Capital Defense Handbook Addendum: A Little Bit of Law

In the beginning of the Handbook, the section concerning the history of the Death Penalty, the case Furman v. Georgia was explained. In the history of our legal system, many cases such as Furman have had a large impact on the rights of defendants and how trials proceed. Rights are based upon the Constitutions of both the United States and each state as well as legislative acts that are passed each year by the states and Congress, and on rulings made by the courts in cases all across the country. As has been described in this Handbook, most major new rulings affecting defendants are the results of appeals which have passed through the State courts, the Federal Courts of Appeal, and have been finally decided by the U.S. Supreme Court.

The following are a few cases, some new, some old, which you should be familiar with to help you deal with the trial and appeal process. Some you may have heard of before, others may be new to you.

Miranda v. Arizona (1966): As with Furman, this was a ground-breaking decision by the U.S. Supreme Court. This ruling actually involved four separate appeals consolidated into one to be argued before the court. The case is merely cited as Miranda, for Ernesto Miranda, as his case is listed first on the court's decision.

This is the case you hear about on police shows, where police must read a suspect their "Miranda Rights". In the Miranda case, the question before the court was rather or not a suspect's statements made while in police custody and under interrogation were admissible as evidence if the suspect had never been informed of his rights. In the court's ruling, the judges found that all suspects had the right to remain silent (5th Amendment Right against self-incrimination) and the right to have an attorney present (6th Amendment Right to assistance of legal counsel). Suspects taken into custody and questioned also had the right to be informed of these rights before any interrogation could begin.

The court determined that being in "custody" and "interrogation" meant any questioning initiated by police officers after a person had been deprived of their freedom to leave. In such instances, Police officers are required to inform suspects of their rights and no questioning can occur if a suspect does not wish to talk or waive his/her rights but that waiver must be made voluntarily, knowingly, and intelligently. Even if a suspect has already answered some questions or volunteered some statements, he or she may at any time, end an interrogation by refusing to answer any more questions and requesting an attorney.

In Miranda, the U.S. Supreme Court held that individuals have these constitutional rights to protect them from threats, intimidation or coercion. Any evidence or statements obtained by police in violation of these rights is inadmissible as evidence in court. Upon being detained by police as a suspect, or at any time as a defendant in a criminal case, you must be made aware of your rights to remain silent and to have an attorney present. You cannot be forced to give statements or be held in isolation without access to legal counsel.

In an update to this case, in 2010, the US Supreme Court ruled that while suspects are guaranteed their 5th and 6th Amendment rights by the US Constitution, suspects must verbally inform police that they wish to exercise those rights to formally stop any questioning or request legal counsel.

Brady v. Maryland (1963): This was the landmark case which established a defendant's right, pre-trial to access any information the State possessed which would be favorable to the defendant. Such "Brady Information" is usually turned over by prosecutors to the defendant's attorney during the pre-trial discovery phase in response to a filing of a Motion for Bill of Particulars, Discovery, Inspection, and Production (See page 5 of Handbook, under Discovery).

Brady information is any evidence the State may posses that exonerates a defendant, is favorable to his/her defense, or might mitigate a defendant's guilt at sentencing. Such evidence may be physical – foot prints, finger prints, blood, DNA, etc. - which does not match the defendant, or it may be statements – by witnesses, the victim, or other co-defendants – which are favorable to the defendant. Defendants, as well, have the right to know of any deals or plea agreements made by the State with any co-defendants or witnesses. Failure of the prosecutor to turn over such favorable material is consider a "Brady violation" of the defendant's 14 Amendment Right (Due Process).

Since the US Supreme Court ruling in Brady, this standard has been further updated by two particular cases. In United States v. Bagley, the court further clarified the Brady rule to all State officers connected to a case. The court declared that prosecutors have a duty to learn any favorable evidence known to others acting on the State's behalf in the case, including the police. This ruling is to ensure that favorable evidence and statements gathered by police officers, detectives, and forensic experts cannot be suppressed in violation of Brady simply by their not being made known to the prosecutor in the case. The Bagley ruling ensures that Brady violations will be enforced against the State even if the prosecutor claims to be unaware of favorable evidence gathered by other State officers

Strickland v. Washington (1984): This case decided before the US Supreme Court involved David Washington, a Florida Death Row Inmate. Charles Strickland was actually representing the Petitioners against Washington's petition of habeas corpus. In Washington's petition, he raised the argument that his trial attorney had provided him with ineffective assistance of counsel. The Supreme Court ultimately denied Washington's claim, affirming his conviction and sentence, yet the ruling laid down the standard for establishing Ineffective Assistance of Counsel (IAC) claims under Strickland.

The Supreme Court has held that a defendant has the right to a fair trial, not a perfect one. Part of that right is the right to counsel. This does not mean just having an attorney standing next to you whenever you're in court, it means effective assistance of an attorney. Effective assistance means the proper investigation and preparation for trial – and in Capital Cases, preparation for the sentencing phase – as well as sound advice regarding one's options through the process. The effective assistance of counsel is to ensure that a trial remains an adversarial process, where the defendant is not left defenseless before the State.

To raise a claim of Ineffective Assistance of Counsel, the Supreme Court ruled in Strickland, that an appellant must demonstrate two things: First, the appellant must show the counsel's performance was deficient. This requires showing that the attorney made errors so serious that he/she was not functioning as the "counsel" guaranteed by the 6th Amendment; Second, the appellant must show the deficient performance prejudiced the defense. This requires showing that the attorney's error were so serious as to deprive the appellant of fair trial, a trial whose result was reliable. This is the "two-pronged" test of Strickland to establish Ineffective Assistance of Counsel claim. If the appellant cannot show both prongs,

it cannot be said the conviction – or sentence, in case of death – resulted from an unconstitutional breakdown of the adversarial process that renders the result unreliable.

It must be understood that not every error is made by an attorney, even if professionally unreasonable, warrants the setting aside of a conviction or sentence. Where an appellant may be able to demonstrate the first prong of the Strickland test – such as an attorney's failure to interview witnesses who may have helped, or failure to request a pre-trial psychological evaluation – the appellant must, as well be able to demonstrate the second prong of the test, how these failures by counsel were so serious as to deprive the appellant of a fair trial resulting in a conviction which is unreliable. It is not enough, on appeal, to look back with hindsight and second guess an attorney's performance or trial strategy, point out how counsel should or could have done this or that, or not done something.

Appellant must be also show that these failures deprived the appellant of his/her 6th Amendment Right. If you can show the first, but not the second, then counsels errors can be dismissed as harmless. (See page 11, under Direct Appeal" for Harmless Error)

Kyles v. Whitley (1995): This was the second ruling clarifying Brady. In Kyles, the court addressed the "issue of cumulative impact", declaring that a prosecution's violations of Brady rules must be viewed in light of their cumulative impact – how each violation, compounds and adds to others – and may not be dismissed individually – one by one – as harmless error. (see page 11, under Direct Appeal for Harmless Error)

Schlup vs. Delo (1995): Missouri Death Row Inmate, Lloyd Schlup's appeal to the US Supreme Court revolved around a claim of actual innocence versus procedural bars in place in the federal courts to limit "successive" habeas petition is on appeal which raises arguments identical to those already raised and rejected on previous appeals. An "abusive" habeas petition occurs where a prisoner files an appeal raising arguments which were known before but not raise on prior appeals. (See p. 14, "D. Federal Habeas Corpus") In either instance a court may refuse to hear an appeal based on procedural grounds, regardless of the merits of the actual arguments raised in the appeal.

In Schlup the US Supreme Court ruled that an appellant may overcome a procedural bar, such as the filing of a successive or abusive petition, by raising a claim of actual innocence. This claim of actual innocence does not, itself, provide a basis for relief, because it is not a constitutional claim, but, instead, a gateway through which an otherwise barred appellant may pass to have actual claims of constitutional errors that were raised in the appeal considered on their merits. It is not enough merely to raise a claim of actual innocence. This claim is a vehicle by which an appellant may convince a court to hear claims, which would normally be procedurally barred.

Such appellants may obtain review of their constitutional claims of error only if they fall into a narrow class of cases showing their conviction and sentence to be a fundamental miscarriage of justice. For a claim of actual innocence to credible, the claim requires the appellant asserting this claim to support the allegations of constitutional error in the appeal with new, reliable evidence; whether it be exculpatory scientific evidence, new, trustworthy eyewitness accounts, or critical new physical evidence that was not presented at trial.

The appellant must be able to establish the probability that the constitutional violations raised resulted in the conviction of one who is actually innocent and to show that it is more likely than not that no reasonable jury would have found appellant guilty beyond a reasonable doubt to justify the conclusion that appellant's conviction and sentence would be a miscarriage of justice.

Atkins v. Virginia (2002) and **Roper v. Simmons** (2005): These two cases, while they deal with separate issues, are closely related, with the US Supreme Court's ruling in Atkins informing its later decision in Roper.

The issue before the court in Atkins was whether or not the execution of the mentally retarded is unconstitutionally cruel and unusual punishment under the 8th amendment. By examining the laws of the State up to the time of the court decision, the court noted that a significant number of states have concluded that death is not a suitable punishment for a mentally retarded criminal. The consensus is that society views mentally retarded offenders as categorically less culpable than the average criminal.

Clinical definitions of mental retardation require not only a sub-average intellectual functioning, but also significant limitations in adaptive skills. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses and to under stand others' reactions.

The mentally retarded, as well, face the risk of wrongful execution due to the possibility they will unwittingly confess to crimes they did not commit, coupled with their lesser ability to give their attorney meaningful assistance, and that they are typically poor witnesses. There is the further risk that their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Those mentally retarded persons who meet the law's requirements for criminal responsibility will be tried and punish when they commit crimes. Yet, because of their disabilities, they do not act with the same level of moral responsibility that characterizes the most serious adult criminal conduct.

It is because of these determinations that the court found the death penalty to be excessive and in violation of the 8th Amendment where the offender had been found to be intellectually disabled. Some three years later, the question of cruel and unusual punishment was before the Supreme Court again, this time in the Roper case involving the death penalty for juveniles. As with the Atkins decision, the court looked into the “evolving standards of decency that mark the progress of maturing society” to determine whether or not the sentence of death was disproportionate to the culpability of the offender.

The court found, when looking into the laws of individual states, as it had done in Atkins, that a majority of states had rejected the death penalty for juveniles and even where it was not specifically prohibited – allowing for the execution of juveniles whose crimes had been committed between the ages of 16 – 18 – it was an still infrequent occurrence. The court held that Capital Punishment must be limited to those offenders who commit “ a narrowing category of the most serious crimes” and whose extreme culpability makes them “the most deserving of execution.”

In deciding the Roper case, the court found three (3) general differences between juveniles under the age of 18 and adults which demonstrated that juvenile offenders cannot, with reliability, be classified among

the worst offenders. First, juveniles' susceptibility to immature and irresponsible behavior means their conduct cannot be as morally reprehensible as that of an adult. Teenagers are just not as emotionally and psychologically developed as adults. Second, their own vulnerability as basic lack of control over their immediate surroundings means juveniles have a greater claim than adults to be forgiven for failing to escape the negative influences of their whole environment.

Third, the reality that teenagers will struggle to define their identity means it is less supportable to conclude that even a terrible crime committed by a juvenile is evidence of an irretrievably depraved character. A terrible act committed by a child does not necessarily define who that child may row into as an adult.

Once these factors were established, the court necessarily found the culpability of juveniles to be diminished, providing adequate justification to reject the death penalty for crimes committed by offenders under the age of 18.

Hall v. Florida (2014): Mental capacity often comes up as a point of contention when applying the death penalty. Many states like Florida have established the intellectual disability threshold at 70 or below. That means anyone who claims intellectual disability with a rate of 71 or higher would have the claim disregarded. After Atkins v. Virginia established the unconstitutionality of executing someone who has a documented intellectual disability, Hall v. Florida urged vacating death sentences applied to intellectually disabled inmates. Hall established the method used to define who is intellectually disabled was unconstitutional. Maintaining an IQ score of 70 as the basis for determining intellectual disability denies those who fall within the margin of error the opportunity to present additional evidence. The Supreme Court also adopted the term intellectually disabled to replace mentally retarded in rendering their opinion in this matter.

Hinton v Alabama (2014): The petitioner Anthony Ray Hinton, asked if the State of Alabama correctly applied Strickland to his case. He had been on death row for 30 years. The Supreme Court ruled in his favor that Strickland had not been properly applied. They found his lawyer's performance at trial was constitutionally deficient. As a result, he was able to get a new trial but was set free instead. The State of Alabama could not match the evidence to him. They could not put him at the scene. Equal Justice Initiative fought for his case for 15 years. He was released from prison in 2014.

Glo**ssip v. Gross (2015)**: Lethal injection has become the favored method of execution in the US. The implementation of lethal injection requires a three-drug protocol. With pressure being placed on drug manufacturers, sodium thiopental is no longer available for use in executions. This ruling takes a look at the death penalty and the administration of midazolam as a suitable replacement for sodium thiopental in the three drug protocol used in most executions in the US. Midazolam was used as a substitute for the sedative sodium thiopental in the botched execution of Clayton Lockett.

The original three drug cocktail involved sodium thiopental to render a condemned inmate unconscious. In this ruling, the court ruled the petitioners failed to prove their claim that midazolam would inflict undue suffering on the condemned. Such undue suffering would be a violation of the Eighth Amendment. With this ruling, the Supreme Court approved the use of midazolam as a substitute for sodium thiopental. The Supreme Court's ruling was against the petitioners 5 to 4.

Hurst v. Florida (2016): The death penalty in many states is decided by a jury with a unanimous decision and affirmed by a judge. Florida did not require a unanimous decision on the part of the jury and sentencing is finalized by the judge. This has lead to death sentences being imposed on people with less than unanimous jury verdicts. In Hurst, the judge's allowance to rule independently of the jury has been ruled unconstitutional. In an 8 to 1 ruling, the Supreme Court affirmed that juries decide a defendant's punishment, not judges.

With this ruling, the door has opened for potential sentence commutations in place of the death penalty. Inmates on Florida's death row have been seeking ways to get Hurst applied retroactively to death penalty cases in Florida. It is unclear how Florida will proceed with death penalty convictions.

Update: The Florida legislature has passed bill, HB 7101, as amended, by a vote of 93-20. To fix the immediate problem in light of Hurst v Florida, the bill would require the jury in a capital case to find at least one aggravating circumstance unanimously for the case to be death-eligible. The bill goes on to require at least a 10-2 vote for the defendant to actually be sentenced to death. Florida, Alabama and Delaware are the only states, out of the 31 with death penalty laws, that do not require a unanimous verdict. Delaware's system, which requires a 7-to-5 jury majority, is under review and at a standstill. Alabama faces problems now, too. On March 3, 2016, a state court judge ruled that Alabama's death penalty law was unconstitutional because its use of aggravating factors was so similar to Florida's old system, among other things.