S. 68 (1985) is a new rule).
[1509] Stone v. Powell, 428 U.S. 465 (1976).
[1510] *Id*.

collateral review of cases in which full and fair consideration of the claim had already been given by the state courts.[1511] In determining whether an applicant had a full and fair opportunity to litigate Fourth Amendment claims in state court, the federal courts have applied a variety of different tests.[1512]

[10.19.] Substantive Standards – Basis for Relief

Habeas applicants who satisfy the many procedural prerequisites previously discussed are entitled to relief only when their convictions are based upon state court decisions that are contrary to, or that unreasonably apply, clearly established federal law *and* when they demonstrate actual prejudice.[1513]

[10.20.] Violation of the Constitution, Laws, or Treaties

Habeas relief is available only in those cases in which the state court decision was "contrary to, or involved an unreasonable application of clearly established federal law" *or* "resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence presented."[1514] In order to secure *habeas* relief, an applicant must establish not only a constitutional or statutory basis, but must also establish a particular kind of legal error or factual error, both of which, in turn, are subject to further limitations and a highly deferential standard of review. To avoid creating a basis for federal *habeas* relief, state courts must methodically, carefully, and correctly apply federal law in state criminal cases.

[10.21.] Relief Based on State Court Application of Law – "Contrary to" *or* "Unreasonable Application" of Clearly Established Federal Law

Under AEDPA, a federal court may only grant relief based on a state court's application of federal law in two circumstances.[1515] The state court

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[1511] *Id*.

[1512] *See e.g.,* Williams v. Brown, 609 F.2d 216, 220 (5th Cir. 1980) (opportunity for full and fair litigation occurs if "the processes provided by a state to fully and fairly litigate fourth amendment claims are routinely or systematically applied in such a way as to prevent the actual litigation of Fourth Amendment claims on the merits"); Gamble v. Oklahoma, 583 F.2d 1161, 1165 (10th Cir. 1978) (standard requires a determination that state court made "at least [a] colorable application of the correct Fourth Amendment constitutional standards"); Boyd v. Mintz, 631 F.2d 247, 250 (3d Cir. 1980) (unfair adjudication of claims when "state provides the process but in fact the defendant is precluded from utilizing it by reason of an unconscionable breakdown in that process").

[1513] Brecht v. Abrahamson, 507 U.S. 619 (1993).

[1514] 28 U.S.C. § 2254(d)(1) & (2) (1996).

[1515] In Williams v. Taylor, 529 U.S. 362 (2000), the U.S. Supreme Court found that a Virginia decision violated both prongs. The Virginia court applied the wrong test for prejudice on an ineffective assistance of counsel claim, requiring overall fundamental unfairness. Thus, the decision was contrary to clearly established federal law. In addition,

decision must either be (1) "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[1516] The "contrary to" and "unreasonable application" clauses have separate and independent meanings but both require that the state court decision involve federal law that is not just established, but clearly established.[1517]

A state court decision is "contrary to" U.S. Supreme Court precedent if the state court "applies a rule that contradicts the governing law set forth in [U.S. Supreme Court] cases" or if the state court "confronts a set of facts that are materially indistinguishable from a decision of the [U.S. Supreme] Court and nevertheless arrives at a result different from precedent."[1518]

A state court's decision involves an "unreasonable application of clearly established Federal law" when its application is objectively unreasonable. For example, an unreasonable application occurs when a state court correctly identifies the applicable legal principle but unreasonably applies the legal principle to the facts. A federal court may grant relief when a state court has misapplied a "governing legal principle" to "a set of facts different from those of the case in which the principle was announced."[1519]

Unreasonable is not synonymous with incorrect. "A federal *habeas* court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."[1520]

[10.22.] Relief Based on State Court's "Unreasonable Determination" of the Facts

Under AEDPA, a federal court may also grant relief based on a state court's "unreasonable determination of the facts in light of the evidence presented in the state court proceedings."[1521] In *Wiggins v. Smith*, the U.S. Supreme Court found that a state court had both unreasonably applied clearly established federal law and unreasonably determined facts in the state court proceedings.[1522] The claim in *Wiggins* was an ineffective assistance of counsel

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the U.S. Supreme Court held that even if the legal standard used was correct, the decision involved an unreasonable application of clearly established law by adding an additional requirement. *Id*. at 393-97.

[1516] 28 U.S.C. § 2254(d)(1) (1996); *see* Williams v. Taylor, 529 U.S. 362 (2000).

[1517] *See e.g.,* Yarborough v. Alvarado, 541 U.S. 652, 665 (2004); Lockeyer v. Andrade, 538 U.S. 63, 74 (2003).

[1518] Williams v. Taylor, 529 U.S. 362, 406 (2000).

[1519] Lockyer v. Andrade*,* 538 U.S. 63, 76 (2003)**.**

[1520] *Id*. at 75-76. *See* Prince v. Vincent, 538 U.S. 634 (2003) (though lower court finding was incorrect, it was not objectively unreasonable given that other courts reached similar conclusions).

[1521] 28 U.S.C. § 2254(d)(2) (1996).

[1522] 539 U.S. 510 (2003).

claim based upon counsel's failure to conduct an adequate investigation before deciding whether to put on mitigating evidence. While counsel had reviewed certain records pertaining to the defendant's background, those records did not reveal evidence of defendant's abusive background. In supporting its conclusion that counsel was not ineffective, the state court found that the defense counsel had reviewed records containing evidence of the abuse. Because the information was not contained in the records that counsel reviewed, the U.S. Supreme Court held that the state court decision was an unreasonable determination of the facts.[1523] State courts should carefully review the evidence in the case making certain that the evidence clearly supports the factual findings. When the record contains contradictory evidence, state courts should articulate why certain evidence is more reliable and credible than other evidence.

[10.23.] Proof of Prejudice

An applicant must specifically plead and prove the specific violations that form the basis for the claim to *habeas* relief.[1524] In addition to pleading and proving the elements of each violation, for most violations the applicant must also plead and prove prejudice in order to prevail.[1525] Proof of the violation without proof that the violation harmed or prejudiced the applicant or proceeding is insufficient to warrant relief.[1526]

To further complicate the pleading and proof requirement, different constitutional violations require varying levels, or standards, of proof of prejudice. The various standards range from presumed prejudice, the most lenient standard, to a standard that requires proof that "but for" the violation, the result of the proceeding would have been different. In addition, in some circumstances, identical facts may support allegations of more than one violation.

[10.24.] Relief Based on State Court Factual Determinations – Presumption of Correction

Under AEDPA, a federal court may only grant relief based on a state court's determination of facts if the state court adjudication "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."[1527] Moreover, state court factual determinations are presumed to be correct,[1528] and may be rebutted only by clear and convincing evidence. The presumption of correction applies only to

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[1523] *Id*. at 532.
[1524] Rule 2 of the Rules (pleading requirement); Brecht v. Abrahamson, 507 U.S. 619 (1993) (proof requirement).
[1525] Brecht v. Abrahamson, 507 U.S. 619 (1993).
[1526] *Id.*; but see 507 U.S. at 638 n. 9 (acknowledging possibility in "egregious" situation that relief would be granted without proof of prejudice).
[1527] 28 U.S.C. § 2254(d)(2) (1996). *See* Wiggins v. Smith, 539 U.S. 510 (2003).
[1528] 28 U.S.C. § 2254(e)(1) (1996).

state court factual determinations.[1529] The presumption does not apply, for example, when the state court fails to resolve the factual issues or to provide for a full and fair hearing. Thus, state courts should make meticulous factual findings on every issue raised.

[10.25.] Relief Based on State Court Legal Determinations

The presumption of correctness does not apply to a state court's resolution of questions of law or mixed questions of fact and law.[1530] To determine which kind of question is at issue, courts look to see whether the hearing judge is better positioned to decide the issue than the appellate panel.[1531] Issues involving witness credibility, for example, are treated as questions of fact, because the hearing judge actually observes the witnesses' demeanor.[1532] State judges should articulate the basis for their determinations, particularly when they relate to observations that the trial judge is uniquely positioned to make.

[10.26.] Establishing the Claim

If the *habeas* petition is not dismissed on procedural grounds, the next inquiry is whether the petition raises issues that are ripe for review and remedy. It is important to note that neither discovery nor an evidentiary hearing is automatic in a *habeas* proceeding. Petitioner may seek permission to conduct discovery and may request an evidentiary hearing, but summary dismissal of the petition on the merits, without either discovery or a hearing, remains a likely disposition.

[10.27.] Discovery

The federal court must authorize discovery before it can be conducted. Rule 6(a) provides that a "judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery."[1533] In order to request permission to engage in discovery, the rule requires a party to "provide reasons for the request" and to "include any proposed interrogatories and requests for admission, and must specify any requested documents."[1534]

[1529] Townsend v. Sain, 372 U.S. 293 (1963); *see also* Miller v. Fenton, 474 U.S. 104 (1985); Sumner v. Mata, 449 U.S. 539 (1981); Lavelle v. Della Rose, 410 U.S. 690 (1973).
[1530] Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963).
[1531] Miller v. Fenton, 474 U.S. 104, 113-14 (1985) ("the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis;" "the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question").
[1532] Maggio v. Fulford, 462 U.S. 111 (1983).
[1533] Rule 6 (a) of the Rules.
[1534] *Id*. at (b).

[10.28.] Evidentiary Hearings

Many, perhaps most, *habeas* claims are resolved without an evidentiary hearing based on the procedural and substantive bars discussed previously. The rules require dismissal without a hearing in certain circumstances.[1535] The statute prohibits an evidentiary hearing in other circumstances.[1536] A hearing is generally allowed when the applicant's efforts to develop a record in state court were thwarted. As a result, state courts should strive to assure that state court petitioners are given the opportunity to make a complete record in state post-conviction cases. If a hearing is granted, the applicant has a right to be present and to have counsel.[1537]

If the application is not dismissed, the rules require the court to review the pleadings, transcript of the record, and expanded record to determine whether a hearing will be conducted.[1538] An evidentiary hearing is required only when there are factual disputes and when the applicant did not receive a full and fair evidentiary hearing in state court either at trial or in the collateral, post-conviction proceeding.[1539] In other circumstances, in which material facts are disputed, the judge may allow an evidentiary hearing.[1540] The statute provides that "evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit."[1541]

The U.S. Supreme Court has further elaborated on the right to a hearing in federal *habeas* proceedings. In *Williams v. Taylor*, the U.S. Supreme Court held that an applicant is precluded from having an evidentiary hearing when the applicant failed to develop a factual basis for the claim in state court.[1542] The U.S. Supreme Court interpreted a failure to develop to mean a lack of diligence. Thus, an applicant is entitled to a hearing when the state court made no determination on a factual question through no fault of the applicant. But when the absence of factual determination is the fault of the applicant, the applicant is only entitled to

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[1535] *See* Rule 4 of the Rules. A dismissal occurs under Rule 4 before an answer has been filed; an application might also be dismissed pursuant to a motion filed by the state, after an answer has been filed and considered; or after consideration of the pleadings and the record.

[1536] 28 U.S.C. § 2254(e)(2) (1996).

[1537] 28 U.S.C. § 2243 (1948) ("the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained"); Rule 8(c) of the Rules

[1538] *See* 28 U.S.C. § 2254(f) & (g) (1996); Rule 7of the Rules (provisions related to producing and expanding the state court record).

[1539]Rule 8 of the Rules; *see* Townsend v. Sain, 372 U.S. 293, 312 (1963) ("The appropriate standard is this: Where the facts are in dispute, the federal court in *habeas corpus* must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding.").

[1540] Rule 8 of the Rules.

[1541] 28 U.S.C. § 2246 (1948). If affidavits are admitted, "any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits." *Id.*

[1542] Williams v. Taylor, 529 U.S. 420 (2000); *see also* Townsend v. Sain, 372 U.S. 293 (1963), *overruled in part by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

a hearing if the claim is based on a new, retroactive constitutional rule or factual predicate that could not have been previously discovered *and* if the applicant satisfies a rigorous cause-and-prejudice standard.[1543] An applicant is also entitled to a hearing if the state court's determination is not supported by the record or was made following an unfair procedure. The decision in *Williams v. Taylor* highlights the need for state trial courts to make explicit unambiguous factual findings on each and every issue raised in the state courts.

[10.29.] Appeals

An appeal from the denial of a *habeas corpus* application is not an appeal as of right. Instead, the applicant must seek permission to appeal by seeking a certificate of appealability from either the district court or the court of appeals.[1544] A judge may only issue a certificate of appealability if "the applicant has made a substantial showing of the denial of a constitutional right."[1545] This requirement includes a "showing that reasonable jurists could debate [whether] the [application] should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"[1546]

[10.30.] Successor Applications

Second or "successor" applications for *habeas* relief are strictly limited.[1547] The rigid limitations on successive applications make filing a comprehensive, detailed initial application extremely important.

Claims that were raised and disposed of on the merits in prior petitions must be dismissed.[1548] If the claim was dismissed for other reasons, such as to allow return to state court to satisfy exhaustion requirements, the claim is not considered "successive" [1549] and is not subject to summary dismissal, but the claim will nonetheless be dismissed absent compliance with strict statutory requirements. In order to survive dismissal on a successive application, the

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[1543] 28 U.S.C. § 2254(e)(2) (1996). The cause-and-prejudice standard requires that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." *Id*. at (e)(2)(B).

[1544] 28 U.S.C. § 2253(c)(1) (1996).

[1545] 28 U.S.C. § 2253(c)(2) (1996).

[1546] Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) "In requiring . . . a 'substantial showing of the denial of [a] federal right', obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'") (citations omitted)).

[1547] 28 U.S.C. § 2244(b) (1996).

[1548] 28 U.S.C. § 2244(b)(1) (1996).

[1549] Slack v. McDaniel, 529 U.S. 473 (2000).

applicant must show either that the claim is based on a new, previously unavailable rule of constitutional law or that its factual predicate "could not have been discovered previously through the exercise of due diligence." In addition, if the application relies on the second ground, the "facts underlying the claim, if proven and viewed in light of the evidence as a whole, [must] be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense."[1550]

Prior to filing a successive application, the applicant must seek an order authorizing the filing from the court of appeals. The three-judge panel may authorize the filing "only if it determines that the application makes a *prima facie* showing that the application satisfies the [statutory] requirements."[1551]

[10.31.] Innocence and *Habeas Corpus* Claims

Claims of innocence arise in federal *habeas corpus* cases in two discrete ways. The first arises when an applicant claims innocence but does not claim a constitutional violation. The claims are referred to as freestanding claims of innocence. An applicant asserting a freestanding claim of innocence asks a court to review the evidence of guilt or innocence in the case but does not allege that the trial included errors of a constitutional magnitude. As a result, reviewing courts give great deference to the previous findings. In order to prevail, the applicant must make a "truly persuasive" showing of innocence.[1552]

While the U.S. Supreme Court had stated that proof of innocence must be "extraordinarily high,"[1553] a specific standard of proof has not been adopted. In *House v. Bell* [1554] the U.S. Supreme Court indicated that the standard was significantly higher than the standard applied to innocence claims that were coupled with allegations of constitutional error.

When an applicant alleges actual innocence as a means at attempting to avoid procedural default, through the miscarriage of justice exception, the innocence claim is referred to as a "gateway claim." The showing of innocence necessary to be granted a hearing on the alleged constitutional error is less demanding than the showing required on freestanding claims. When an applicant claims both actual innocence and constitutional error, the applicant must show that it is more likely than not that no reasonable juror would have found the defendant guilty beyond a reasonable doubt.[1555]

[1550] 28 U.S.C. § 2244(b)(2)(B)(i) & (ii) (1996).
[1551] 28 U.S.C. § 2244(b)(3)(A), (B), & (C) (1996).
[1552] Herrera v. Collins*,* 506 U.S. 390, 417 (1993).
[1553] *Id*. at 429 (White, J., concurring).
[1554] House v. Bell, 547 U.S. 518 (2006).
[1555] Schlup v. Delo, 513 U.S. 298 (1995).

[10.32.] Conclusion

Federal *habeas corpus* review is sought by virtually every defendant sentenced to death by a state court. Although these *habeas corpus* petitions are filed in federal courts and determined by federal judges applying federal law, the *habeas* proceedings and dispositions are affected by many aspects of the state petitioner's trial, direct appeal, and state post-conviction proceedings. It is incumbent upon state court judges to allow a capital defendant to raise and fully and fairly litigate all claims arising under the treaties, laws and Constitution of the United States and to rule clearly and definitively on all issues raised.