CHAPTER 9

POST-CONVICTION PROCEEDINGS IN CAPITAL CASES
Hon. Kevin M. Emas

[9.1.] In General

The term "post-conviction remedy" refers to any procedural device that may be used to raise a collateral challenge to the judgment or sentence in a criminal case. In a capital case, the claims that are raised in a post-conviction proceeding may be directed to the validity of the conviction, the validity of the sentence of death, or both. The essential feature of all claims in post-conviction proceedings is that it challenges the validity of the judgment or sentence on grounds other than those that were or could have been raised on direct appeal.

[9.2.] *Habeas Corpus*

Many states have now adopted specific post-conviction procedures that may be used in place of a petition for writ of *habeas corpus*.[1219] These procedures are typically characterized as civil remedies since they are designed to supplant the civil remedy of *habeas corpus*. If there is no post-conviction procedure established by rule of statute, or if the procedure does not provide a remedy for the kind of claim that is raised, the proper method of seeking post-conviction relief is to file a petition for writ of *habeas corpus*. Some states continue to use *habeas corpus* as the principal method of post-conviction relief. In two of the largest death penalty states, California and Texas, post-conviction claims are raised by *habeas corpus*.[1220]

There are still some common uses of the remedy of *habeas corpus* even in those states that have a comprehensive rule or statute regarding post-conviction remedies. For example, *habeas corpus* is used in some states as a post-conviction remedy to raise a claim of ineffective assistance of appellate counsel.[1221] Depending on the local procedure, it may also be proper to file a petition for writ of *habeas corpus* to raise a claim of ineffective assistance of counsel in a previous post-conviction motion.

[9.3.] *Coram Nobis*

In the absence of a more specific procedure established by a post-conviction rule or statute, the proper method for a defendant to bring a factual error to the attention of the court is to file a petition for writ of error *coram nobis*.

[1219] *See, e.g.,* FLA. R. CRIM. P. 3.851; IND. R. P. POST-CONVICTION REMEDIES PC 1; KY. R. CRIM. P. 11.42; MO. R. CRIM. P. 29.15; TEX. CODE CRIM. P. 11.071.
[1220] *See* In re Marquez, 822 P.2d 435 (Cal. 1992); Ex parte Williams, 833 S.W.2d 150 (Tex. Crim. App. 1992).
[1221] *See* Correll v. Dugger, 558 So.2d 422 (Fla. 1990).

Under the common law, a defendant seeking a writ of error *coram nobis* was required to file the petition in the appellate court alleging that there are facts that were unknown at the time of the trial and that, if known, those facts would have changed the result of the case. If the appellate court granted the petition, the defendant would be given an opportunity to present the newly discovered facts in the trial court and the trial judge would then determine whether it is necessary to grant a new trial.

Some states continue to use the writ of error *coram nobis* under modernized versions of the common law procedure. In other states, it is now proper to raise claims of newly discovered evidence in a post-conviction motion.[1222]

[9.4.] Post-conviction Motions

Many post-conviction claims may now be raised by filing a motion in the trial court under procedures established by a rule or a statute. The American Bar Association Standards for Criminal Justice regarding post-conviction remedies provide that "[t]here should be one comprehensive remedy for post-conviction review of the validity of judgments of conviction, or of the legality of custody or supervision based upon a judgment of conviction. The remedy should encompass all claims whether factual or legal in nature and should take primacy over any existing procedure or process for determination of such claims."[1223] The procedures in effect in most states replace the remedies formerly available by *habeas corpus*, *coram nobis* and other extraordinary proceedings.

The procedures that apply to post-conviction motions in state courts are generally found in criminal statutes and rules of criminal procedures. However, the courts have often observed that post-conviction motions are civil in nature.[1224] This is so because the extraordinary remedies of *habeas corpus* and *coram nobis*, from which post-conviction remedies are derived, were regarded as civil proceedings even when used in conjunction with a criminal case.

A post-conviction motion may only be used to raise a collateral challenge to the validity of the judgment or sentence. For this reason, it is improper to include in a post-conviction motion a claim that was or could have been raised on direct appeal. The courts have consistently held that post-conviction relief is not a substitute for an appeal.[1225] The right to file a post-conviction motion was not intended as a second opportunity to argue alleged trial errors. Nor was it intended to provide a forum for reargument of the issue of guilt

---

[1222] *See* People v. Steidl, 568 N.E.2d 837 (Ill. 1991), *rev'd on other grounds*, 685 N.E.2d 1335 (Ill. 1997); Richardson v. State, 546 So.2d 1037 (Fla. 1989).

[1223] A.B.A. STANDARDS CRIM. JUST. § 22-1.1 (1986).

[1224] *See* State v. Bostwick, 443 N.W.2d 885 (Neb. 1989); State v. Skjonsby, 417 N.W.2d 818 (N.D. 1987); Ouimette v. Moran, 541 A.2d 855 (R.I. 1988); Peltier v. State, 808 P.2d 373 (Idaho 1991).

[1225] *See* Andrews v. Utah Bd. of Pardons, 836 P.2d 790 (Utah 1992); Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991); State v. El-Tabech, 453 N.W.2d 91 (Neb. 1990); Cutbirth v. State, 751 P.2d 1257 (Wyo. 1988); Coplen v. State, 766 S.W.2d 612 (Ark. 1989); Combs v. State, 537 N.E.2d 1177 (Ind. 1989); Stephens v. State, 737 S.W.2d 147 (Ark. 1987).

or innocence. These matters will have already been settled by the time the motion is filed. Rather, a post-conviction motion serves the limited purpose of providing the defendant with a remedy in the event there has been a substantive deprivation of federal or state constitutional rights in the proceeding that produced the judgment or sentence under attack.[1226]

[9.5.] Executive Clemency

Clemency is an exclusive function of the executive branch of government. Therefore, the courts lack jurisdiction to interfere with the proper exercise of discretion to grant a petition for executive clemency. Judicial power over executive clemency is limited to claims that the clemency statute is unconstitutional on its face or that the executive officers failed to apply the statute according to state and federal constitutional requirements. Assuming the clemency statute is valid and that the defendant's constitutional rights have not been violated in the manner in which the statute has been applied, the final decision to grant or deny clemency is not subject to review in court.

Trial judges are not usually involved in the clemency process except to the extent that a particular state procedure may allow a judge to make a recommendation regarding clemency. Trial judges may also have some indirect involvement in the process under state laws requiring them to appoint counsel and to resolve potential disputes regarding the compensation of counsel.

[9.6.] Motion and Response

While the formal requirements for filing a post-conviction motion depend on the provisions of the rules or statutes in each jurisdiction, there are some general requirements that are almost always imposed. In most jurisdictions, the defendant must sign the post-conviction motion even if it has been prepared by an attorney. Likewise, in most jurisdictions the factual allegations of the motion must be verified either by the defendant or by some other person. If the applicable rule or statute requires a signature and verification, a post-conviction motion that does not meet these formal requirements is insufficient and may be dismissed.[1227]

[9.7.] Contents of Motion

Generally, a post-conviction motion is subject to certain basic pleading requirements that are designed to enable the trial judge to quickly ascertain the proper method of disposition. While the specific requirements vary depending on the provisions of the rule or statute in effect in a particular jurisdiction, the

---

[1226] *See* People v. Enoch, 585 N.E.2d 115 (Ill. 1991).

[1227] *See* Kilgore v. State, 791 S.W.2d 393 (Mo. 1990) (containing a discussion of the signature and verification requirements for post-conviction motions in capital cases); Scott v. State, 464 So.2d 1171 (Fla. 1985), *clarified by* Gorham v. State, 494 So.2d 211 (Fla. 1986).

applicable procedures typically require that a post-conviction motion must contain such information as:

1. The judgment or sentence under attack and the court that rendered the judgment;
2. Whether there was an appeal from the judgment or sentence and the disposition of the appeal;
3. Whether a previous post-conviction motion has been filed, and if so, how many;
4. If a previous motion or motions have been filed, the reason or reasons why the claim or claims in the present motion were not raised in the former motion or motions;
5. The nature of the relief sought; and
6. A statement of the facts relied on in support of the motion.

Some states have adopted standard forms that must be used in preparing a post-conviction motion. As is the case with federal *habeas corpus* petitions, the motion must follow the general format of an approved form even if the defendant is represented by a lawyer. Forms are widely used because post-conviction motions are often filed as *pro se* pleadings.

To be entitled to an evidentiary hearing on a claim of ineffective assistance of trial counsel during either the guilt phase or the penalty phase, the defendant must allege specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant.[1228] A mere conclusory allegation that counsel was ineffective is insufficient to require an evidentiary hearing.[1229] Counsel is not constitutionally ineffective simply because he or she fails to raise every conceivable claim, even those of constitutional magnitude.[1230]

[9.8.] Order to Show Cause

In most states, there is some procedural mechanism by which the court can order a response from the state before deciding whether to grant a hearing on the motion. Depending on the applicable procedure, the court may direct either the state attorney or the attorney general to file a response to the motion. In any event, it would be wise to obtain a response if the post-conviction motion is sufficient on its face, and if the available files and records do not readily show that the defendant's claims are unfounded. Counsel for the state may be able to provide a transcript or some other portion of the record that conclusively refutes the claim. At the very least, the state has a right to be heard on the issue whether the motion can be summarily decided. The state may wish to argue that the court

---

[1228] *See* Roberts v. State, 568 So.2d 1255 (Fla. 1990).
[1229] *See* Pollard v. State, 807 S.W.2d 498 (Mo. 1991); In re Rice, 828 P.2d 1086 (Wash. 1992).
[1230] *See* Engle v. Isaac, 456 U.S. 107 (1982).

is required to grant an evidentiary hearing on certain issues.

[9.9.] Response by the State

In most states, the attorney general has the responsibility to respond to a post-conviction motion when the court has issued an order to show cause. The response may contain an argument that the motion is insufficient on its face or it may alert the court to parts of the record that conclusively show the defendant is not entitled to relief.

The following matters should be considered in determining whether a post-conviction motion meets the formal sufficiency requirements:

- ✓ Whether the applicable rule or statute requires that a post-conviction motion be signed by the defendant or that the facts be verified.
- ✓ Whether the factual allegations are sufficient to establish a *prima facie* case in support of the motion.
- ✓ Whether the allegations of the motion are sufficient to establish a ground upon which relief could be granted.
- ✓ Whether a particular form is required, and if so, whether the motion has been submitted on the approved form.
- ✓ Whether an appendix is required and if so, whether the necessary documents are submitted as an appendix.
- ✓ Whether the allegations of the motion are refuted by the files and records in the previous criminal proceedings.

[9.10.] Successive Motions

A second or successive motion for post-conviction relief can be summarily denied if there is no reason for failing to raise the issues in the previous motion.[1231] Likewise, the court is not required to entertain a post-conviction claim that could have been raised in a previous petition for writ of *habeas corpus*.[1232] A claim that is not asserted in a previous collateral challenge to the conviction is waived.[1233] Presentation of a new claim in a successive motion is sometimes referred to as an "abuse of process,"[1234] or an "abuse of the writ."[1235]

There are some circumstances that justify a failure to present a claim in an earlier post-conviction motion. When a successive motion is filed, however, the defendant has the burden of establishing a justification for the failure to

---

[1231] *See* Bolder v. State, 769 S.W.2d 84 (Mo. 1989); State v. Otey, 464 N.W.2d 352 (Neb. 1991).
[1232] *See* Hurst v. Cook, 777 P.2d 1029 (Utah 1989).
[1233] *See* People v. Stewart, 565 N.E.2d 968 (Ill. 1990); Hendrix v. State, 557 N.E.2d 1012 (Ind. 1990); Commonwealth v. Hagood, 532 A.2d 424 (Pa. 1987).
[1234] *See* Eutzy v. State, 541 So.2d 1143 (Fla. 1989).
[1235] In re Rice, 828 P.2d 1086 (Wash. 1992).

present the claim in an earlier proceeding before the court. One reason that is often given for presenting a new claim in a successive post-conviction motion is that the facts were not known, and could not have been known, at the time the original post-conviction motion was filed. Another is that the claim is based on a principle of constitutional law that was not announced until after the disposition of the first motion.[1236]

The state may claim an "abuse of process" not only as to those issues that could have been raised in a prior post-conviction motion but also as to those issues that were actually presented and decided. If the court has adjudicated a claim on the merits then the decision is binding on the parties and the claim cannot be raised again in a subsequent petition. Of course, if the motion was summarily denied on the ground that it failed to allege a basis for relief, then the defendant would not be precluded from raising the issues once again in a subsequent post-conviction motion. In this situation, the denial is not a decision on the merits and has no binding effect on the parties.

[9.11.] Federal Standard

The issues that arise in the presentation of a successive post-conviction motion are similar to those that arise in federal court in connection with a successive petition for writ of *habeas corpus*. The U.S. Supreme Court has held that a second federal *habeas corpus* petition can be dismissed on the ground that it is an "abuse of the writ" if the issue was, or could have been, raised in a previous petition for writ of *habeas corpus*.[1237] The test to be applied in such cases is the "cause and prejudice" test set out in *Wainwright v. Sykes.*[1238] The petitioner must show cause for the failure to raise the issue in an earlier petition, and that the failure to consider the claim will result in prejudice to his rights. Under this standard, a claim negligently omitted from a *habeas corpus* petition cannot be raised in a subsequent petition.

As an exception to these requirements, the court may entertain a successive federal *habeas corpus* petition if the petition demonstrates a case of "actual innocence."[1239] In that event, the defendant need not meet the cause and prejudice test.

The following matters should be considered in ruling on a successive post-conviction motion:

- ✓ Whether the claim is barred by the time limits governing the filing of post-conviction motions.
- ✓ Whether the claim was actually raised in a prior appeal or post-conviction motion and if so, whether it was decided on the merits.
- ✓ Whether the claim is one that could have been raised in a

---

[1236] *See* Stuart v. State, 801 P.2d 1283 (Idaho 1990).
[1237] *See* McCleskey v. Zant, 499 U.S. 467 (1991).
[1238] 433 U.S. 72 (1977).
[1239] *See* Sawyer v. Whitley, 505 U.S. 333 (1992).

prior appeal or post-conviction motion.

- ✓ Whether the claim is based on a newly announced principle of constitutional law, and if so, whether the principle is one that is applied retroactively.
- ✓ Whether the claim is based on evidence that was not known or could not have been known within the time period for filing the motion.
- ✓ Whether a failure to consider the claim would prejudice the defendant's rights.

[9.12.] Time Limitations

The passage of time can operate as a bar to the right to pursue a claim in a post-conviction proceeding. Generally, the state may place a time limit on the filing of a post-conviction motion without violating any constitutional right guaranteed to the defendant.[1240] It has been said that the purpose of placing a time limit on post-conviction relief is to promote fairness and finality, and to avoid piecemeal litigation in post-conviction proceedings.[1241]

Some states have placed fixed time limits on the filing of post-conviction motions while others resolve the issue of staleness by applying the equitable doctrine of laches. In recent years, there has been a trend toward the adoption of fixed time limits. Statutes or rules imposing time limits on post-conviction relief have come about primarily in response to criticism for the delays in capital cases.

The recommendation in the ABA Standards is that the right to obtain post-conviction relief should not be subject to a statute of limitations. The rationale for this view is based in part on the fact that there are no time limits on the comparable remedy afforded by a writ of *habeas corpus*, and in part on the fact that the courts retain the ultimate power to find that a post-conviction motion is an abuse of the process if the defendant has raised a claim that could have been raised at an earlier stage of the proceedings.[1242]

However, many states have placed specific time limits on the filing of a post-conviction motion. Among those states with specific time limits are Alabama (one year);[1243] Delaware (one year);[1244] Florida (one year);[1245] Illinois (three years);[1246] Kentucky (three years);[1247] Mississippi (three years);[1248] Montana (one year);[1249] Oklahoma (90 days from filing the reply brief in the

---

[1240] *See* State v. Rhoades, 820 P.2d 665 (Idaho 1991); State v. Ervin, 835 S.W.2d 905 (Mo. 1992).
[1241] *See* Mathews v. Eldridge, 424 U.S. 319 (1976); Johnson v. State, 536 So.2d 1009 (Fla. 1988).
[1242] A.B.A. STANDARDS CRIM. JUST. § 22-2.4 (1986).
[1243] ALA. R. CRIM. P. 32.2(c).
[1244] DEL. SUPER. CT. CRIM. R. 61(i)(1).
[1245] FLA. R. CRIM. P. 3.851(d)(1).
[1246] 725 ILL. COMP. STAT. 5/122-1(c) (2004).
[1247] KY. R. CRIM. P. 11.42(10)
[1248] MISS. CODE ANN. § 99-39-5(2) (2000).
[1249] MONT. CODE ANN. § 46-21-102 (1997).

direct appeal);[1250] Tennessee (one year).[1251]

[9.13.] Exceptions

Even in the states that impose a time limit on post-conviction relief, there may be exceptions for claims that could not be discovered within the applicable time period. For example, Alabama adds an additional six months for claims based on newly discovered facts[1252] and Florida allows an exception for claims based on facts that could not have been discovered in time with the exercise of due diligence.[1253]

Some states also recognize an exception to the time period for claims that are based on a newly recognized principle of law. Under Delaware law, a post-conviction motion may be filed within three years of newly recognized right that can be applied retroactively.[1254] Similarly, Mississippi recognizes an exception for claims based on an intervening decision of the state or U.S. Supreme Court.[1255] This is discussed in Section 9.30.

[9.14.] Abbreviated Time Limits

Abbreviated time periods may apply to the filing of a motion for post-conviction relief after a death warrant is signed. This procedure is designed to prevent the defendant from disrupting the process by filing an unmeritorious post-conviction motion immediately before the date of the execution. Generally, if an abbreviated time period applies to a post-conviction motion filed after a warrant, the time period will be subject to the same exceptions for newly discovered evidence and newly established constitutional rights. For example, in *Lightbourne v. Dugger,*[1256] the Florida Supreme Court reversed the denial of an untimely post-conviction motion because the allegations of the motion demonstrated that the defendant could not have previously discovered the claim by the exercise of due diligence.

The following matters should be considered in determining whether a post-conviction motion is timely:

- ✓ Whether there is a statute or court rule that imposes a time limit for filing a post-conviction motion.
- ✓ Whether the statute or rule imposes a different time limit if the defendant has sought review in a state or federal appellate court.
- ✓ Whether there is an exception to the time limit for newly

---

[1250] OKLA. STAT. ANN. tit. 22, § 1089 (2006).
[1251] TENN. CODE ANN. § 40-30-102 (1996).
[1252] ALA. R. CRIM. P. 32.2(C).
[1253] FLA. R. CRIM. P. 3.850.
[1254] DEL. SUPER. CT. CRIM. R. 61(i)(1).
[1255] MISS. CODE ANN. § 99-39-5(2) (2000) and MISS. CODE ANN. § 99-39-23(6) (2000).
[1256] 549 So.2d 1364 (Fla. 1989).

discovered evidence or newly recognized principles of law, and if so, whether the exception applies.

✓ Whether there is an abbreviated time period that applies to post-conviction motions filed after the issuance of a death warrant.

[9.15.] Right to Counsel

There is no absolute constitutional right to counsel in post-conviction proceedings.[1257] However, this rule is usually qualified with an explanation that the circumstances of a particular case may require the appointment of counsel.[1258] Moreover, the need for appointed counsel may rise to the level of a constitutional right if there is no statutory provision for the appointment of counsel in such proceedings. However, the states must give defendants in post-conviction proceedings "meaningful access" to the courts to press their claims, and states are given broad discretion to define the manner of providing such access.[1259]

Some states provide appointed counsel to all indigent defendants in post-conviction proceedings in capital cases.[1260] If there is no specific provision requiring the appointment of counsel, there may be a general rule or statutory provision that permits the appointment of counsel when necessary to protect the rights of the defendant. Finally, if there is no express authority permitting the appointment of counsel in a post-conviction proceeding, the trial judge has inherent authority to appoint an attorney and to require the state to pay the legal costs.

The need for appointed counsel in post-conviction litigation in a capital case is greater than in any other kind of criminal case. This is so because an error in preparing or presenting a post-conviction claim could easily go uncorrected before the execution of the sentence. Although a defendant has no absolute constitutional right to counsel in a post-conviction proceeding, as the court explained in *Murray v. Giarratano*,[1261] a good argument could be made in nearly any capital case, that the circumstances demand the appointment of counsel as a matter of constitutional law. For this reason, it would be wise to provide counsel

---

[1257] *See* Coleman v. Thompson, 501 U.S. 722 (1991); Pennsylvania v. Finley, 481 U.S. 551 (1987); Ross v. Moffitt, 417 U.S. 600 (1974); McKague v. Whitley, 912 P.2d 255 (Nev. 1996).

[1258] *See* Spalding v. Dugger, 526 So.2d 71 (Fla. 1988).

[1259] Bounds v. Smith, 430 U.S. 817 (1977). *See* Murray v. Giarratano, 492 U.S. 1 (1989), (Kennedy, J., concurring).

[1260] *See e.g.,* ARIZ. R. CRIM. P. 32.4(c) (the court is required to appoint counsel for a defendant sentenced to death); FLA. STAT. ANN. § 27.702 (2004) (creating capital collateral regional counsel, funded by the state, to represent defendants in capital post-conviction proceedings in state and federal courts); NEV. REV. STAT. § 34.820(1)(a) (1991) (Nevada statute mandates appointment of counsel in post-conviction proceeding for a defendant under sentence of death); OKLA. STAT. ANN. tit. 22, § 1089 (2006) (the public defender must represent all indigent defendants in post-conviction proceedings in capital cases).

[1261] 492 U.S. 1 (1989).

for every defendant who is seeking post-conviction relief from a judgment and sentence of death.

Trial judges are more likely to encounter lawyers from other states in the post-conviction stage of a capital case than any other stage of the case. Lawyers who specialize in handling such motions are not always confined to a particular state. Generally, if the attorney is not a member of the state bar association and has filed a motion to appear *pro hac vice* along with the post-conviction motion, the trial judge must rule on the motion to appear *pro hac vice* before striking the post-conviction motion on the ground that it was not filed by an attorney authorized to practice in the state.[1262] The summary denial of the motion for leave to appear deprives the defendant of his right to due process of law.

[9.16.] Grounds for Relief

A post-conviction motion may be based on any legal claim as long as it is the kind of claim that can be raised as a collateral challenge to the judgment or sentence. That is, a post-conviction motion may be based on any legal ground that could not have been raised on direct appeal, and any legal ground that affects the essential validity of the judgment or the sentence of death. The specific grounds that may be asserted in a post-conviction motion are usually listed in the applicable rule or statute governing post-conviction remedies. Many of the rules and statues in effect in the United States were patterned after the ABA Standards, which contains a list of the grounds in support of a post-conviction motion. ABA Criminal Justice Standards, Standard 22-2.1 states:

A post-conviction proceeding should be sufficiently broad to provide relief:

(a) for meritorious claims challenging judgments of conviction and sentence, including cognizable claims:
  (i) that the conviction was obtained or sentence imposed in violation of the Constitution of the United States or the constitution or laws of the state in which the judgment was rendered;
  (ii) that the applicant was convicted under a statute that is in violation of the Constitution of the United States or the constitution of the state in which judgment was rendered, or that the conduct for which the applicant was prosecuted is constitutionally protected;
  (iii) that the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;
  (iv) that the sentence imposed exceeded the maximum authorized by law or is otherwise not in accordance with the sentence authorized by law;

[1262] *See* Huff v. State, 569 So.2d 1247 (Fla. 1990).

(v) that there exists evidence of material facts which were not, and in the exercise of due diligence could not have been, theretofore presented and heard in the proceedings leading to conviction and sentence, and that now require vacation of the conviction or sentence;

(vi) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence where sufficient reason exists to allow retroactive application of the changed legal standard;

(b) for meritorious claims challenging the legality of custody or restraint based upon a judgment of conviction, including claims that a sentence has been fully served or that there has been unlawful revocation of parole or probation or conditional release.[1263]

This list describes the general types of claims that may be raised in a post-conviction motion. Within each category on the list there are numerous specific claims that could be raised. Without attempting to catalog every possible claim, the legal issues that arise most often in post-conviction motions filed in death penalty cases are discussed in more detail below.

[9.17.] Competency to Proceed

Competency to proceed and related issues are often litigated in post-conviction motions. Courts in many states will entertain a claim of incompetence to proceed even if the claim is made for the first time in the motion for post-conviction relief.[1264] In such cases it is difficult for the state to argue that the defendant waived the right to argue the issue of incompetence by failing to raise the issue at trial or on direct appeal.

In *Ake v. Oklahoma*,[1265] the U.S. Supreme Court held that a criminal defendant who makes a preliminary showing that his mental condition may be an issue in a death penalty case, either in the guilt phase or the penalty phase, is entitled to a court-appointed expert to assist in the investigation and presentation of the mental health issues. The decision in *Ake,* has given rise to a variety of issues relating to duty to appoint experts and the extent of the required psychiatric assistance. Many of these issues will be presented as post-conviction claims just as they are presented in trials and appeals.

[1263] A.B.A. STANDARDS CRIM. JUST. § 22-2.1 (1986).
[1264] *See* People v. Eddmonds, 578 N.E.2d 952 (Ill. 1991); Mason v. State, 489 So.2d 734 (Fla. 1986).
[1265] 470 U.S. 68 (1985).

[9.18.] Ineffective Assistance of Counsel

The claim raised most frequently in post-conviction proceedings is that the defendant did not receive effective assistance of counsel. Challenges to the effectiveness of counsel are often raised in collateral proceedings because the record of the alleged errors and the effect of those errors are not easily developed until after the trial and the direct appeal.

[9.19.] Ineffective Assistance of Counsel in Guilt or Penalty Phase

An ineffective assistance of counsel claim can be raised at the penalty phase as well as the guilt phase. The same legal standards apply. To demonstrate prejudice in connection with a death sentence a defendant must show that there is a reasonable probability that, absent the deficient performance, the outcome at sentencing would have been different.[1266] It is more difficult for the defendant to establish a claim of ineffectiveness at sentencing when the jury has recommended life and the judge overrode that recommendation. A jury's life recommendation is a strong indication of counsel's effectiveness.[1267]

[9.20.] Categories of Ineffective Assistance of Counsel

There are two general categories of ineffective assistance of counsel claims and each is governed by a different standard. The first type of claim alleges that defense counsel rendered actual ineffective assistance, and is based on specific actions or omissions by counsel which resulted in prejudice to the defendant. This is often referred to as "actual ineffective assistance" or a *Strickland* claim.[1268]

The second (and much narrower) category applies to circumstances in which the defendant was actually or constructively denied the assistance of counsel. Under these circumstances, prejudice is presumed and need not be established to be entitled to relief. This is often referred to as *per se* ineffective assistance or a *Cronic* claim.[1269]

[1266] Bell v. Cone, 535 U.S. 685 (2002); Strickland v. Washington, 466 U.S. 668, 687 (1984); *see* State v. Twenter, 818 S.W.2d 628 (Mo. 1991); Bertolotti v. State, 534 So.2d 386 (Fla. 1988); Boyd v. State, 811 S.W.2d 105 (Tex. Crim. App. 1991); U.S. v. Bono, 26 M.J. 240 (C.M.A. 1988).

[1267] *See* Francis v. State, 529 So.2d 670 (Fla. 1988); Minnick v. State, 698 N.E.2d 745 (Ind. 1998).

[1268] Strickland v. Washington, 466 U.S. 668 (1984).

[1269] U.S. v. Cronic, 466 U.S. 648 (1984).

[9.21.] Actual Ineffective Assistance

This first category of ineffective assistance of counsel is based entirely on the acts or omissions of the lawyer, and requires assessing both the deficient conduct of counsel as well as the resulting prejudice to the defendant. These claims are premised on the argument that the defendant was deprived of his right to the effective assistance of counsel as a result of something the lawyer did or failed to do. The proper standard for resolving this type of ineffective assistance of counsel claim is outlined in *Strickland v. Washington*.[1270] The standard contains two prongs. To be entitled to relief, the defendant must establish *both* prongs:

The lawyer's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Defendant must show that the representation fell below an objective standard of reasonableness under prevailing professional norms; and

The deficient performance "prejudiced" the defense. Under this prong, defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[1271] This standard is generally followed by all jurisdictions.[1272]

Because a defendant must establish both prongs before she or he is entitled to relief, trial judges have the option to decide the second prong first; that is, a trial judge need not determine whether counsel's performance was deficient before examining whether the alleged deficiency was prejudicial. If the defendant fails to establish either of the two prongs, the defendant's claim fails.[1273] Two of the most common grounds asserted under *Strickland* are the failure to investigate and the failure to present evidence.

[9.22.] Failure to Investigate

As a general rule, defense attorneys have an affirmative duty to investigate and uncover all reasonably available evidence in the defense of their clients. Therefore, a failure to investigate or uncover evidence that would be

---

[1270] 466 U.S. 668 (1984).
[1271] *Id.* at 694.
[1272] *See*, e.g., Humphries v. State, 570 S.E.2d 160 (S.C. 2002); Roche v. State, 690 N.E.2d 1115 (Ind. 1997); State v. Gegia, 809 N.E.2d 673 (Ohio Ct. App. 2004); Hill v. State, 537 S.E.2d 75 (Ga. 2000); State v. Kandies, 467 S.E.2d 67 (N.C. 1996); Humphrey v. Commonwealth, 153 S.W.3d 854 (Ky. Ct. App. 2004); Boyd v. State, 811 S.W.2d 105 (Tex. Crim. App. 1991); U.S. v. Scott, 24 M.J. 186 (C.M.A. 1987); In re Brett, 16 P.3d 601 (Wash. 2001); People v. Pickens, 521 N.W.2d 797 (Mich. 1994).
[1273] *See* In re Rice, 828 P.2d 1086 (Wash. 1992); Leisure v. State, 828 S.W.2d 872 (Mo. 1992); Elliott v. State, 465 N.E.2d 707 (Ind. 1984).

relevant or helpful may constitute ineffective assistance of counsel. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[1274]

This does not mean, however, that lawyers are obligated to pursue every possible lead or to interview every possible witness.[1275] Trial lawyers have a reasonable degree of discretion to determine what investigation is necessary in a given case, and their decision will be evaluated by a standard of objective reasonableness under prevailing professional norms.[1276]

Nevertheless, the failure to uncover or investigate substantial (and reasonably available) mitigating evidence for sentencing cannot be justified as a tactical decision where counsel "had not fulfilled their obligation to conduct a thorough investigation of defendant's background."[1277] Counsel's inaction was not objectively reasonable under the circumstances, and his failure to investigate could not fairly be characterized as strategic: "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on the investigation."[1278] No reasonable basis existed in *Williams* to support the failure to investigate the defendant's background.[1279]

Failure to pursue certain discovery procedures does not necessarily require a finding that counsel was ineffective, because both deficient performance and prejudice must be established.[1280] It must be shown that some relevant and helpful information would have been obtained or that the defendant was otherwise prejudiced by counsel's failure to pursue the discovery in question. For example, in *People v. Titone*,[1281] the Illinois Supreme Court rejected a claim of ineffective assistance of counsel based on a failure to pursue discovery because there was no reasonable probability the outcome of the case would have been different. In a similar vein, a defense lawyer does not have a duty to investigate every possible statement that could be used as impeachment.

In determining the reasonableness of an attorney's decision not to investigate, or to limit an investigation, the court must consider the totality of the circumstances at the time, avoiding the use of hindsight and with a heavy measure of deference to counsel's judgments.[1282] The trial court should consider the evidence which was reasonably available at the time, the scope and extent of the investigation actually conducted, and the reasons for counsel's limitation on the investigation. In *Wiggins v. Smith*,[1283] the U.S. Supreme Court found defense counsel's actions constitutionally deficient where "counsel abandoned their investigation of defendants' background after having acquired only rudimentary

---

[1274] *Strickland*, 466 U.S. at 691.
[1275] Ex parte Woods, 176 S.W.3d 224 (Tex. Crim. App. 2005).
[1276] *Strickland*, 466 U.S. at 688.
[1277] Williams v. Taylor, 529 U.S. 362, 396 (2000).
[1278] *Strickland*, 466 U.S. at 690-91.
[1279] Williams v. Taylor, 529 U.S. 362 (2000).
[1280] U.S. v. Garcia, 57 M.J. 716 (N-M. Ct. Crim. App. 2002).
[1281] 600 N.E.2d 1160 (Ill. 1992).
[1282] *Strickland*, 466 U.S. at 690-91; Davi v. Class, 609 N.W.2d 107 (S.D. 2000).
[1283] 539 U.S. 510 (2003).

knowledge of his history from a narrow set of sources."[1284]

Where the failure to investigate (or limiting an investigation) is the result of the defendant's own actions, she or he cannot complain that counsel's performance was deficient. As the U.S. Supreme Court observed in *Strickland*:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.[1285]

To establish a claim of ineffective assistance of counsel based on a failure to contact a witness, the defendant must show, among other things, that the witness would have been located through a reasonable investigation, that he would have testified at trial, and that the witness' testimony would have provided a viable defense or otherwise affected the jury's decision.[1286]

The U.S. Supreme Court recently addressed the parameters of defense counsel's duty to investigate, especially in the context of preparation for the penalty phase proceedings. In *Rompilla v. Beard*,[1287] defense counsel was aware

---

[1284] *Wiggins*, 539 U.S. at 524. *Compare* Burger v. Kemp, 483 U.S. 776 (1987) (counsel's limited investigation objectively reasonable where he interviewed all witnesses brought to his attention, discovering little that was helpful and much that was harmful).

[1285] *Strickland*, 466 U.S. at 691. *See also* Virginia Dept. of Corrections v. Clark, 318 S.E.2d 399 (Va. 1984); Commonwealth v. Wilson, 861 A.2d 919 (Pa. 2004); Brewer v. State, 496 N.E.2d 371 (Ind. 1986), *rev'd on other grounds sub nom.* Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991) (attorney's failure to conduct further investigation of alibi defense resulted from defendant's statement that alibi was not true); Stewart v. State, 801 So.2d 59 (Fla. 2001) (attorney could not be faulted for failing to investigate claim that defendant had been abused as a child; counsel interviewed and questioned defendant about his childhood and never mentioned any alleged abuse); Kirksey v. State, 923 P.2d 1102 (Nev. 1996) (trial counsel's acquiescence to defendant's waiver of right to present mitigation evidence does not constitute ineffective assistance of counsel); Jividen v. State, 569 S.E.2d 589 (Ga. Ct. App. 2002) (failure to challenge legality of search not deficient where defendant informed counsel that that defendant and his family had consented to search); Fotopoulos v. State, 838 So.2d 1122 (Fla. 2002) (failure to locate witnesses to testify at suppression hearing not ineffective assistance where defendant told counsel the property seized by police did not belong to defendant).

[1286] *See* State v. Twenter, 818 S.W.2d 628 (Mo. 1991).

[1287] 545 U.S. 374 (2005).

that the prosecution was relying on defendant's prior sexual battery conviction as an aggravating circumstance. The prosecutor advised counsel that he intended to read into evidence the testimony of the victim from that prior sexual battery trial. Defense counsel did not obtain the transcript of the testimony until the day before the penalty phase proceeding and did not review the transcript prior to the penalty phase proceeding. The U.S. Supreme Court held that defense counsel's actions constituted deficient performance under *Strickland*. The U.S. Supreme Court found defense counsel's actions were not justified by the fact that defendant and his family advised counsel that the victim's testimony would be neither helpful nor harmful in the penalty phase:

> It flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecutor will cull for aggravating evidence. *No reasonable lawyer would forgo examination of the file thinking he could do as well by asking the defendant or family… whether they recalled anything helpful or damaging in the prior victim's testimony*.[1288]

While this may appear to conflict with cases which hold that the reasonableness of an attorney's investigation may be affected by the defendant's own statements or actions, the strict holding in *Rompilla* goes no further than to require counsel to make reasonable efforts to obtain and review any evidence the prosecutor intends to rely upon at the penalty phase.

However, the U.S. Supreme Court in *Rompilla* found that defense counsel's performance was deficient not only in his failure to review the transcript of the prior testimony, *but in failing to review the court file related to that prior conviction*. It is in this regard that the prejudice component of *Strickland* was established. Had counsel reviewed the court file of defendant's prior felony conviction, he would have discovered significant mitigation evidence (and information leading to even more mitigation evidence). This failure to review the prior court file (and the failure to discover the mitigation evidence) led the U.S. Supreme Court in *Rompilla* to conclude that defendant was entitled to a new penalty phase proceeding.

Rompilla suggests the need for counsel to do more than simply rely upon the defendant or his family as the single source of information regarding potential mitigation. The following general rules could fairly be said to flow from *Rompilla*:

1. Defense attorneys have a duty to obtain and review any evidence they know the state intends to introduce at the penalty phase proceeding.
2. If the state intends to introduce evidence of a prior conviction (or evidence related to that prior conviction), defense attorneys should review the entire court file of that prior conviction.

[1288] *Rompilla*, 545 U.S. at 388 (emphasis added).

3. As a part of the investigation for the penalty phase, defense attorneys should attempt to obtain defendant's school, medical, and prison records to the extent they are readily available.

In determining whether counsel has acted reasonably in obtaining (or not obtaining) files and records in the course of his or her investigation, a trial court should consider the following factors:

- ✓ The number of records or files involved
- ✓ The cost and time required to obtain and review the records
- ✓ Accessibility of the records
- ✓ Actual efforts made to obtain or review the records
- ✓ Certainty of the state's intent to use the records
- ✓ Timing of notice to defense attorney of the state's intent to use the records
- ✓ Potential impact of the records on the defense theory or argument

[9.23.] Failure to Present Evidence

Failure to present evidence does not necessarily compel a conclusion that the trial attorney's performance was deficient.[1289] Such a conclusion depends on whether the decision not to present evidence was an informed decision based on a reasonable investigation of the reasonably available evidence. Furthermore, to prevail on an ineffective assistance claim based on a failure to present evidence, defendant must show counsel's failure was deficient *and,* had the evidence been presented, there is a reasonable probability it would have affected the outcome of the proceeding.[1290]

One of the most common claims raised in capital post-conviction motions is the failure to present mitigation evidence at the penalty phase of the trial. As in the guilt phase, an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigation evidence in preparation for the penalty phase.

In analyzing the actions of trial counsel regarding the presentation of evidence, the focus is not on whether trial counsel could or should have taken a different course of action; the central question is whether the course of action taken was a reasonable one which resulted from an informed, professional judgment.[1291]

If counsel's decision not to present mitigating evidence was made after a

---

[1289] *See* Pollard v. State, 807 S.W.2d 498 (Mo. 1991); King v. State, 649 S.W.2d 42 (Tex. Crim. App. 1983).
[1290] *See* State v. Ervin, 835 S.W.2d 905 (Mo. 1992); In re Marquez, 822 P.2d 435 (Cal. 1992).
[1291] Wiggins v. Smith, 539 U.S. 510 (2003).

full investigation, the court is not likely to find ineffectiveness.[1292] As the U.S. Supreme Court noted in *Strickland*: "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."[1293]

In contrast, the court is more likely to find ineffective assistance of counsel in a case in which the lawyer has not conducted any investigation of the potential mitigating evidence. For example, in *In re Marquez,*[1294] the California Supreme Court granted relief in a case in which counsel had undertaken no investigation of the mitigating circumstances: "Unless a minimally adequate investigation is undertaken, it is impossible to make a tactical decision about whether to present or withhold mitigating evidence at the penalty phase."[1295] Similarly, in *Stevens v. State*,[1296] the Florida Supreme Court found that defendant did not receive effective assistance of counsel and ordered a new sentencing where defense counsel did "virtually nothing" on the defendant's behalf and explained that the defense attorney's failure to investigate or present any mitigating evidence was a deficiency that may have affected the outcome of the sentencing hearing.[1297]

Counsel is not ineffective simply because he or she fails to raise every conceivable claim, even those of constitutional magnitude.[1298] Strategic or tactical decisions, even if they prove incorrect, do not generally establish ineffectiveness.[1299] For example, a reasonable decision to advise a defendant not to take the witness stand, even if it proves improvident, is a tactical decision within the realm of counsel's professional judgment and generally may not be regarded as ineffective assistance of counsel.[1300]

The fact that a defendant, at an evidentiary hearing, presents mitigation evidence superior to that presented at the penalty phase of his trial does not necessarily render trial counsel's performance deficient nor establish the requisite prejudice to justify relief.[1301]

In assessing whether defendant can establish *Strickland* prejudice as a result of counsel's failure to present sufficient mitigating evidence at the penalty phase, several factors are of significance: (1) the nature and extent of the

---

[1292] *See* In re Jackson, 835 P.2d 371 (Cal. 1992), *disapproved on other grounds* In re Sassounian, 887 P.2d 527 (Cal. 1995).
[1293] *Strickland*, 466 U.S. at 690. *See* Darden v. Wainwright, 477 U.S. 168 (1986) (counsel's assistance not deficient where he conducted extensive investigation and thereafter made the decision that presenting a mitigation case would have resulted in the jury hearing evidence that defendant had been convicted of violent crimes and spent much of his life in jail).
[1294] 822 P.2d 435 (Cal. 1992).
[1295] *Id.* at 447.
[1296] 552 So.2d 1082 (Fla. 1989).
[1297] *Id*. at 1088 n. 13. *See also* Hirning v. Dooley, 679 N.W.2d 771 (S.D. 2004).
[1298] *See* Engle v. Isaac, 456 U.S. 107 (1982).
[1299] *See* State v. Twenter, 818 S.W.2d 628 (Mo. 1991); Brewer v. State, 496 N.E.2d 371 (Ind. 1986).
[1300] Wainwright v. State, 823 S.W.2d 449 (Ark. 1992).
[1301] Pace v. State, 854 So.2d 167 (Fla. 2003); Hodges v. State, 885 So.2d 338 (Fla. 2004).

mitigating evidence that was available but not presented; (2) whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings; and (3) whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination.[1302]

The reasonableness of an attorney's actions in deciding whether to present evidence may be substantially influenced by the defendant's own statements or actions. In *Cummings-El v. State*,[1303] defendant could not complain about trial counsel's failure to call defendant's family members to testify at the penalty phase, when defendant told his counsel he was adamantly opposed to having his family testify and beg the jury for mercy.[1304]

Defendant cannot complain where the limitations on the investigation or the failure to present evidence results from defendant's own lack of cooperation with counsel.[1305] Further, counsel's failure to present evidence is not deficient where presenting such evidence would result in opening the door to other, more harmful, evidence.[1306]

[9.24.] *Per Se* Ineffective Assistance

U.S. v. Cronic[1307] was a companion case to *Strickland*. While the *Strickland* standard is appropriate for the overwhelming majority of cases raising ineffective assistance claims, *Cronic* recognized that in rare circumstances the egregiousness of the conduct may warrant a finding of *per se* ineffective assistance of counsel. The U.S. Supreme Court reasoned that, in such instances, the conduct is so likely to prejudice the accused that the cost of litigating its effect in a particular case is unjustified; prejudice should be presumed. Absent circumstances of this magnitude, courts cannot find a violation of defendant's Sixth Amendment right without a showing of prejudice under *Strickland*.

Cronic delineated the narrow circumstances to which the *per se* rule would apply:

1) State's actions
2) Failure to subject case to meaningful adversarial testing
3) Conflict of interest

[1302] Nichols v. State, 90 S.W.3d 576 (Tenn. 2002); Abshier v. State, 28 P.3d 579 (Okla. Crim. App. 2001).
[1303] 863 So.2d 246 (Fla. 2003).
[1304] *See also* Brewer v. State, 496 N.E.2d 371 (Ind. 1986), *rev'd on other grounds sub nom.* Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991); Commonwealth v. Wilson, 861 A.2d 919 (Pa. 2004).
[1305] Hodges v. State, 885 So.2d 338 (Fla. 2004).
[1306] Gaskin v. State, 822 So.2d 1243 (Fla. 2002).
[1307] 466 U.S. 648 (1984).

[9.25.] State Actions

If the state's actions result in an actual or constructive denial of assistance of counsel, prejudice may be presumed. In such a case, the argument focuses primarily on the actions of the state and does not involve a claim that the lawyer could have done something differently. For example, if the trial judge appoints an out of state lawyer to a high-profile capital case one day before trial, the defendant will prevail on a claim that the actions of the court constituted a *per se* deprivation of effective assistance of counsel.[1308] Under these circumstances the result of the trial is deemed unreliable and the court need not engage in a determination of prejudice to the defendant. However, the late appearance of counsel in a case does not, by itself, automatically require application of the *per se* rule.[1309] Denial of counsel at a critical stage of the proceeding may also warrant a presumption of prejudice.[1310]

[9.26.] Entire Failure to Subject Case to Meaningful Adversarial Testing

Another type of *per se* ineffective assistance occurs when defense counsel acts in such a way as to wholly abdicate his adversarial role in the trial process. Failing entirely to subject the state's case to meaningful adversarial testing will result in a presumption of prejudice and a *per se* violation of the right to counsel. This claim is often raised when counsel concedes defendant's guilt to the crime charged, during opening statement, and does so without the defendant's knowledge or consent. In *Nixon v. State*,[1311] the Florida Supreme Court held this was the functional equivalent of a guilty plea at trial without defendant's knowledge or consent, thus denying defendant his or her Sixth Amendment right to counsel. The Florida Supreme Court reasoned, under *Cronic*, that by conceding guilt to the crime charged in opening statement, counsel failed to subject the state's case to meaningful adversary testing. Absent the defendant's express consent to such a strategy, the actions of defense counsel were presumptively prejudicial, requiring a new trial. The U.S. Supreme Court reviewed the decision and, in *Florida v. Nixon*[1312] overturned the decision of the Florida Supreme Court, holding that the *per se* standard of *Cronic* was not applicable. Rather, the more appropriate measure of counsel's conduct is the

---

[1308] *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932).
[1309] Chambers v. Maroney, 399 U.S. 42 (1970) (refusing to "fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel"). *See also* State v. Sanders, 750 N.E.2d 90, 126-27 (Ohio 2001) (defendant had two attorneys, one appointed only two months before trial; court held *Cronic* standard did not apply and prejudice would not be presumed).
[1310] *See* Geders v. U.S., 425 U.S. 80 (1976) (defendant was denied effective assistance of counsel where judge prohibited criminal defendant from consulting with his attorney during overnight recess of trial; no assessment of prejudice required).
[1311] 857 So.2d 172 (Fla. 2003).
[1312] 543 U.S. 175 (2004).

standard announced in *Strickland*.[1313]

Critical to the U.S. Supreme Court's decision was the fact that defense counsel had tried, on several occasions, to advise his client of the proposed strategy. The defendant refused to respond or provide input. He neither assented nor objected to the intended strategy. The U.S. Supreme Court held:

> When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfied the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.[1314]

Most states follow the reasoning of *Nixon* and hold that if the client is informed of the strategy, conceding guilt is a decision to be analyzed under the *Strickland* standard.[1315] Some states, however, have held that the proper standard is to be determined on a case-by-case basis.[1316] Though not squarely reaching the issue, at least one state appears inclined to continue to apply the *Cronic* standard while acknowledging the holding in *Nixon*.[1317] *Nixon* does not hold that *Cronic* can never apply where counsel concedes guilt to first degree murder in opening statement. The Florida Supreme Court's application of the *per se* standard may survive in those limited circumstances where defense counsel concedes guilt in opening statement, to the crime charged, without the knowledge of the defendant.[1318]

[9.27.] Conflict of Interest

The third category of *per se* ineffective assistance claims centers upon a conflict of interest involving defense counsel. For example, if the lawyer representing the defendant had an actual conflict of interest and if the conflict resulted in a deficiency in the lawyer's performance, the defendant would have a valid claim for post-conviction relief.[1319]

[1313] Strickland v. Washington, 466 U.S. 668 (1984).
[1314] *Nixon,* 543 U.S. at 177.
[1315] *E.g.,* Commonwealth v. Cousin, 888 A.2d 710 (Pa. 2005); Pinnell v. Palmateer, 114 P.3d 515 (Or. Ct. App. 2005).
[1316] *E.g.,* Nance v. Ozmint, 626 S.E.2d 878 (S.C. 2006); Siler v. State, 115 P.3d 14 (Wyo. 2005); People v. Johnson, 538 N.E.2d 1118 (Ill. 1989).
[1317] *See* State v. Al-Bayyinah, 616 S.E.2d 500 (N.C. 2005).
[1318] *See also* Bell v. Cone, 535 U.S. 685 (2002) (distinguishing between failure to advocate throughout the proceeding and failure to do so at specific points during the proceeding).
[1319] *See* Cuyler v. Sullivan, 446 U.S. 335 (1980); People v. Enoch, 585 N.E.2d 115 (Ill. 1991); In re Stenson, 16 P.3d 1 (Wash. 2001).

The test announced in *Cuyler* requires defendant to establish:

1. Counsel actively represented conflicting interests; and
2. An actual conflict adversely affected counsel's performance.[1320]

If this showing is made, prejudice is presumed and defendant is entitled to relief without the need to establish any probability that the conflict affected the outcome of the trial itself.[1321] To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests his or her interests were compromised. A possible, speculative or merely hypothetical conflict is insufficient to impugn a criminal conviction.[1322] In *State v. Gleason*,[1323] the Supreme Court of Kansas held that the fact that defense counsel served as an assistant county attorney in a neighboring county for the first two months of his representation of the defendant did not create an actual conflict of interest.

In *State v. Dhaliwal*,[1324] the Supreme Court of Washington found defense counsel's prior or concurrent representation of various defense and prosecution witnesses (in unrelated matters) during his representation of defendant in his capital case created a *possibility* of conflict. However, such prior or concurrent representation did not warrant reversal in the absence of proof of an actual conflict; defendant failed to show how counsel's concurrent or prior representation affected counsel's performance at trial.

The fact that there were disciplinary proceedings against the attorney at the time of the trial does not require a finding that the attorney failed to provide effective assistance.[1325] The rule in *Cuyler* evolved from concurrent representation of multiple defendants in the same case, the high probability of a conflict of interest from such representation, and the difficulty inherent in proving actual prejudice.[1326] The *Cuyler* rule does not necessarily apply in all instances of multiple representation. For example, the fact that defense counsel previously represented the co-defendant or a witness (in unrelated matters) does not raise a conflict issue measured under *Cuyler*. This is described as "successive representation" and prejudice will not be presumed under these circumstances; a defendant raising such an issue must meet the two-pronged standard of *Strickland* to be entitled to relief.[1327]

It has been held that the acquisition of book rights by a defendant's attorney constitutes a conflict of interest which may so adversely affect the defendant as to warrant reversal of a conviction.[1328] In *Corona* the defendant

---

[1320] *Cuyler*, 446 U.S. at 348.
[1321] *Id*.; Mickens v. Taylor, 535 U.S. 162 (2002); State v. Gleason, 88 P.3d 218 (Kan. 2004); Wright v. State, 857 So.2d 861 (Fla. 2003).
[1322] Mickens v. Taylor, 535 U.S. 162 (2002); Hunter v. State, 817 So.2d 786 (Fla. 2002).
[1323] 88 P.3d 218 (Kan. 2004).
[1324] 79 P.3d 432 (Wash. 2003).
[1325] *See* O'Callaghan v. State, 542 So.2d 1324 (Fla. 1989) (investigation into alcohol abuse alleged to affect attorney's ability to practice law).
[1326] Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978).
[1327] Lordi v. Ishee, 384 F.3d 189 (6th Cir. 2004).
[1328] *See* People v. Corona , 145 Cal.Rptr. 894 (Cal. Ct. App. 1978).

retained a private attorney who, in exchange for his services, obtained exclusive rights to the defendant's life story and a waiver of the attorney-client privilege. The income derived from publication was to go solely to the attorney. The California Court of Appeals in *Corona* held that reversal was warranted because the attorney deliberately decided not to develop viable incompetence, insanity and irresponsibility defenses so as to insure that the publication rights would retain their value.[1329]

Even in the absence of prejudice, courts have held the acquisition by an attorney of a financial stake in litigation directly adverse to that of his client is a *per se* conflict, which warrants reversal without further showing of its effect on the outcome of the trial.[1330]

However, the mere fact that the defendant's attorney was offered, and refused to accept, a contract for publication rights does not constitute a "tie" sufficient to engender a *per se* conflict.[1331]

[9.28.] Filing of Motion Waives Attorney-Client Privilege

Generally, the filing of a post-conviction motion alleging ineffective assistance of counsel is a waiver of the attorney-client privilege.[1332] A waiver of the attorney-client privilege is not limited solely to the attorney's testimony, but extends also to documents in trial counsel's files. The purpose of the post-conviction proceeding is to determine the truth of the allegations that constitutional rights were violated. Thus, the defendant "cannot allege that he was deprived of his constitutional rights and then invoke the shield of the attorney-client privilege to prevent an accurate determination of the merit of his claim."[1333] The state is permitted to discover pretrial communications between the defendant and counsel as well as the files and records which pertain to the claim, including work-product material.[1334] Ordinarily, the waiver does not entitle the state to examine the former attorney's entire file. The court may have to conduct an in camera inspection to determine the extent to which the motion for post-conviction relief waives the privilege and the documents or items which are no longer subject to privilege.[1335] Absent extraordinary circumstances, the court

---

[1329] *Cf.* Rudin v. State, 86 P.3d 572 (Nev. 2004) (finding trial counsel's attempts to acquire literary rights, while improper, were not proven to adversely affect counsel's performance at trial).
[1330] *See, e.g.,* People v. Washington, 461 N.E.2d 393 (Ill. 1984).
[1331] People v. Gacy, 530 N.E.2d 1340 (Ill. 1988); *see also* Brown v. State, 894 So.2d 137 (Fla. 2004) (the fact that defense counsel attempted to acquire defendant's property rights in the defendant's life story, songs and poems, did not create an actual conflict of interest where the agreement between the defendant and his counsel was entered into after defendant's sentencing).
[1332] *See* Molina v. State, 87 P.3d 533 (Nev. 2004); Waldrip v. Head, 532 S.E.2d 380 (Ga. 2000); Petersen v. Palmateer, 19 P.3d 364 (Or. Ct. App. 2001); Arbelaez v. State, 775 So.2d 909 (Fla. 2000).
[1333] *Waldrip*, 532 S.E.2d at 386.
[1334] State v. Buckner, 527 S.E.2d 307 (N.C. 2001).
[1335] *Waldrip*, 532 S.E.2d at 387; LeCroy v. State, 641 So.2d 853 (Fla. 1994).

does not have the authority to require former defense counsel to submit to an *ex parte* interview by the prosecutor.[1336]

[9.29.] Ineffective Assistance Resulting in a Guilty Plea

The involuntariness of the defendant's plea of guilty to a capital offense can be raised in a post-conviction motion.[1337] There is a critical difference, however, between a claim that the plea was involuntary and a claim of ineffective assistance of counsel resulting in the entry of a plea. The latter claim is governed by the two-part standard set out in *Strickland*.[1338] When presenting a claim of ineffective assistance of counsel in connection with the entry of a guilty plea the defendant must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[1339]

Likewise, the failure to convey a plea (for example, a plea which would have resulted in a life sentence) may constitute ineffective assistance if defendant can satisfy the deficient performance and prejudice prongs of *Strickland*. Prejudice is shown if defendant can establish a reasonable probability that he would have accepted the offer instead of going to trial, and that acceptance of the plea offer would have resulted in a lesser sentence.[1340]

Some jurisdictions impose an additional requirement -- proof that the trial court would have actually accepted or approved the plea. The current trend does not necessitate such a showing.[1341]

[9.30.] Newly-Discovered Evidence

Before the widespread use of comprehensive post-conviction rules, claims of newly-discovered evidence could be raised only by petition for writ of error *coram nobis*. At common law, this cumbersome procedure required a defendant to ask the appellate court for permission to present new evidence in the trial court. The defendant also had a heavy burden to show conclusively that the newly-discovered evidence would have changed the outcome of the case. A few states continue to rely on *coram nobis*, in some form, as the principal method of securing relief when the defendant has filed a post-conviction claim based on newly-discovered evidence.

[1336] *Buckner*, 527 S.E.2d at 314.
[1337] See State v. Herred, 964 S.W.2d 391 (Ark. 1998); State v. Ysea, 956 P.2d 499 (Ariz. 1998); Wilson v. State, 813 S.W.2d 833 (Mo. 1991).
[1338] *See* Hill v. Lockhart, 474 U.S. 52 (1985); Ware v. State, 567 N.E.2d 803 (Ind. 1991).
[1339] *Hill*, 474 U.S. at 59; State v. Langford, 813 P.2d 936 (Mont. 1991); U.S. v. Ginn, 47 M.J. 236 (C.A.A.F. 1997).
[1340] State v. James, 739 P.2d 1161 (Wash. Ct. App. 1987); State v. Stillings, 882 S.W.2d 696 (Mo. Ct. App. 1994); State v. Donald, 10 P.3d 1193 (Ariz. Ct. App. 2000); Commonwealth v. Napper, 385 A.2d 521 (Pa. Super. Ct. 1978).
[1341] *E.g.,* People v. Curry, 687 N.E.2d 877 (Ill. 1997); Turner v. Tennessee, 858 F.2d 1201 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902 (1989); Judge v. State, 471 S.E.2d 146 (S.C. 1996).

In most states, however, the remedy of *coram nobis* is now included within the relief that can be sought by a motion for post-conviction relief. Since a claim of newly discovered evidence is a form of "collateral attack" such a claim is generally treated as a claim that is cognizable in a post-conviction motion.[1342] The remedies afforded by the post-conviction rules were intended to supplant the remedies previously afforded only by extraordinary writs such as a writ of error *coram nobis*.

While there may be slight differences among the jurisdictions, a claim of newly-discovered evidence will generally not result in a new trial unless a defendant establishes:

1. The evidence was not known to defendant prior to the trial;
2. The evidence could not have been discovered prior to the trial in the exercise of due diligence;
3. The evidence would probably produce a different result at trial;
4. The evidence is material;
5. The evidence is not cumulative; and
6. The evidence is not merely impeaching.[1343]

Some jurisdictions incorporate the last three requirements (material, not cumulative, not merely impeaching) into an analysis of the third requirement (that the newly-discovered evidence would probably produce a different result at trial).[1344]

[9.31.] Recantation of Testimony

When a material witness recants his or her trial testimony, a defendant will often raise this as a form of newly-discovered evidence. Such a claim requires the trial court to make factual and credibility determinations; this will usually necessitate an evidentiary hearing to assess the reliability of the recantation.[1345] However, courts must be cautious before granting relief based on recanted testimony. Defendants seeking relief based on recantation must meet a higher burden than that applicable to other forms of newly-discovered evidence,

---

[1342] *See* Richardson v. State, 546 So.2d 1037 (Fla. 1989); People v. Steidl, 568 N.E.2d 837 (Ill. 1991).

[1343] Drake v. State, 287 S.E.2d 180 (Ga. 1982); State v. Wilson, 554 P.2d 636 (Or. Ct. App. 1976); State v. Ieng, 942 P.2d 1091 (Wash. Ct. App. 1997); State v. Bell, 679 N.E.2d 44 (Ohio Ct. App. 1996); State v. Spann, 513 S.E.2d 98 (S.C. 1999); People v. Johnson, 545 N.W.2d 637 (Mich. 1996); Commonwealth v. Fiore, 780 A.2d 704 (Pa. Super. Ct. 2001).

[1344] *See, e.g.,* State v. Wilson, 554 P.2d 636 (Or. Ct. App. 1976).

[1345] State v. Ieng, 942 P.2d 1091 (Wash. Ct. App. 1997).

reflecting the inherent suspicion with which courts treat recantations.[1346]

In addition to the general requirements for newly-discovered evidence, a defendant seeking a new trial based upon recanted testimony must establish that the original testimony is false (or, conversely, that the recantation is true) and the witness' testimony will change to such an extent as to render probable a different verdict.[1347]

[9.32.] Failure to Disclose Exculpatory Evidence

Failure to disclose exculpatory evidence is a ground that may be asserted in a post-conviction motion. Furthermore, such a claim can be raised after the time limit for filing a post-conviction motion if the failure to disclose could not reasonably have been discovered in time. These claims are sometimes referred to as *Brady* claims after the decision in *Brady v. Maryland*.[1348]

The Brady Test

To successfully assert a *Brady* claim, the defendant must establish the following:

1. The evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching;
2. The defendant did not possess the evidence because it was withheld or suppressed by the state, either willfully or inadvertently; and
3. The undisclosed evidence was "material," and the state's failure to disclose the evidence was thus prejudicial. The undisclosed evidence is considered "material" if there is a reasonable probability that, had the evidence been disclosed, the outcome of the proceeding would have been different.[1349]

Some courts also require that the defendants establish that they could not have obtained the evidence in the exercise of due diligence.[1350] However, there is no due diligence requirement contained in the U.S. Supreme Court's most recent

---

[1346] *See, e.g.,* Commonwealth v. D'Amato, 856 A.2d 806 (Pa. 2004); People v. Steidl, 685 N.E.2d 1335 (Ill. 1997); Armstrong v. State, 642 So.2d 730 (Fla. 1994); Johnson v. State, 513 S.E.2d 291 (Ga. Ct. App. 1999); Thacker v. Commonwealth, 453 S.W.2d 566 (Ky. Ct. App. 1970); State v. Porter, 239 S.E.2d 641 (S.C. 1977).

[1347] State v. Ieng, 942 P.2d 1091 (Wash. Ct. App. 1997); Armstrong v. State, 642 So.2d 730 (Fla. 1994); Drake v. State, 287 S.E.2d 180 (Ga. 1982); State v. Doisey, 532 S.E.2d 240 (N.C. Ct. App. 2000); Curtis v. Commonwealth, 474 S.W.2d 394 (Ky. Ct. App. 1971).

[1348] 373 U.S. 83 (1963).

[1349] *Id*. at 87.

[1350] *See, e.g.,* Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991); Pinson v. State, 596 S.E.2d 734 (Ga. Ct. App. 2004).

formulation of the *Brady* test.[1351]

Even in the absence of a due diligence requirement, the defendant cannot establish a *Brady* violation if the defense was aware of its existence and had the ability to obtain it. Under such circumstances, the evidence cannot be said to have been "suppressed" by the state.[1352]

Evidence may qualify as *Brady* even if it is not in the actual possession of the state. Possession will be imputed to the state if it is in the possession of a law enforcement agency involved in the investigation or prosecution. Prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[1353]

To prevail on a *Brady* claim, it is not necessary that the defendant show the prosecution had actual knowledge of the undisclosed favorable evidence. Because prosecutors have an affirmative duty to learn of favorable evidence, any failure to uncover *Brady* information will be measured under a standard of objective reasonableness. As the Supreme Court of California observed in *In re Jackson*,[1354] the question is whether the state knew or should have known about the testimony.[1355] In *In re Jackson*, the Supreme Court of California concluded that the prosecution should have known from information the police had that the witnesses had been given promises of leniency in exchange for testimony. Further, the prosecutor's duty to disclose is applicable even if there had been no request made by the defendant.[1356]

The *Brady* requirement applies not only to evidence relating to guilt, but also evidence that could affect the sentence.[1357] Even if undisclosed evidence was not material to the issue of guilt or innocence it is a violation of the rule for the state to suppress evidence that is material to the penalty phase of the trial.[1358]

Brady claims are most often rejected on the ground that the evidence was not material,[1359] or on the ground that the failure to provide the evidence was harmless. The courts have found that a *Brady* violation is harmless error when there is no reasonable probability that the evidence, if disclosed, would have affected the outcome of the case.[1360]

[1351] *See* Strickler v. Greene, 527 U.S. 263 (1999). *See also* Occhicone v. State, 768 So.2d 1037 (Fla. 2000); Anderson v. Leeke, 248 S.E.2d 120 (S.C. 1978).
[1352] Sanders v. Commonwealth, 89 S.W.3d 380 (Ky. 2002).
[1353] Kyles v. Whitley, 514 U.S. 419 (1995); Riley v. State, 531 S.E.2d 138 (Ga. Ct. App. 2000); State v. Sanders, 750 N.E.2d 90 (Ohio 2001).
[1354] 835 P.2d 371 (Cal. 1992),
[1355] *Id.*
[1356] U.S. v. Agurs, 427 U.S. 97 (1976).
[1357] *Brady*, 373 U.S. at 87 (1963) ("evidence is material either to guilt or punishment").
[1358] *See* Garcia v. State, 622 So.2d 1325 (Fla. 1993); Commonwealth v. Marinelli, 810 A.2d 1257 (Pa. 2002).
[1359] *See* Boyd v. State, 910 So.2d 167 (Fla. 2005); U.S. v. Agurs, 427 U.S. 97, 109-110 (1976) ("the mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense").
[1360] *See* In re Jackson, 835 P.2d 371 (Cal. 1992). *But see, e.g.,* Nelson v. Zant, 405 S.E.2d 250 (Ga. 1991) (prosecution's failure to disclose existence of FBI report, showing that

Withheld information, even if it is inadmissible at trial, may qualify as material under *Brady* if its disclosure could lead to the discovery of admissible substantive or impeachment evidence.[1361]

Failure to disclose exculpatory evidence is the kind of claim that will frequently require an evidentiary hearing.[1362] The defendant had alleged that the state suppressed the names of other persons who confessed to the crime, and the state was unable to refute this claim without a hearing. Moreover, claims that the prosecution failed to disclose exculpatory evidence are often allowed after the expiration of the time limit for filing post-conviction motions. In many of these claims the nondisclosure gives the defendant a built-in argument that the factual basis for the claim was not known, and could not have been known, within a certain period of time.

The materiality prong of a *Brady* violation requires the court to determine "whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[1363] "Material" under *Brady* is measured in the same manner as "prejudice" under *Strickland*: whether there is a reasonable probability that the new evidence would produce a different result in the proceeding.

Courts must assess the cumulative effect of all of the suppressed evidence. In other words, not only must the court consider the impact of the evidence withheld, but also how the withheld evidence adversely affected the defendant's ability to investigate or present other aspects of the case.[1364]

[9.33.] Knowing Use of False or Misleading Testimony

The deliberate use of false or misleading testimony is a claim that can be raised in a post-conviction motion. These claims are sometimes referred to as *Giglio* claims, after the decision in *Giglio v. U.S.*[1365]

The Giglio Test

To be entitled to relief, the defendant must establish the following:

1. The testimony was false;
2. The prosecutor knew the testimony was false; and
3. The testimony was material.[1366]

---

hair samples were of little value and could not be compared, held material under *Brady* because the prosecution used the hair samples to link the defendant to the crime and because the other evidence in the case was circumstantial).

[1361] Rogers v. State, 782 So.2d 373 (Fla. 2001); Martinez v. Wainwright, 621 F.2d 184 (5th Cir. 1980).

[1362] *See* Hoffman v. State, 571 So.2d 449 (Fla. 1990) (reversing the summary denial of a post-conviction motion).

[1363] Strickler v. Greene, 527 U.S. 263, 290 (1999), *quoting* Kyles v. Whitley, 514 U.S. 419, 435 (1995).

[1364] U.S. v. Bagley, 473 U.S. 667 (1985).

[1365] 405 U.S. 150 (1972).

[1366] *Id.;* U.S. v. Agurs, 427 U.S. 97 (1976); Mondy v. State, 494 S.E.2d 176 (Ga. Ct. App. 1997); Commonwealth v. Spaulding, 991 S.W.2d 651 (Ky. 1999).

A *Giglio* violation can also occur if, after presenting the testimony, the prosecutor learns of its falsity and fails to correct it.[1367]

False testimony is "material" for *Giglio* purposes if there is any reasonable likelihood that it could have affected the verdict.[1368] This is a lower standard than the prejudice prong required in *Brady* and *Strickland* claims, reflecting a heightened judicial concern, and correspondingly heightened judicial scrutiny, where perjured testimony is knowingly used to convict a defendant.

Once a defendant establishes that the prosecutor knowingly presented false testimony at trial, the burden shifts to the state to show that the false evidence was not material. The state must establish that the error was harmless beyond a reasonable doubt.[1369]

In some circumstances, knowledge of the falsity of the testimony may be imputed to the individual prosecutor even in the absence of actual knowledge. For example, where such knowledge is possessed by individuals comprising the "prosecution team"-- which includes police officers as well as other investigative and prosecutorial personnel-- it will be imputed to the attorney prosecuting the case.[1370] Some courts have held that a *Giglio* violation can be established even if the prosecutor was not aware that the testimony was false.[1371] This appears to be the minority view.[1372]

[9.34.] Sentencing Errors

Since the imposition of an illegal sentence is "fundamental error," a claim that the defendant's sentence of death is illegal is the kind of claim that can be raised for the first time in a post-conviction motion. However, if the sentencing issue presents a substantive or procedural error that does not affect the legality of the sentence itself, then it must be presented on direct appeal and not in a post-conviction motion.

Generally, the trial courts may consider a post-conviction claim that the sentence is in excess of the maximum allowed by law, that the sentence was

---

[1367] Napue v. Illinois, 360 U.S. 264 (1959); State v. Edwards, 366 S.E.2d 520 (N.C. Ct. App. 1988); Fitzgerald v. Bass, 366 S.E.2d 615 (Va. Ct. App. 1988).

[1368] *Agurs*, 427 U.S. at 103; State v. Iacona, 752 N.E.2d 937 (Ohio 2001); Ventura v. State, 794 So.2d 553 (Fla. 2001); Williams v. State, 298 S.E.2d 492 (Ga. 1983).

[1369] U.S. v. Bagley, 473 U.S. 667 (1985); Guzman v. State, 868 So.2d 498 (Fla. 2003).

[1370] *Giglio*, 405 U.S. at 154; Ex parte Castellano, 863 S.W.2d 476 (Tex. Crim. App. 1993).

[1371] *See, e.g.,* Commonwealth v. Spaulding, 991 S.W.2d 651 (Ky. 1999) (holding that the integrity of the judicial process is the overriding concern, and may supersede the relative good faith with which the government presented the testimony).

[1372] *See, e.g.,* Sanders v. Sullivan, 863 F.2d 218 (2d Cir. 1988) (affirming *Giglio's* requirement that defendant demonstrate the prosecutor knowingly used false testimony); Burks v. Egeler, 512 F.2d 221 (6th Cir. 1975) (same); Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984) (same); Marcella v. U.S., 344 F.2d 876 (9th Cir. 1965) (same); Wild v. Oklahoma, 187 F.2d 409 (10th Cir. 1951) (same); People v. Jimerson, 652 N.E.2d 278 (Ill. 1995) (same).

imposed in violation of the state or federal constitution, or that the sentence is otherwise subject to collateral attack.[1373] Within these general categories there are many specific sentencing issues that could be raised. Among other things, defense lawyers frequently use post-conviction motions to challenge the sufficiency of the jury instructions given during the penalty phase.[1374]

Many sentencing issues are presented in post-conviction motions as alleged violations of newly established constitutional principles. For example, the decision of the U.S. Supreme Court in *Hitchcock v. Dugger*[1375] that the sentencing jury must be informed of its right to consider nonstatutory mitigating factors, required state courts to consider new post-conviction claims in old cases. Likewise, defense lawyers attempted to use the decision of the U.S. Supreme Court in *Caldwell v. Mississippi*,[1376] that the trial court cannot minimize the role of the jury in the sentencing process, as a basis for raising new post-conviction claims. Ultimately, the U.S. Supreme Court held that *Caldwell* did not announce a new principle of law and that it was not therefore "cause" for excusing a procedural default.[1377]

[9.35.] Retroactive Application of Newly Announced Constitutional Right

Under certain circumstances, a significant change in substantive or procedural law may excuse the failure to raise an issue on direct appeal or in a prior post-conviction motion. To be entitled to seek relief under this principle, the defendant must generally allege:

1. The fundamental constitutional right asserted was not established within the period provided for in the rule; and
2. The fundamental constitutional right has been held to apply retroactively.

For example, the courts allowed claims under *Hitchcock v. Dugger*[1378] that the jury was not informed of its right to consider nonstatutory mitigating factors to be raised for the first time in post-conviction motions, as this was found to be a constitutional right which did not exist during the relevant time period for filing, and the constitutional right was determined to be retroactive in application.[1379] However, this is only an example of the principle. Because the principle of law announced in *Hitchcock* is now well-established, new post-

---

[1373] *See* Gardner v. State, 764 S.W.2d 416 (Ark. 1989).
[1374] *See* Arnold v. State, 420 S.E.2d 834 (S.C. 1992); Ex parte Williams, 833 S.W.2d 150 (Tex. Crim. App. 1992); Riley v. State, 585 A.2d 719 (Del. 1990).
[1375] 481 U.S. 393 (1987).
[1376] 472 U.S. 320 (1985).
[1377] Dugger v. Adams, 489 U.S. 401 (1989).
[1378] 481 U.S. 393 (1987).
[1379] *See* Hall v. State, 541 So.2d 1125 (Fla. 1989); Ford v. State, 522 So.2d 345 (Fla. 1988).

conviction claims on this issue would have to be raised within the time limit of the rule or would otherwise be time-barred.[1380]

While a significant change in the law may excuse the failure to timely raise a claim on direct appeal or in a post-conviction motion, a mere evolutionary refinement of the law will not provide the same excuse.[1381] For example, in *Rogers v. State*,[1382] the Florida Supreme Court limited the scope of the aggravating circumstance for murders that are "cold, calculated and premeditated." The Florida Supreme Court held in a subsequent case that the *Rogers* decision was merely a refinement of existing law and not a new point of law.[1383] Thus, such claims must be raised in a timely fashion or are procedurally barred.

The Florida Supreme Court has held that a claim under *Caldwell v. Mississippi*[1384] -- that the trial judge improperly minimized the role of the jury in the sentencing process -- can be procedurally barred because *Caldwell* did not announce a new rule of law.[1385] The U.S. Supreme Court has agreed that the *Caldwell* decision is not "cause" for excusing a procedural default.[1386] As a general proposition, new rules of substantive criminal law are presumed to apply retroactively, and new rules of procedure are presumed not to apply retroactively. There is an exception to the non-retroactivity of a new procedural rule. A new procedural rule will be applied retroactively if the change involves:

1. A decision which removes from the state the authority or power to regulate certain conduct or impose certain penalties; or
2. A decision which announces a new watershed rule of criminal procedure that alters our understanding of bedrock procedural elements essential to the fairness of a particular conviction.[1387]

The *Teague* analysis is generally followed by the state courts.[1388]

[1380] *See* Davis v. State, 589 So.2d 896 (Fla. 1991).
[1381] Carter v. Johnson, 599 S.E.2d 170 (Ga. 2004); Ferguson v. Singletary, 632 So.2d 53 (Fla. 1993).
[1382] 511 So.2d 526 (Fla. 1987).
[1383] *See* Harich v. State, 542 So.2d 980 (Fla. 1989).
[1384] 472 U.S. 320 (1985).
[1385] *See* Cave v. State, 529 So.2d 293 (Fla. 1988); Ford v. State, 522 So.2d 345 (Fla. 1988).
[1386] *See* Dugger v. Adams, 489 U.S. 401 (1989).
[1387] Teague v. Lane, 489 U.S. 288 (1989).
[1388] *See, e.g.,* State v. Zuniga, 444 S.E.2d 443 (N.C. 1994); Head v. Hill, 587 S.E.2d 613 (Ga. 2003); Daniels v. State, 561 N.E.2d 487 (Ind. 1990); Brewer v. State, 444 N.W.2d 77 (Iowa 1989); State *ex rel.* Taylor v. Whitley, 606 So.2d 1292 (La. 1992); Avery v. State, 129 P.3d 664 (Nev. 2006).

Although the exact parameters of this "watershed" exception are often difficult to discern, courts usually cite *Gideon v. Wainwright*[1389] to illustrate the type of watershed rule that would support retroactive application.[1390] It is fair to say that such watershed rules are rare. In the 19 years since *Teague* was decided, the U.S. Supreme Court has never found that any rule falls within the "watershed" exception, despite at least eleven opportunities to do so. However, state courts have found circumstances where newly announced constitutional rules should be applied retroactively to cases on post-conviction review.[1391] Below are a list of issues often raised in capital post-convictions proceeds where the *Teague* analysis is applied.

[9.36.] *Ring* Issues

The U.S. Supreme Court held that the rule announced in *Ring v. Arizona*[1392] is procedural and does not apply retroactively to cases whose convictions are already final.[1393] State courts have generally followed this holding.[1394]

[9.37.] Murder Committed as a Juvenile

In *Roper v. Simmons*,[1395] the U.S. Supreme Court held that the execution of individuals who were under 18 years of age at the time of their capital crimes is prohibited by the Eighth Amendment. Defendants who meet this criterion will be able to raise this claim by way of post-conviction relief, even if the claim would otherwise be time barred. *Roper* announces a rule of substantive law and as such is presumed to apply retroactively.

[9.38.] Mental Retardation

In *Atkins v. Virginia*,[1396] the U.S. Supreme Court held that the Eighth Amendment prohibits the execution of a mentally retarded person. It has since been held that this new rule meets the first exception to *Teague's* rule of non-retroactivity, and may be raised by defendants in post-conviction proceedings.[1397]

[1389] 372 U.S. 335 (1963) (holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses).
[1390] Saffle v. Parks, 494 U.S. 484, 495 (1990).
[1391] *See, e.g.*, State v. Zuniga, 444 S.E.2d 443 (N.C.1994) (the U.S. Supreme Court's decision in McKoy v. North Carolina, 494 U.S. 433 (1990), that capital sentencing jury cannot be required to find unanimously that mitigating circumstances existed before mitigating circumstances can be considered for purposes of sentencing, should be applied retroactively to final cases on state post-conviction review).
[1392] 536 U.S. 584 (2002).
[1393] Schriro v. Summerlin, 542 U.S. 348 (2004).
[1394] *See, e.g.,* Head v. Hill, 587 S.E.2d 613 (Ga.2003).
[1395] 543 U.S. 551 (2005).
[1396] 536 U.S. 304 (2002)
[1397] In re Holladay, 331 F.3d 1169 (11th Cir. 2003); In re Morris, 328 F.3d 739 (5th Cir. 2003); Hill v. Anderson, 300 F.3d 679 (6th Cir. 2002).

[9.39.] *Crawford v. Washington*

In *Crawford v. Washington*,[1398] the U.S. Supreme Court created a bright line rule regarding the admissibility of testimonial statements made by a non-testifying declarant. *Crawford* held that the Sixth Amendment's Confrontation Clause prohibits the introduction of testimonial statements of a non-testifying declarant (e.g., a co-defendant at a joint trial), unless:

1. The declarant is unavailable; and
2. Defendant has had a prior opportunity to cross-examine the declarant concerning the testimonial statement.

In announcing its ruling, the U.S. Supreme Court did not address the retroactive application of this rule. However, the U.S. Supreme Court subsequently held that *Crawford* is not retroactively applicable to cases which are final on direct appeal.[1399] Virtually every state court that has considered the issue has held that the principle announced in *Crawford* should not be given retroactive effect.[1400]

[9.40.] Grounds for Denial of Relief

There are several reasons why there may be grounds for denial of relief. Most likely to be those grounds are already litigated matters, issues that could have been raised on direct appeal and harmless error. Each of these is discussed below.

[9.41.] *Res Judicata*

An issue that has been presented and decided on direct appeal cannot be litigated again in a post-conviction motion. The decision on appeal operates as a bar to further consideration of the issue under the doctrine of *res judicata*.[1401] For the same reason, an issue that was decided in a post-conviction motion cannot be considered again in a subsequent post-conviction motion.

A closely related principle of law holds that an issue presented and decided on direct appeal cannot be recast as a claim of ineffective assistance of counsel and raised again, in that form, on a post-conviction motion.[1402]

[1398] 541 U.S. 36 (2004).
[1399] Whorton v. Bockting, 549 U.S. 406 (2007).
[1400] Newsome v. Comm'r of Correction, 951 A.2d 582 (Conn. 2008); Ex parte Lave, 257 S.W.3d 235 (Tex. Crim. App. 2008); Edwards v. People, 129 P.3d 977 (Colo. 2006); Drach v. Bruce, 136 P.3d 390 (Kan. 2006); In re Markel, 111 P.3d 249 (Wash. 2005); Bynum v. State, 929 So.2d 324 (Miss. Ct. App. 2005); Commonwealth v. Brooks, 875 A.2d 1141 (Pa. Super. Ct. 2005); Chandler v. Crosby, 916 So.2d 728 (Fla. 2005).
[1401] *See* People v. Neal, 568 N.E.2d 808 (Ill. 1990).
[1402] *See* O'Neal v. State, 766 S.W.2d 91 (Mo. 1989).

[9.42.] Waiver

Issues that could have been raised on direct appeal are waived and may not be considered in a post-conviction motion.[1403] In this context, the waiver resulting from the defendant's failure to present the claim in an earlier proceeding is sometimes referred to as a "procedural default."

An issue is also waived if it could have been presented in a prior post-conviction motion.[1404] For example, in *Resnover v. State*,[1405] the Indiana Supreme Court declined to consider a claim of ineffective assistance of trial counsel because the claim was presented in a second post-conviction motion and available at the time the defendant filed his first motion.

The defendant cannot overcome a procedural default merely by using a different argument to relitigate an issue that has been decided on appeal or in a previous post-conviction motion.[1406] Nor can the defendant overcome a procedural default by recasting the argument as a claim for ineffective assistance of counsel.[1407] If the issue is one that was or could have been made in a direct appeal or a previous post-conviction motion, then it is barred.

As discussed in Section 9.35., a significant change in the law will excuse the failure to raise an issue on direct appeal or in a prior post-conviction motion.[1408] For example, in *Selvage v. Collins*,[1409] the Texas Court of Criminal Appeals held that the decision of the U.S. Supreme Court in *Penry v. Lynaugh*[1410] holding that the Texas death penalty statute, as applied, precludes consideration of mitigating circumstances was a new point of law. Therefore, the Texas Court of Criminal Appeals held that the defendant's failure to raise a claim under the principles announced in *Penry* was excused.

As discussed earlier, for example, the U.S. Supreme Court announced a new principle of law in *Hitchcock v. Dugger*,[1411] when it decided that the jury must be informed of its right to consider nonstatutory mitigating factors. It was held that a claim under *Hitchcock* could be raised in a post-conviction motion even if it had not been raised earlier on direct appeal or in a previous post-conviction motion. However, the right to present a claim based on a new point of

---

[1403] *See* People v. Enoch, 585 N.E.2d 115 (Ill. 1991); Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991); Johnson v. State, 593 So.2d 206 (Fla. 1992); Flamer v. State, 585 A.2d 736 (Del. 1990).

[1404] *See* People v. Stewart, 565 N.E.2d 968 (Ill. 1990); Hendrix v. State, 557 N.E.2d 1012 (Ind. 1990); Commonwealth v. Hagood, 532 A.2d 424 (Pa. 1987); Adams v. State, 543 So.2d 1244 (Fla. 1989); Bolder v. State, 769 S.W.2d 84 (Mo. 1989); State v. Otey, 464 N.W.2d 352 (Neb. 1991).

[1405] 547 N.E.2d 814 (Ind. 1989).

[1406] *See* Medina v. State, 573 So.2d 293 (Fla. 1990); Quince v. State, 477 So.2d 535 (Fla. 1985).

[1407] *See* Roberts v. State, 775 S.W.2d 92 (Mo. 1989); Kight v. Dugger, 574 So.2d 1066 (Fla. 1990).

[1408] *See* State v. Slemmer, 823 P.2d 41 (Ariz. 1991).

[1409] 816 S.W.2d 390 (Tex. Crim. App. 1991).

[1410] 492 U.S. 302 (1989).

[1411] 481 U.S. 393 (1987).

law does not exist forever. Many claims that could have been made previously under *Hitchcock* are now time-barred under local procedures. The defendant must raise a new constitutional claim at the first opportunity when it becomes available. If there is a time limit on post-conviction claims, the time for raising a claim based on a new point of law generally begins to run when the new point of law is announced.[1412]

A modification or interpretation of an existing law does not amount to a "new" principle and, therefore, does not serve as a reason to excuse a procedural default. The natural development of the law through precedents is not necessarily a change in the law. In this regard, the courts have observed that an "evolutionary refinement" of the law will not excuse the failure to raise a claim in a previous direct appeal or post-conviction motion.[1413] As the U.S. Supreme Court described it in *Teague*: "[t]o put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[1414]

[9.43.] Harmless Error

A post-conviction motion may also be denied on the ground that the error at trial was harmless, and this is one instance in which it would be appropriate for a trial judge to apply the harmless error rule.[1415] For example, a claim that the prosecution failed to disclose exculpatory information might be resolved on the ground that the information would not have changed the result. *See* Section 9.33. A claim of ineffective assistance of counsel might be resolved on the ground that the acts or omissions of the lawyer did not affect the outcome of the proceeding. *See* Section 9.30.

[9.44.] Evidentiary Hearing

There is no absolute right to an evidentiary hearing on a post-conviction motion.[1416] An evidentiary hearing is not required if the post-conviction motion is legally insufficient on its face or if the files and records show that the defendant is not entitled to relief.[1417] However, if the post-conviction motion is sufficient on its face to establish a *prima facie* ground for relief and if the claim raised in the motion is not conclusively refuted by the files and records in the case, the trial judge must grant an evidentiary hearing on the motion.

Claims that are dependent on facts not determined at the time of trial will often require an evidentiary hearing. For example, a defendant who has raised a

---

[1412] *See* Hall v. State, 541 So.2d 1125 (Fla. 1989); Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989).
[1413] *See* Harich v. State, 542 So.2d 980 (Fla. 1989) (a previous decision of the court was merely a refinement of existing law and not a new point of law).
[1414] Teague v. Lane, 489 U.S. 288, 301 (1989).
[1415] *See* Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991).
[1416] *See* People v. Titone, 600 N.E.2d 1160 (Ill. 1992).
[1417] *See* State v. Otey, 464 N.W.2d 352 (Neb. 1991); State v. Rehbein, 455 N.W.2d 821 (Neb. 1990). Holland v. State, 503 So.2d 1250 (Fla. 1987).

prima facie case of ineffective assistance of trial counsel is likely to obtain an evidentiary hearing because it will be difficult for the court to resolve the claim on the existing record.[1418] Likewise, a defendant who has raised a claim that the prosecution failed to disclose favorable evidence is likely to obtain an evidentiary hearing. In most cases the issues relating to knowledge and materiality of the alleged favorable evidence are not discovered until after the trial and the facts cannot be resolved without a hearing.

Any doubt about the need for an evidentiary hearing should be resolved in favor of granting a hearing. While the denial of a hearing may save some time, it only opens the door to an argument in federal court that the defendant is entitled to an evidentiary hearing on a federal *habeas corpus* petition because he or she was denied a full and fair hearing in state court. If the federal court agrees, then the denial of an evidentiary hearing in state court will serve to delay, not expedite, a resolution of the case.

Generally, a successive motion for post-conviction relief is less likely to require an evidentiary hearing.[1419] This is not to say that every successive motion can be resolved without an evidentiary hearing. A successive motion may involve a factual issue that could not have been raised in an earlier proceeding and, in that event, the court should grant an evidentiary hearing to properly resolve the claim.

[9.45.] Presence of the Defendant

Generally, the defendant must be present in court if there is an evidentiary hearing on a post-conviction motion.[1420] The defendant's presence is not absolutely required if the motion for post-conviction relief is denied without a hearing, or if the defendant is represented by counsel and the hearing is limited to issues of law. For hearings such as an initial hearing to determine which claims, if any, will be addressed in an evidentiary hearing, it may not be advisable to arrange to have the defendant present. However, it would be wise to have the defendant available for the final hearing on the motion even if the hearing does not involve the taking of testimony.

[9.46.] Scheduling and Conducting Hearing

The trial judge should allow a reasonable time for a full and fair evidentiary hearing. Consideration should be given to the scheduling needs of counsel for the parties as well as the scheduling needs of the court. If a stay of execution is required to accommodate these interests, then the court should grant a stay. Haste in resolving a post-conviction claim that truly requires an evidentiary hearing will, ultimately, result only in additional delay.

The hearing is similar to any other evidentiary hearing in a criminal case.

[1418] *See* Neal v. State, 525 So.2d 1279 (Miss. 1987).

[1419] *See* Bolder v. State, 769 S.W.2d 84 (Mo. 1989).

[1420] *See* A.B.A. STANDARDS CRIM. JUST. § 22-4.6(a) (1986); Clark v. State, 491 So.2d 545 (Fla. 1986).

The defendant is entitled to present evidence on any issue that has not been summarily decided and the state is entitled to present evidence in response. The trial judge acts as the trier of fact and resolves conflicts in the evidence and all issues of fact including credibility and weight to be given the testimony of the witnesses. Generally the trial court's findings of fact will be upheld unless they are clearly erroneous.[1421]

[9.47.] Practical Considerations

Post-conviction motions in capital cases should take priority over all other matters pending before the court. Trial judges should be aware of the fact that if a warrant has been signed, the state appellate courts and the federal courts will all have to work within the time remaining under the warrant. If the warrant sets the date of execution in three months and if the trial judge uses two full months to decide the state post-conviction motions, the other state and federal courts will be left with little time to perform their functions. An excessive delay in the trial court will only increase the likelihood that a higher court will grant a stay of execution. These and other problems of managing time in capital post-conviction proceedings are discussed in *Glock v. Dugger*.[1422]

The need to proceed expeditiously may also require the trial judge to make special arrangements with the clerk and the court reporter. The available time for preparing a record on appeal from a post-conviction motion when there is a pending warrant is obviously not the same as the time that is available when the defendant is filing a direct appeal from the judgment and sentence.

[9.48.] Summary Disposition

A post-conviction motion may be summarily denied if the motion is facially insufficient or if the files and records of the proceeding show that the defendant is not entitled to relief.[1423] Appellate review of the sufficiency of a post-conviction motion is analogous to the review of a civil defendant's motion to dismiss for failure to state a cause of action.[1424] A post-conviction motion is properly dismissed if it fails to establish a *prima facie* ground upon which relief could be granted.

[9.49.] Legal Sufficiency

A post-conviction motion that is legally insufficient may be summarily denied. In this context the term “legal sufficiency” actually includes several distinct concepts. A post-conviction motion must meet all of the procedural requirements of the rule or statute, that is, it must be timely filed and it must be prepared in the proper form. If the rule or statute requires a defendant to verify

---

[1421] *See* State v. El-Tabech, 453 N.W.2d 91 (Neb. 1990).
[1422] 537 So.2d 99 (Fla. 1989).
[1423] *See* State v. Otey, 464 N.W.2d 352 (Neb. 1991).
[1424] *See* Billiot v. State, 515 So.2d 1234 (Miss. 1987).

the facts alleged in a post-conviction motion, then an unverified motion would be legally insufficient and it would be subject to summary denial.[1425]

Another concept that is included within the general meaning of the term legal sufficiency is that the motion must allege facts that would establish a right to relief. A timely post-conviction motion that is otherwise procedurally correct in all respects may be denied on the ground that it fails to allege any facts that would give rise to a claim for relief.[1426]

If the motion is untimely or procedurally defective in some other respect or if it simply fails to allege a basis for relief, the trial judge may summarily deny the motion without requesting a response from the state. This is so because these are all defects that are apparent from the motion itself. Even if it is possible to deny a post-conviction motion on its face, however, the better practice is to request a response from the state. The state will have to defend the summary denial on appeal and should be given an opportunity to address the court on the motion, even if that is not a matter of right.

[9.50.] Non-meritorious Claims

One final kind of post-conviction motion that could be characterized as "legally insufficient" is a claim that is sufficient on its face but refuted by evidence in the record. In some states, a post-conviction motion that raises a facially sufficient yet frivolous claim may be summarily denied as long as the portions of the record that conclusively refute the claim are attached to the order denying the motion. For example, if the defendant claims that he or she was not informed that he or she could be sentenced to death when the plea was entered, and if that is not true, the motion could be denied by an order that has the plea transcript attached.

If the deficiency in the post-conviction motion is that the facts alleged are refuted by the record, it is advisable to request a response from the state before summarily denying the motion. Counsel for the state may believe that the allegation cannot be refuted by the record or that it could be refuted more effectively by evidence that was not previously presented. As a practical matter, the opportunity to attach parts of the record exists only in the trial court. The state will not be able to provide any evidence to the appellate court, so the decision to grant an evidentiary hearing or to summarily deny the motion by attaching parts of the trial record is one that should be made carefully. As with other issues, a doubt regarding the need for an evidentiary hearing should be resolved in favor of granting the hearing.

[1425] Kilgore v. State, 791 S.W.2d 393 (Mo. 1990).

[1426] *See* Stuart v. State, 801 P.2d 1283 (Idaho 1990) (the new evidence was insufficient to warrant an evidentiary hearing because it would not have changed the conviction or sentence in any event); Pollard v. State, 807 S.W.2d 498 (Mo. 1991) (the motion contained only conclusory allegations); In re Rice, 828 P.2d 1086 (Wash. 1992) (the allegations must be based on more than speculation, conjecture, or inadmissible hearsay).

[9.51.] Findings and Conclusions

The final order of a post-conviction motion should state whether the disposition was made summarily, or whether it was made after an evidentiary hearing. Depending on the nature of the disposition, the order should contain findings of fact, conclusions of law, or both. If the motion is summarily denied on the ground that it is not legally sufficient on its face, then the order of denial should contain conclusions of law explaining why the defendant is not entitled to relief. If the motion is summarily denied on the ground that the files and records conclusively show that the defendant is not entitled to relief, the trial judge should attach the portions of the record necessary to support that conclusion. Finally, if the motion is granted or denied after an evidentiary hearing, the order should contain both findings of fact and conclusions of law supporting the decision.

The importance of including specific findings in the order on a post-conviction motion is that it will avoid the possibility the case will be reversed by the state appellate court because the court could not ascertain the basis of the ruling. There are other good reasons for making express findings of fact and conclusions of law. As explained below, express findings of fact may preclude relitigation of the facts in federal court. Moreover, as to some issues express conclusions of law will preclude relitigation of certain issues of law in federal court.

[9.52.] Finality of Factual Decisions

The existence of specific findings of fact may preclude the possibility that the defendant will be granted another evidentiary hearing in federal court. Title 28 of the United States Code § 2254(d) sets out a list of circumstances under which a U.S. district court is required to grant an evidentiary hearing on a federal *habeas corpus* petition.[1427] For the most part, these reasons deal with the adequacy of the state court hearing procedure, and the hearing itself in the state court. [1428]

In the adjudication of federal *habeas corpus* petitions, the federal courts are required to presume that factual findings made by state courts are correct.[1429] In contrast, a conclusion of law with respect to a federal constitutional issue is not entitled to any deference in a subsequent post-conviction proceeding in federal court.[1430]

[9.53.] Issue Preclusion

If a federal constitutional claim is denied on the ground that it was barred by a state procedural default, then that ground and only that ground should be

---

[1427] 28 U.S.C. 2254(d) (1996).
[1428] *Id*.
[1429] *See* Wainwright v. Witt, 469 U.S. 412 (1985); Sumner v. Mata, 449 U.S. 539 (1981).
[1430] *See* Miller v. Fenton, 474 U.S. 104 (1985).

assigned as a reason for denying the claim. The rule in federal court is that if a state court disposes of an issue on the basis of a procedural default, that fact must plainly appear from the ruling of the state court.[1431] Otherwise, the federal court may assume that the state court addressed the issue on the merits and that, in turn, will be cause for the federal court to assume that the issue has been exhausted in state court and subject to review on the merits in the federal *habeas corpus* proceeding. This rule plainly shows the danger in assigning alternative reasons for the denial of a post-conviction claim. If the trial judge holds that a federal constitutional claim is barred by a state procedural default, and then for good measure adds that the claim was without merit in any event, the issue will be reviewable in federal court. In contrast, the federal court will have no authority to review the issue if the trial judge has plainly denied the claim on the basis of a state procedural default.

The following matters should be considered in drafting an order on a post-conviction motion in a capital case.

- ✓ If the motion is summarily denied on the ground that it is facially insufficient, the order should contain a legal conclusion regarding the insufficiency of the allegations.
- ✓ If the motion is summarily denied on the ground that the files and records conclusively show the defendant is not entitled to relief, the order should specifically identify the parts of the record that refute the defendant's claim. Depending on the applicable procedure, the order should also contain an appendix that includes copies of the files and records that refute the defendant's claim.
- ✓ If the order was entered after an evidentiary hearing, it should contain findings of fact and conclusions of law.
- ✓ If the decision can be based either on a state procedural ground or on the merits of the defendant's claim, the trial judge should consider whether it is necessary to discuss the merits at all. A decision on the merits may undercut the effect of the decision on state procedural grounds.

[9.54.] Stay of Execution

In some jurisdictions, the authority to grant a stay of execution pending disposition of a post-conviction motion may be expressly provided by law.[1432] Even in the absence of a rule or statute on the subject, however, trial judges have inherent authority to grant a stay of execution pending post-conviction

---

[1431] *See* Harris v. Reed, 489 U.S. 255 (1989).
[1432] *See* ARIZ. R. CRIM. P. 32.4(d); TENN. CODE ANN. § 40-30-109 (1995).

proceedings in the trial court.[1433]

[9.55.] Criteria

The prospect of irreparable injury is apparent in death penalty cases. Therefore, whether it is appropriate to grant a stay of execution is an issue that usually deals more with the likelihood of success on the merits of the case. The resolution of this issue is, for the most part, left to the discretion of the trial judge. Given the broad range of circumstances that might exist from case to case, there is no practical way to establish a formula for determining whether a trial judge should exercise discretion to grant or deny a motion for stay. There are some factors that have a bearing on the decision and these are discussed below.

If a death warrant has been signed, the trial judge should consider the date that a stay was requested in relation to the date the warrant was signed. A motion for stay of execution that is filed near the end of the time, when it could have been filed earlier, is more likely to be an abuse of the process. For example, in *Osborn v. Shillinger*,[1434] the Supreme Court of Wyoming denied a motion for stay of execution in part because the defendant had waited more than three months after the warrant had been signed.

The trial judge should consider the sufficiency of the allegations in the motion for stay of execution or in the post-conviction motion. If the claims are based on conclusory assertions that are not supported by specific factual allegations, then there is a greater likelihood the post-conviction motion will be denied without an evidentiary hearing. Ordinarily, the need for a stay of execution in such a case is not as great as it would be in a case requiring an evidentiary hearing. In *Osborn*, the Supreme Court of Wyoming affirmed the denial of a stay in part because the motion for stay contained only conclusory allegations.

Another matter the trial judge should consider is the relative merit of the allegations in the motion for stay of execution in light of the record. If the motion for stay of execution alleges a facially sufficient ground for relief, but if the facts supporting that ground are conclusively refuted by the files and records of the proceeding, the motion is likely to be denied without a hearing. Again, in this situation there may not be a need to stay the execution. However, if there is some doubt about the merits of the defendant's claim, the court should grant a stay so that the claim can be resolved in a full and fair hearing. Generally, it is proper to grant a stay of execution if the motion reveals that the defendant "might be" entitled to post-conviction relief[1435] or if the files and records do not readily establish the lack of merit in the defendant's post-conviction claim.[1436]

[1433] *See* Spalding v. Dugger, 526 So.2d 71 (Fla. 1988); Zant v. Dick, 294 S.E.2d 508 (Ga. 1982). *But see* State v. Steffen, 639 N.E.2d 67 (Ohio 1994) (Ohio Supreme Court has sole authority to grant stay of execution pending post-conviction proceedings).

[1434] 705 P.2d 1246 (Wyo. 1985).

[1435] *See* State ex rel. Russell v. Schaeffer, 467 So.2d 698 (Fla. 1985).

[1436] *See* Zant v. Dick, 294 S.E.2d 508 (Ga. 1982); State v. Sireci, 502 So.2d 1221 (Fla. 1987).

The propriety of granting a stay of execution depends to some extent on whether the motion before the court is the first post-conviction motion or whether it is a successive motion. Major collateral challenges, such as ineffective assistance of trial counsel and failure to disclose favorable evidence are often raised in the first motion. These claims typically involve disputed issues of fact that must be resolved in an evidentiary hearing. If the post-conviction motion is the first one the defendant has filed and if the motion raises fact-based claims that will require an evidentiary hearing, a stay will almost always be required. In contrast, if the post-conviction motion before the court is the second or third motion the defendant has filed and if the claims are legal issues that could be quickly decided, there may be no need to grant a stay of execution. Generally, a motion for stay of execution should be denied if the post-conviction motion alleges grounds that were previously presented on direct appeal or in a prior post-conviction motion.[1437]

The following matters should be considered in determining whether to grant a stay of execution.

- ✓ Whether there was a delay in filing a motion for stay of execution and if so whether the delay can be excused.
- ✓ Whether the motion for stay of execution or the post-conviction motion contains allegations that are sufficient to establish a *prima facie* ground supporting the claim for relief.
- ✓ Whether the allegations of the motion for stay of execution or the post-conviction motion are conclusively refuted by the files and records of the proceedings.
- ✓ Whether the post-conviction motion will require an evidentiary hearing and if so whether the scheduling needs of the court and counsel will require a stay of execution.
- ✓ Whether the post-conviction motion is the first motion or a successive motion.

[9.56.] Appeals

Post-conviction remedies are generally characterized as civil remedies even though they are often made part of the state criminal procedure by a rule or statute.[1438] For this reason, the state has a right to appeal an order granting a post-conviction motion in the same way that the defendant has a right to

---

[1437] *See* Johnson v. State, 508 So.2d 1126 (Miss. 1987); Darden v. State, 521 So.2d 1103 (Fla. 1988).

[1438] *See* State v. Bostwick, 443 N.W.2d 885 (Neb. 1989); State v. Skjonsby, 417 N.W.2d 818 (N.D. 1987); Ouimette v. Moran, 541 A.2d 855 (R.I. 1988); Peltier v. State, 808 P.2d 373 (Idaho 1991).

appeal an order denying such a motion.[1439]

Ordinarily, the proper court to hear an appeal from an order on a post-conviction motion is the court that has jurisdiction over the case on direct appeal. If a sentence of death is appealable directly to the state supreme court, and not to intermediate appellate court, then an order on a post-conviction motion in which the defendant has been sentenced to death would be appealable to the state supreme court. If the defendant may file a direct appeal to the state supreme court from an order denying a post-conviction motion, then the state may file a direct appeal to the supreme court from an order granting such a motion.[1440]

The standard of review on appeal depends on the nature of the decision made in the trial court and the applicable state law. Generally, if a decision on a post-conviction claim is based on a finding of fact, the decision will not be reversed on appeal unless the appellate court finds that it is clearly erroneous. As the Supreme Court of Missouri said in *Wilson v. State*,[1441] a factual decision on a post-conviction motion is clearly erroneous only if after reviewing the entire record the appellate court is left with "the definite impression a mistake has been made."

[9.57.] Conclusion

Although each state has its own set of rules and statutes governing post-conviction proceedings in capital cases, all are intended to ensure a defendant a full and fair opportunity to collaterally challenge the constitutionality of his or her conviction and sentence. However, a post-conviction proceeding is not a substitute for direct appeal; nor is it intended to provide an opportunity to review those issues which were or could have been raised on direct appeal. A trial court analyzing post-conviction claims should ensure that the defendant has followed the pleading requirements provided by state rule or law, should hold an evidentiary hearing when necessary to resolve any disputed issues of fact, and should explain, in a written order, the basis for its rulings on each claim so that the trial court's decisions will withstand appellate scrutiny.

[1439] *See* State v. Thomas, 599 A.2d 1171 (Md. 1992); Commonwealth v. Francis, 583 N.E.2d 849 (Mass. 1992); State v. Twenter, 818 S.W.2d 628 (Mo. 1991); State v. Sireci, 502 So.2d 1221 (Fla. 1987).

[1440] *See* Commonwealth v. Francis, 583 N.E.2d 849 (Mass. 1992); State v. Sireci, 502 So.2d 1221 (Fla. 1987).

[1441] 813 S.W.2d 833 (Mo. 1991).