GEORGE C. COCHRAN INNOCENCE
PROJECT MISSION STATEMENT

The George C. Cochran Innocence Project is committed to providing the highest quality legal representation to its clients: Mississippi state prisoners serving significant periods of incarceration who have cognizable claims of wrongful conviction. In addition, the Project seeks to identify systemic problems in Mississippi’s criminal justice system, develop initiatives designed to raise public and political awareness of the prevalence, causes and societal costs of wrongful convictions, and to promote meaningful criminal justice reform. As an integral part of the University of Mississippi School of Law, the Project also provides a clinical learning opportunity for law students, who actively participate as full-members of the Project staff in representing the Project's clients and engaging in outreach and reform.
## Table of Contents

Student Expectations ............................................................................................................ 4  
Confidentiality .......................................................................................................................... 5  
Introduction ............................................................................................................................. 6  
Project Staff ............................................................................................................................. 7  
What is an Innocence Project Case? ....................................................................................... 8  
Case Criteria ............................................................................................................................ 8  
Mandatory Criteria: .................................................................................................................. 11  
Important Criteria ................................................................................................................... 15  
Less Important But Relevant Criteria .................................................................................... 15  
Working in the MIP Clinic ........................................................................................................ 16  
  A. Initial Case Screening:....................................................................................................... 16  
  B. Initial Case Work ............................................................................................................... 16  
  C. Grading Criteria: ............................................................................................................... 26  
APPENDIX .................................................................................................................................. 32  
  A. Understanding DNA .......................................................................................................... 32  
    1. What is DNA? ................................................................................................................... 32  
    3. When is DNA Testing Appropriate? .............................................................................. 34  
    4. Types of DNA Testing .................................................................................................... 36  
  B. SAMPLE INITIAL LETTER ............................................................................................ 39  
  C. INITIAL APPLICATION FOR AID ............................................................................... 40  
  D. SAMPLE INVESTIGATIVE MEMO ................................................................................. 68  
  E. SELECTED CASES .......................................................................................................... 84  
    1. Brady v. Maryland .......................................................................................................... 84  
    2. Strickland v. Washington ............................................................................................... 92  
    3. Youngblood v. Arizona .................................................................................................. 133  
    4. Third Judicial Circuit v. Osborne .................................................................................. 150  
  F. Mississippi DNA Preservation and Testing Statute ......................................................... 179  
  G. Howard v. State ............................................................................................................... 193  
  H. Mississippi Rules of Professional Conduct ...................................................................... 256


**STUDENT EXPECTATIONS**

Students are expected to represent the clinic clients in a zealous and professional manner. The George C. Cochran Innocence Project and its staff, legal and administrative, work to provide a model of indigent defense representation for its clients that is second to none. While we understand that clinic students do not have the same depth of experience in this work, clinic students should nonetheless aspire to provide the same quality representation.

Further, in regard to your expected level of professional responsibility, understand that it is an indispensable feature of good lawyering. Knowledge of and adherence to ethical rules is obviously necessary to practice law. You will be expected to zealously represent your client and, of course, to preserve client confidences. You will also be expected to identify the ways in which these obligations and the others contained within the Mississippi Rules of Professional Conduct affect your work on any case.

This area is not limited to the ethical considerations of lawyering. It also includes attention to case and other clinic responsibilities, effort in the representation of clients, and management of one’s workload. Some specific factors are:

- Paying attention to ethical issues in cases and initiation of discussions with supervisor.
- Putting forth effort to provide zealous representation and the best possible defense.
- Taking personal responsibility for client’s case.
- Maintaining appropriate relationships with clients, other attorneys, law enforcement and other officials and involved parties.
- Meeting deadlines imposed by the necessities of the case, your supervisor, or your own initiative.
- Attending and being punctual to professional obligations, including meetings with clients, supervisors, witnesses, and other students.
- Maintaining files accurately and precisely and complying with office procedures.
- Allocating time and effort to carry out tasks responsibly.

We believe that professional responsibility, as we have defined it, is one of the primary obligations of a lawyer.
CONFIDENTIALITY

During the course of your work for the Project, you will have access to information about individuals and case files that is not generally available to the public. Please be advised that all information you obtain as a result of working for the Project is confidential. Do not discuss the details of the cases the Project is working on with anyone but the members of the Project, attorneys working with the Project, and the client. In particular, never talk to any members of the media about any cases we are working on. All media inquiries should be referred to Project staff. Furthermore, do not take any of the case file materials out of the office area without prior approval or allow anyone not associated with the George C. Cochran Innocence Project access to our offices or files. Disclosure of confidential information is a violation of the rules of practice and may result in a waiver of the attorney client privilege that, in turn, can hurt the client. Any breach of this confidentiality requirement may subject you to failing the Project and civil liability. In addition, serious breaches may need to be reported to the state bar admitting authorities.

GEORGE C. COCHRAN INNOCENCE PROJECT CONFIDENTIALITY AGREEMENT

As a student working under the supervision of attorneys licensed by the Mississippi State Bar, I understand that I am bound by the Mississippi Rules of Professional Conduct governing the duties and responsibilities of attorneys. In particular, I understand that I am bound by the duty to maintain complete confidentiality regarding any information gained through communication with a client or prospective client of the Mississippi Innocence Project. Maintaining “complete confidentiality” means refraining from discussing client communications with friends, family, or with anyone not covered by duty of confidentiality.

My signature below constitutes an agreement to maintain inviolate client confidences and, at every peril to myself, preserve client secrets.

__________________________________  __________________________________
Signature                        Date
INTRODUCTION

This manual will introduce you to the Mississippi Innocence Project (MIP) -- to the types of cases we handle, case management protocols, and a general outline of some of the issues you will see in the files you will be reviewing and cases that you will be working on. Also included are a number of sample letters, case law, rules, and articles that will help you in your work this semester in our office.

Although this manual is not an exhaustive overview of the work of the MIP, it should be sufficient to get you started in understanding the issues that we confront, reviewing your caseloads and determining what work needs to be done. In the past decade, more than 270 wrongfully convicted inmates have been released due to the efforts of Innocence Projects (IPs) across the nation. We hope that through your commitment and diligent work, we will secure the liberty of additional innocent prisoners and advance our policy goals.

THE GEORGE C. COCHRAN INNOCENCE PROJECT CLINIC

The George C. Cochran Innocence Project is a student-staffed, post-conviction relief class with attorney/ professor supervision. The Project was conceived to provide assistance for incarcerated individuals who assert that they were wrongfully convicted and that post-conviction new evidence can prove their innocence. The goal of the Project is to investigate these claims, determine if they have merit, and obtain the release of the inmate by vacating a conviction.

The responsibilities of a Project Clinic student are varied. You will alternately assume the role of student, advocate, counselor, and investigator. One of the most time consuming (and important) tasks when handling a case is tracking down necessary information, evidence, and paperwork. This requires persistent phone calls, follow-up letters, and patience as you navigate your way through the criminal justice system's bureaucracy. The success of this project is dependent upon your tenacity and commitment.
**PROJECT STAFF**

**A. Project Director: Professor Tucker Carrington**

The Project Co-Director is responsible for teaching the weekly class component of the Project, supervising student casework, including but not limited to guidance in appellate and post conviction issues, and legal research and writing. He also represents the Project in court appearances and media coverage.

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Cell: 202-432-1755  
wtc4@ms-ip.org

**B. Project Program Director: Carol Mockbee**

The Project Director is responsible for fulfilling many of the non-legal duties of MIP. The PD is responsible for supervising all day-to-day operations of the Project, fundraising activities, coordinating volunteer students, and planning MIP programs.

Office: 662-915-6000  
Cell: 601-750-0023 – You may call or text any time  
carol@ms-ip.org

**C. Staff Attorney: Sandra Levick**

The Staff Attorneys are responsible for their own complement of cases, including investigation and drafting of any potential claims. Staff attorneys also supervise and/or accompany students when they work on their own assigned cases.

Sandra Levick  
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**D. Student Workers: Alaina Garland, Leigh Horn**

Student Workers are responsible for handling all mail, phone calls, and maintaining the office space. The student worker will assign cases for clinical students to screen, organize all files, and keep a record of cases currently being worked on by both the attorneys and clinical students.

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**What is an Innocence Project Case?**

Each month we receive many letters from inmates interested in obtaining our assistance. Many of the requests for assistance we receive, though compelling and sympathetic, do not involve a claim of actual innocence. The Project only handles cases where new evidence can yield conclusive proof of innocence. New evidence can appear in a variety of forms. Typically, the best cases of new evidence involve new technology, like DNA testing that was not done or was not available at trial, new computer technology that allows for the enhancement or better understanding of a pre-existing piece of evidence, such as a videotape, or a key witness who has recanted his or her testimony in a credible and corroborative fashion.

Many of our cases will involve DNA testing as the “new evidence.” In some of these, conventional serology evidence (ABO testing and other enzyme and protein markers) was introduced at trial; in other cases, no serological test results were offered. For our purposes, it does not matter. In order to set aside a conviction, we must establish that the results of a correctly administered DNA test would have a substantial probability of resulting in a different outcome at trial. This test can be performed on any biological specimen collected during the investigation of the case, whether or not it was introduced at trial.

**Case Criteria**

The MIP handles both DNA and non-DNA cases. In either type of case the MIP has established a series of criteria to be considered when reviewing a case. As a fellow with the MIP, you will screen cases to determine:

i. if the defendant’s case involves new evidence;
ii. if that evidence, once obtained and developed, would be dispositive of innocence.

It is important for you to understand why, in each case, the evidence is exculpatory. An understanding of the issues involved is crucial; otherwise, you will be wasting time trying to find documents and evidence that do not have relevance. You must approach each case from an informed position so that you can evaluate it and immediately go about securing the necessary information and evidence – whether it’s a case that your helping to screen, or whether it’s one of the cases that we have decided to pursue. You should familiarize yourself with Mississippi’s recently passed DNA testing statute, as well as the definition of “newly discovered evidence” in the same post-conviction area (These statutes are included in the appendix We most frequently employ both to seek relief in our cases.).
Beyond the two elements noted above, the Project also considers the following criteria:

**Mandatory Criteria:**

1) The inmate is asserting actual innocence:

We deal with cases involving actual innocence as opposed to wrongful convictions. For example, an inmate who asserts, “My conviction should be overturned because I was not read *Miranda* warnings before I confessed,” is not alleging that he is innocent. He is merely alleging that he was wrongfully convicted, because if the law had been followed and his confession properly thrown out, he might have been acquitted. Similarly, an inmate who argues, “If my trial attorney had been more effective I would have been acquitted,” is also not necessarily alleging innocence. Neither of these situations by themselves would warrant an MIP investigation.

2) Conviction in Mississippi court:

We do not accept out of state cases and all letters from inmates convicted outside of Mississippi should be summarily rejected by the Office Administrator before the letter reaches you. In addition, we only accept cases from certain counties of conviction. Other Mississippi counties are handled by Innocence Project of New Orleans. The counties that we accept are as follows:

- Alcorn
- Attala
- Benton
- Bolivar
- Calhoun
- Chickasaw
- Choctaw
- Clay
- Coahoma
- De Soto
- Franklin
- Grenada
- Hinds
- Holmes
- Humphreys
- Issaquena
- Itawamba
- Kemper
- Lafayette
- Lauderdale
- Leake
- Lee
- Leflore
- Lowndes
- Madison
- Marshall
- Monroe
3) **Inmate not involved in crime at all and not merely disputing role in offense or mental state:**

We do not take cases where the inmate alleges that he committed a crime, but it was in self-defense, that the sex was consensual, that he committed the act but did not have the *mens rea* required, or that he deserves a lesser sentence because he was one of many individuals who assaulted the victim and there is no proof that he was the one who threw the fatal punch. We take cases where the inmate was not involved in any way, and is totally innocent.

4) **Case involves “new evidence” and this new evidence must cause a reasonable, objective person to believe the inmate is probably innocent:**

The standard in Mississippi for new evidence under the post-conviction statute and relevant case law is that the new evidence *must raise a “strong probability” that the outcome* would be different in a new trial if the newly discovered evidence were now considered by the jury. Because a jury must acquit if reasonable doubt exists, the new evidence must raise reasonable doubt to satisfy the standard. We generally take cases only when the new evidence not only raises reasonable doubt, but would cause a reasonable, objective person to believe that the inmate is probably innocent.

Examples of new evidence that you should be looking for include:
a. DNA test results on biological evidence from the crime scene. Even though the biological evidence is not “new evidence,” if it is now tested for DNA, the DNA results would be “new evidence.”

DNA evidence is the primary evidence that you should be considering when examining a case. It is the best possible new evidence. But keep in mind that inmates will often not know if DNA exists in their case and are often not educated enough to figure out if there COULD be DNA in their case. It is your job to try to determine if this could be a DNA case if the inmate is claiming actual innocence.

It is very important for you to review the facts of the case to see if DNA evidence might be available. To determine the facts you must look at the totality of the information available: read what the inmate wrote in his letters and questionnaire, look up the inmate’s appellate cases or any published decisions in the case (utilizing Westlaw or Lexis), and then do a Google search and read newspaper articles about the incident, the victim, and the defendant.

After reviewing all of these items, ask yourself:
- Would the perpetrator have left any DNA at the scene?
- Was there a struggle, such that the murder victim might have had tissue of the attacker under his fingernails?
- Did the perpetrator handle items left at the crime scene, such as a rope, phone, cord, pantyhose, or other items?
- Did any clothes, such as a hat, fall off the perpetrator?
- Were gloves found at the scene that police thought were worn by the perpetrator?
- In a sex case, was there semen left?
- Was there blood left and the facts suggest the perpetrator might have bled because of a struggle?
- Was the defendant convicted because they said at trial that he had blood on his clothing when he was arrested shortly after the incident occurred?

If any of these elements fit the case, then there may be evidence that can be tested for DNA.

b. Brady violations: When evidence that demonstrates innocence was in existence before trial but the police or prosecutors failed to disclose it to the defense and it has just come to light post-trial, a Brady violation can be claimed. The evidence that the police suppressed must cause a reasonable person to think that the inmate is probably innocent. Examples of material Brady evidence include: (i) statements from someone who saw the perpetrator and said it wasn’t the inmate; (ii) persuasive evidence that another person may have committed the crime; or (iii) any other evidence that could prove that the inmate did not commit the crime. (A copy of Brady v. Maryland is under Selected Cases section)

c. Other police misconduct: Example: Defendant alleges that the police planted evidence. Be aware that inmates make these bold accusations often with nothing to back-up their allegations. While these cases are very hard to prove, evidence that might prove police misconduct could include a retired police officer who has come forward and exposed actions of his department.
d. **Powerful new eyewitness:** Example: A witness who was silent or not discovered before trial now comes forward and says, “I saw the crime and it was someone else who did the shooting.”

e. **Trial Witness Recantation:** Example: A key witness for the State at trial has now come forward and said, “I lied at trial….It really wasn’t X who did it, it was Z.” The recantation must be credible before we will go to court with the case and must include a credible rationale for why the witness’ earlier statements and their present statements are contradictory.

Snitches (co-conspirators) will often testify against the inmate at trial and then later recant because they regret putting someone in prison. Snitch recantation is generally not considered credible by the courts and will not, by itself, be strong enough evidence unless some other circumstance makes it credible. In child molestation cases the child may believe that after the parent or family friend defendant has been in prison for several years that he has done enough time and will falsely recant to return the parent/friend to the family. Do not reject a case solely because the recanting witness is a snitch or a child molestation victim, but discuss the case with an attorney to see if the recantation is credible.

f. **Inmate was convicted at trial based primarily on “junk science”:** In February 2009 the National Academy of Sciences released a report on the state of forensic science in the United States. One of the highlights of the report was the inaccuracy of several forensic methods that had previously been utilized in cases throughout the country. These methods of “junk science” are highlighted in Chapter 5 of the NAS Report, “Strengthening Forensic Science in the United States: A Path Forward” which is included in our class reading assignment later in the semester.

In your cases, you should keep an eye out for:

(i) **Gun shot residue (GSR) cases:** Example: Expert said GSR was on the inmate’s hands, thus he must have been the shooter. GSR is now considered junk science. Components of the chemicals identified in gun shot residue can be transferred to a person simply by pressing on the brakes in their vehicle or by sitting in a police vehicle.

(ii) **Arson cases:** Example: Expert testified at trial that he can tell by photos of a burnt house that an “accelerant” such as gasoline was used and thus the fire could not have been accidental. This is now discredited.

(iii) **Microscopic hair comparison:** Example: Pre-DNA testing, expert testifies, “I looked at the pubic hair found at the crime scene under a microscope and also looked at the defendant’s pubic hair. The hairs match.” This is also junk science.

(iv) **Bite mark analysis:** Example: Expert testified, “The bite mark that was found on the dead body matches the teeth of the defendant.” This is junk science.

(v) **Any other “science” that seems fishy:** Example: Forensic analysts working for the state have taken huge leaps with science. Wound pattern analysis, blood spatter, shoe print, video enhancement are all also junk science.
(vi) Attorney at trial was constitutionally ineffective (“ineffective assistance of counsel” or “IAC” claim): An inmate might be able to get a conviction overturned because his attorney is later shown to have been ineffective during his trial. But this does not mean that the inmate is necessarily innocent. We examine whether, but for the mistakes and negligence of counsel, the inmate would have been acquitted and is probably innocent. Example: A credible witness, like a minister, was ready to testify that the defendant was with him when the crime occurred, but the defense counsel was too lazy or drunk at trial and didn’t call the minister as a witness.

(vii) Other obviously powerful new evidence: Example: A video that no one knew existed is found from a surveillance camera which shows the defendant didn’t commit the crime. Or, someone else is now confessing to the crime and is able to prove his involvement.

**IMPORTANT CRITERIA:**

The following criteria are very important, but not absolute:

1) **Inmate has exhausted the first appellate process, the direct appeal.** We will rarely take a case that is still winding its way through the initial appellate process immediately following conviction. Inmates in their first phase of the appellate process are entitled under law to have an attorney appointed. The MIP does not intervene in cases where the inmate already has an attorney, unless that attorney requests our assistance. Once direct appeals are exhausted, inmates no longer have a right to an attorney. If new evidence is then discovered, the MIP will step in and fill the void.

2) **Inmate is convicted of a serious crime and has a substantial sentence remaining.** As a general rule, we should not take cases where the inmate will definitely be released within three years, because of the length of time needed to achieve an exoneration. This rule can be subject to exceptions if other factors weigh toward accepting the case.

3) **Inmate has not already litigated the new evidence and lost.** You only get one shot with new evidence and if a new trial is denied, then you can’t try again because of *res judicata*. Before continuing other aspects of the investigation, you will need to confirm that this “new evidence” has not already been litigated in the initial trial or through appeals.

**LESS IMPORTANT BUT RELEVANT CRITERIA:**

1) **Inmate is not currently represented by an attorney.** If the inmate has completed his direct appeals, but is still represented by an attorney, we will check with that attorney to see if assistance. Otherwise, we will not get involved in the case. Inmates will often write to us even when another attorney is handling the case.

2) **Inmate did not plead guilty.** Guilty pleas are much harder to overcome than jury verdicts.
unless there is a credible excuse for the guilty plea, such as mental instability or the defendant was threatened with the death penalty if he didn’t take the plea.

**WORKING IN THE MIP CLINIC**

**GETTING STARTED**

Your work with us – aside from class work – will consist of three parts: Initial Case Screening, Initial Case Work, and Grading Criteria.

**a. Initial Case Screening:**

Sometime during the first three weeks of the semester’s start we will meet as a group, along with MIP staff attorneys, to discuss case screening – the process by which we review incoming applications for assistance. After that initial meeting, you will be responsible for screening a certain number of cases. We ask that you sign up for designated office hours so that we can keep track of the number of hours you’re dedicating to the office – and so that as an administrative matter we can also keep track of the cases being screened. If you are unable to make one of your office-hour time slots, please let all of us in the office know so that you can re-schedule. NOTE: See instructions below.

It is frustrating to review transcripts and pursue evidence which you are not certain will actually be relevant to a determination of innocence. In an effort to assess early on whether the Project can assist an inmate, a detailed application/questionnaire is sent to inmates who have requested our assistance. An Initial Letter is sent along with the questionnaire form. This letter describes the purpose and mission of the Project. Once this form has been completed and returned, it is used to help determine whether it is a case that should be accepted by the Project for further investigation. (The questionnaire is also a good place to start investigating a case.) It will outline the very basics of the case, including the date, jurisdiction, sentence, evidence, and contact information. The initial letter and questionnaire are included in the appendix.

**b. Initial Case Work:**

You will be assigned at least one case – along with a student-partner – to work on during the semester. This case is one that MIP has not formally accepted as a case – but, instead, one where we are actively interested in pursuing additional investigation.

As a preliminary matter, one of your significant responsibilities in the MIP is to maintain a high level of professionalism when working on these cases on behalf of the Project and your client. During the course of your casework you will serve as the primary liaison to the client and related parties. This means regularly updating clients on the status of the case; informing clients when you’ll be gone for significant periods of time (vacations, etc.); informing clients when your “office hours” are and when you can reliably be reached; and, letting them know promptly when you take over the case and when you’re phasing out at the end of the year. You will most likely be contacting family members, witnesses, and victims. You will also have to make numerous calls to a client’s trial lawyer, appellate counsel, and
possibly prosecuting attorneys. It is your responsibility to adhere to the following protocol:

- You must respond promptly to any contact regarding your cases.
- Before your initial phone call to an attorney you must be prepared. If you encounter defensive resistance from an attorney (e.g., “I tried a good case. He was guilty as sin.”), don’t be put off. Explain that you are a mere student with a task to complete and have to provide your professor with an answer. Attempt to find out the basis for the attorney’s conclusion that the client is guilty. Many inmates who request assistance are guilty. When we conclude that a client was not wrongfully convicted, we close the case.
- Never give the client or client’s family member or friend legal advice or even make predictions about how the case will go (which many clients will want you to do, i.e., “Do you think the judge is going to grant the motion?”) unless you’ve cleared it with your staff attorney first; it’s important not to raise false hopes and to prepare clients for roadblocks.
- Never send an email or written correspondence to anyone on the case without approval from a supervisor.
- Always rehearse a difficult phone call with a supervisor and fellow students before placing the call.
- Do not call or contact prosecuting attorneys without prior approval from your supervisor.

• Know your cases inside and out.

Supervising attorneys may not yet have had the time to read the full file/transcript from the dozens of cases they have assigned to them, especially before litigation begins, but you should, and should master it. (See Appendix for Investigative Memo example)

- Read the full trial transcript (if requested), police and lab reports, reported decisions, trial attorney file, and other case documents. You should also review prior students’ memos (if there are any) and correspondence to get a feel for how the case has developed before you took it over, and what angles still need to be pursued.

  **Remember: Don’t hesitate to take a fresh look at all previously reviewed materials. There may be a significant fact that has been overlooked over the years.**

• Be proactive.

Often the attorneys will give you specific assignments or have a clear sense of what direction the case will move at this juncture. But given the numbers of cases we track and your relative familiarity with the ones assigned to you (as well as your innate talents and intellect, which is why we selected you to work here), we rely on you for ideas and action as well. While interactions with prosecutors and law enforcement are delicate matters and should always be discussed beforehand with staff attorneys, we welcome your insight and action on angles to be pursued, things in the file that don’t make sense, and any independent steps you can take to move the case forward -- whether that be research, investigation, memos to the file, or simply new ideas on angles we haven’t yet explored. And when you do hit a snag or important new development, don’t just come to us with that information and ask what to do – come with your assessment of what to do next, so we can discuss it from there.
• Meticulously document each and every task you do on the case, and each and every thing that happens in the case.

This is perhaps the single most important thing to remember during your time here. We are lawyers and it is necessary to keep an accurate record. Because of the nature of our work, cases are inevitably handed down, sometimes for many years, from student to student. As a result, keeping detailed and accurate records of what transpires on your watch is absolutely critical – as you’ll learn the hard way if you’re unlucky enough to have a case file that wasn’t so well maintained.

• You **MUST** give copies of all correspondence (including email) you receive to your supervising attorney, so they can review it and direct you in your response. Do not respond without having your response approved by your supervisor.

• You **MUST** log every phone call you receive or make into your case log, with the person’s contact information and a call log on what was said (with memos to the file for longer/more substantive interactions).

• You must log in every action into your case log.

• **Case Files**

The hard files must be maintained in an orderly and professional manner. All files must be organized at all times so that anyone who needs to review a file can find all documents and know the current status of the case. The tedious organization process will allow you to become familiar with every document in the case file. Many times, relevant facts have been uncovered, during the organization process, which have been crucial to the success of a case.

Some case files will consist of more documents than are able to fit in a folder, and will be stored in box files. For both the case file and its supporting box file, you will be expected to organize and inventory all case file documents. All case files and boxes will be clearly marked to display name of client and case#. If a file folder becomes too full, begins to fall apart, or the name tab is no longer visible or not secured, the file should be reorganized in a larger folder – see a student worker or Carol.

• **Screening Cases**

The MIP student workers will assign cases for you to screen. These are cases that we have received a completed application for, but have not been reviewed by anyone yet. That will be your job. You will complete the Initial Case Screening Form, which we will provide, to the best of your ability based on the information provided by the inmate as well as any additional research you do for that inmate. When you have finished this process, you will place your case screening form at the very front of the file and return the file to the box in the MIP office labeled “Files Finished Screening by Students”. A student worker will ensure the file is returned to the appropriate location and will execute any further actions needed. At no point should you remove a file from the MIP office. There is a box for you to leave it in when you leave if you are not finished with it. This is labeled “Files Currently Being Screened by Students”. Any work you do on a case file should be completed within the MIP office space.
• Mail

Mississippi Department of Corrections has explicit rules about communications with inmates. A breach of those rules may lead to sanctions against the lawyer involved in a case or against the inmate. An inmate could lose his right to confidential communications with his attorney and be subject to other penalties. Because of this concern, all correspondence by students must be reviewed and approved by a supervisor before being sent to the inmate.

• Do not send money, stamps, or personal cards or gifts to inmates on behalf of MIP or on your own behalf!
• All outgoing mail should be placed in the outgoing mail basket in the MIP main office.

• Telephone messages, inquiries, and etiquette

Every student must follow the proper protocol when handling incoming and outgoing telephone calls. If an incoming telephone call is not handled appropriately, critical case information or witness contacts may be lost. Moreover, the lack of an adequate response may frustrate the caller. Accordingly, students need to know how to handle incoming telephone calls, leave a message, and how to prepare a record of the telephone call or message in the case log.

**Incoming telephone calls:**
If you ever take a call, greet the caller with the following salutation: “Good Morning/Afternoon, Mississippi Innocence Project, this is Steven Student, how may I help you.”

After you have completed the call, enter the information in a memo form and give it to Carol. When talking to family members or friends of the inmate, or the general public, remember that you must maintain client confidentiality and cannot share information about the case unless the inmate has provided written authorization to do so. When discussing the case with an attorney, only share relevant and necessary information to get your questions answered.

**Leaving messages:** When leaving a telephone message, it is important to do the following:

• State your name, the reason for your call, and the specific information you are seeking.
• Request that your call be returned at a time that you expect to be available in the office and leave the number. If you are in the office at unpredictable hours, you may leave your cell phone number in the message. Only do this if you are comfortable with the person returning your call to that number.
• Record in the case log a list of questions you wish to have answered and any other
pertinent information you are seeking.

- Leave a hard copy or email of your questions with the supervising attorney if you would like them to take the return call.

**Memorializing information:** Remember to memorialize all contacts, including names and telephone calls, and upload to Box under the appropriate folder.

**Investigation:**

Investigation is the gathering of information that supports, undermines, or refutes the legal elements of a case. For cases, the crux of any investigation will be to determine: 1) whether the client’s claim of innocence can be proven, and 2) whether there are sufficient facts to support a legal argument that the client’s conviction should be reversed. In general, these are two separate lines of inquiry.

The first inquiry, whether we can prove a client’s factual claim of innocence, will rest on the facts of the offense. For example: Are there witnesses to support the client’s alibi? Are there witnesses to support the client’s claim that the prosecution witnesses lied? Are there witnesses or other evidence to support the client’s claim that another person committed the crime?

The second inquiry is whether there are sufficient facts to support a legal argument that the client’s conviction should be reversed. This requires understanding why the client’s claim of innocence was not raised at trial. Did trial counsel provide ineffective assistance? Did the prosecution hide exculpatory information? Is there a legally justifiable reason that the facts of the client’s innocence were not discovered earlier?

These facts are essential to overcoming the procedural hurdles in post-conviction litigation. In sum, we begin the investigation by asking questions of the client and obtaining and reviewing the trial and appellate files. The client will tell us why he or she claims to be innocent of the crime. The client, as well as the trial record, will start to answer the questions of why the claim was not raised or considered important at trial. The trial defense team—the attorney, investigator, paralegal, and expert can also assist in answering these questions. However, there are often strategic reasons to postpone contacting them. An analysis of the trial file should be completed prior to conducting substantive interviews with trial defense team members.

**Chronology and Witness Lists**

Based on the appellate briefs, client questionnaire and other relevant documents contained within the file, the facts of the case should be analyzed and a case chronology developed. The chronology allows you to organize the facts surrounding the crime as well as the procedural development of the case (i.e., arrest, pretrial hearings, trial etc.) to understand more clearly what happened and what gaps of information and inconsistencies exist. As you receive additional documents (e.g., the police reports and defense investigative reports), update the case chronology.
When reviewing documents to create a chronology, prepare an alphabetized, annotated witness list. The witness list should include: 1) all names and aliases used by the witness; 2) last known contact information (address, phone number, employer); 3) identifying information (date of birth, social security number); and (4) relationship to client and/or case (relative, friend, employer, parole officer, etc.; testifying witness, non-testifying witness, eyewitness, etc.). Update this list as you learn more about the facts of the case and the witnesses. Do not cull out people at an early stage; you do not know who will be important until much later in the investigation.

Investigative Plan

After you have reviewed the case documents and developed a preliminary chronology of the case and a witness list, the next step is to create an investigative memo. In general, this memo is a list of tasks to be undertaken to develop the case, a detailed plan for accomplishing these tasks, and the order in which they should be pursued. The order in which the tasks are done will depend on both practical reasons (e.g., you must locate a witness before interviewing him or her) and strategic reasons (e.g., you want to interview one witness first, before he or she learns of your investigation from another witness or from someone else).

Students should gather as many of the key documents as possible before interviewing witnesses. It is usually a good idea to interview peripheral witnesses before interviewing crucial witnesses and friendly witnesses before hostile witnesses. The goal here is to be armed with as much information as possible before speaking with persons critical to your case. When developing your investigative plan, it may help to think of the investigation as a series of concentric circles comprised of numerous documents and witnesses. The key person in the investigation is in the middle circle. Thus, the general rule in investigation of innocence project cases is to begin in the outer circles and work inward.

There are, however, some exceptions to this rule. For example, if you want to investigate the background of a prosecution witness who may have lied on the witness stand, follow the general rule by first gathering all of the relevant documentation about the witness (e.g., marriage records, civil lawsuits, criminal lawsuits, bankruptcies, liens, property records, etc.). However, when interviewing other people about that witness, it may be advisable to reverse the order of witness interviews and talk to the witness before talking to his or her ex-spouse, ex-employers, neighbors, or other contacts. By doing this, you minimize the risk that the witness will be tipped-off to your investigation and either make themselves unavailable or prepare to mislead or stonewall you.
WITNESSES: LOCATING, INTERVIEWING AND MEMORIALIZING

Locating witnesses. Witness contact information provided by the inmate will need to be confirmed and/or updated in the case file. Sources for locating witnesses that are free to MIP include Lexis/Nexis and WestLaw people locator services, the telephone directory, and Internet people finder services. Although the information from these sources is limited, they are a good place to begin. The more common a person’s name, however, the less helpful the telephone directory will be. In addition, many people have unlisted telephone numbers.

Other sources for locating witnesses are in various public records, such as civil and criminal litigation files located in county court houses, traffic court records, property ownership and tax records, fictitious business name records, and corporate officer records. Keep in mind that information from these sources can be very useful, not only in developing background information about witnesses but also in investigating other possible suspects.

Interviewing witnesses. Witness interviews cannot be approached informally. Students need to be armed with as much information as possible about the witness before contacting them. Students should be knowledgeable about all prior statements made by the witness, all statements made by others about the witness and a list of issues to be explored during the interview.

If possible, interviews should be done in person. Unless you are certain the witness will talk to you, it is best to show up at the witness’s house or work place without notifying the witness in advance of your planned visit. There are some rare exceptions to this strategy. Keep in mind that a witness who is not a friend, relative or colleague of the inmate has no personal stake in the inmate’s case and may not be interested in cooperating with your investigation. The interviewing student will need to overcome an initial reluctance by the witness to be interviewed. This may best be accomplished by expressing a particular interest in the witness and in what the witness has to say about the case. Begin the interview with very open-ended questions and listen attentively to what the witness tells you. An interview is not a cross-examination or a direct examination. It is a two-sided conversation between the witness and the interviewer and the student should openly demonstrate that he or she is fascinated by what the witness is telling them. That is the attitude and demeanor the student needs to convey.

A good interview begins with your explanation of why you want to talk with the witness and a broad question that asks the witness to tell you what happened. Only after the witness relates the full story in his or her own words, at his or her own pace, and in his or her sequence of events should you seek out details and clarifications. By allowing the witness this freedom, you will learn information that you would never discover by conducting the interview as a question and answer session.

When you ask the detailed questions, try to use the witness’s words to demonstrate that you listened carefully to what s/he said. If you don’t understand jargon or slang, do not be afraid to tell the witness that. Rather than appearing ignorant, you will communicate your interest in
understanding the witness. It is sometimes helpful to have a witness repeat a particular portion of the story to ensure that you have the facts correct. Leave questions of a personal nature to a point in the interview where you sense the witness is relaxed and trusts you.

At the end of the interview, leave the door open to re-contacting the witness for additional information. You should confirm (or get) the witness’ telephone number, place of business and other contact information and find out whether the witness intends to leave the jurisdiction (temporarily or permanently).

**Memorializing the interview: note taking and report writing.** Witnesses are often put off when interviewers approach them with large, yellow legal pads or, even worse, a tape recorder. The interviewer’s initial goal is to place the witness at ease. Wait to begin recording the interview (either by writing or recording) until the witness is comfortable. Then, ask permission to take notes.

**Memorializing witness statements: writing the investigation report.** Witness interviews need to be documented in a report as soon as possible after the interview. The purpose of a report is to 1) provide a quick reference for anyone needing to follow-up with the witness, 2) inform the reader of the substance of the conversation the interviewer had with the witness, and 3) provide a general sense of the type of witness the person would be at trial or other legal proceeding.

At the top of the report, list the witness’s contact information as well as other identification (e.g., name(s), date of birth, social security number, address, telephone number, or place of business). The first paragraph should introduce the witness: a brief physical description and an explanation of the witness’ relationship to the case. Should the witness ever have access to the report, it is important not to include unflattering physical descriptions of the witness. (If you believe it is important to include such information, use a separate report to describe relevant, unflattering characteristics of the witness.) The report should also inform the reader when and where the interview took place, and identify the interviewer.

Interviews do not follow a logical sequence. Often a witness’s story will jump from one topic to another. In your report, organize the information around topics or in chronological order. If it was difficult for the witness to relate the story in a coherent fashion, note that in the report. If possible, use the witness’s terminology for describing the events. You need not quote the witness extensively except when the witness uses a specific phrase to describe something about the event in which case you should quote that portion of the witness’s statement verbatim and indicate using quotation marks.

When writing the report, it is better to avoid the use of the passive voice. Sentences will often become too convoluted or difficult to read. Use footnotes and parentheses sparingly, if at all. In general, everything the witness tells you should be in the body of the report. A report should be comprehensible on its own. Your reader may be unfamiliar with the case so err on the side of providing more information about the case than less. Remember, too, that your report may be discoverable. Do not put any attorney-client communications or work product in your report, such as your impressions, strategies, and suggestions for other investigation. These matters belong in a separate memorandum for the file.
Beyond the Questionnaire:

**Learning the Facts of the Case that the Inmate May Have Left Out**

There are a number of online resources that you can use to discover details of an inmate’s case that they may have intentionally or unintentionally left out of the questionnaire.

**Internet inquiry: appellate opinions.** To find appellate opinions, we recommend that you use Westlaw. Use the database MS-CS-ALL. That will reach all opinions from both Mississippi and federal courts about the case. The best way to find those opinions is to use the title restrictor [TI] with various combinations of the inmate’s name. Suppose the inmate signs his name John Jones. You could look for opinions by searching for TI(“JOHN JONES”). If the appellate opinion in Jones’ case identifies him exactly as “John Jones” that strategy will produce the opinion. However, if the opinion uses a middle name, it will not. Therefore, you could allow for a middle name by searching TI(JOHN /3 JONES). That will reach all of the opinions in which a John Jones is in the title whether or not he is identified with a middle name. If the inmate used a middle name in his/her letter, you could put all three names in quotation marks in your search, such as TI(“JOHN PAUL JONES”).

If your search turns up an opinion, you can readily determine from the statement of facts in the opinion whether it belongs to the inmate whose case we are screening. If so, print out the opinion and place it in the case file. Then highlight on the printed copy those portions of the opinion that support or undermine the inmate’s claim of actual innocence. Do this with every opinion you find concerning the inmate’s case.

**Internet inquiry: newspaper articles.** You will also want to do an Internet inquiry to find any newspaper articles that were published about the case. In Westlaw, you can use the database ALLNEWSPLUS. Note that unless you supply a date restriction, your search will go back only to January 1, 2004; in most cases, you will need to provide a date restriction to reach articles about the trials of these cases, e.g. DA(AFTER 1970). Use the same strategies regarding the inmate’s name to locate newspaper articles that you used to locate appellate opinions. A full search strategy might be JOHN /3 JONES & DA(AFTER 1970).

If the inmate’s name is common, you will probably need to apply a more specific date restriction than AFT 1970 to avoid obtaining hundreds of hits. If all you know is the year of the trial court proceedings, you can specify it as & YE(1989). If you have a more specific date for trial court proceedings, you can provide a before and after date, such as, DA(AFT 10/31/1999 & BEF 12/1/1999), which of course will limit the search to newspaper stories dated in November 1999. If the inmate’s name is common, but the victim’s or a witness’s name is unusual, you can attempt to locate newspaper stories by using such a name. Print out and highlight any articles you find and place them in the case file.

**Internet inquiry refutes claim of actual innocence.** Sometimes, appellate opinions or newspaper articles refute the inmate’s claim of innocence by providing information the inmate chose not to include in his/her letter or by showing that the exculpatory information provided by the inmate was admitted at the trial and rejected by the jury.

**Inmate Interviews**

If warranted, we may arrange to visit the inmate for an initial interview to discuss the case in-depth with the inmate as well as to get a “feel” for the case.
Other Lawyers
You may have to make numerous calls to your inmate's trial and/or appellate counsel as well as prosecuting attorneys. After you introduce yourself and explain the purpose of your call, these attorneys should be helpful and provide you with the information that you seek or direct you to another source. Be sure to note to attorneys that you have a release from the inmate to discuss the case. You may be asked to fax a copy of the release to the attorney before they will discuss the case with you. As a result, it is imperative that you confirm that you have a release from the inmate to speak to former attorneys before you initiate a call.

If you encounter defensive resistance from an attorney (i.e., "I tried a good case. He was guilty as sin."), don't be put off. Explain that you are but a mere student with a task to complete (a grade depends on it). Note: just because the former attorney indicates that the inmate is guilty does not necessarily mean this is true. Ask follow-up questions about why they believe he or she is guilty and use this information along with your other investigative information to make a determination of guilt or innocence.

Your inmate's former attorneys are an excellent source for you to get a feel for the case, a thumbnail sketch of the basic facts, and a sense of local rules concerning how evidence is preserved in that jurisdiction's post-conviction practice. Most important, the attorney may still be in possession of the inmate's file, transcripts, police reports, and/or laboratory reports.

The Crime Scene
In some cases, it will be helpful for you to visit the crime scene. All visits to crime scenes must be approved by a supervisor, and a determination must be made as to whether or not supervision should be required. If a crime scene visit is approved, you will be required to write a crime scene report and map and photograph the crime scene.

Reimbursement and Travel
The Mississippi Innocence Project will reimburse you for reasonable expenses related to your case. You must have attorney approval prior to incurring expenses for reimbursement. For travel, you will be reimbursed for gas and lodging, if required. See Carol prior to any travel. In addition, other expenses will arise on occasion, such as to have film developed or to have records at a courthouse copied. When you incur such an expense, you must save all receipts and submit the receipts to Carol for Payment.

Confidentiality
Although you as students do not represent inmates as their attorneys, you must maintain confidentiality as if an attorney/client relationship exists. At some point the MIP may represent these individuals in court and it is important to maintain confidentiality throughout the investigative process. Do not discuss the case with anyone other than those involved with the MIP, unless you have the permission of a supervisor. Confidentiality is paramount to the success of each case.

Media Contacts
All contacts between fellows and members of the media regarding the MIP and/or a case must be approved by a supervisor. All attempts by the media to make contact with a student regarding the MIP must be reported to a supervisor. If contacted directly, “No comment” is the appropriate response to any inquiry.
DNA
The Physical Specimen in DNA cases
Once we have accepted a DNA case, our task is to track down the potentially exculpatory physical evidence. This often requires extreme persistence and ingenuity. Each county or locality has different procedures for preserving trial evidence. In many jurisdictions all items admitted into evidence are stored in the courthouse. In other jurisdictions, evidence may be stored in a police property clerk's office or the state/local crime laboratory. Evidence may also have even been returned to trial counsel or the Office of the District Attorney, or in some jurisdictions may even remain with the court stenographer. You must make whatever phone calls are necessary to find out this information.

A good place to begin your search for the physical evidence is with the Clerk of the Court, particularly if the relevant evidence was introduced at trial. When you phone the Clerk, you should introduce yourself as a law student working with the Mississippi Innocence Project. After this polite introduction, you may want to ask: "I was wondering if you could assist me with locating physical evidence introduced at a trial in your county in 1989. What is the procedure in your jurisdiction for the disposition of trial evidence after conviction?" Follow-up calls to trial and/or appellate attorneys or court personnel may be necessary.

You may learn that a given jurisdiction has no set procedure for preserving evidence. This could mean one of two things: either the sample is irretrievably lost or you must search further. An assertion by a clerk or attorney that the evidence has been destroyed does NOT close the case. You must investigate the source of this individual's knowledge (politely but firmly) to determine whether or not it is correct. **We do not close a case until we have reliable, written confirmation that the relevant, testable items have been destroyed, from a person with direct knowledge. Written confirmation should include: the date of destruction, an inventory of what was destroyed, and the authority or statute under which the evidence was destroyed. Be sure to request a copy of the destruction order if applicable.**

Here is what an innocence project student in another project wrote about finding the evidence: *When talking to a police department, ask to speak to the supervisor of the property room. If they don't give you satisfaction, ask to speak with their boss. You never know how a police department will respond to your request. However, if they tell you the evidence you're inquiring about is destroyed, ask them to fax the court order allowing its destruction. If they are able to fax you the order, you'll know they're being truthful. If not, chances are they're giving you the run around. I had a case where I called a particular place looking to see if the victim's clothing still existed. The officer there told me they wouldn't give out information over the phone. However, departments should be able to do that. While they can't release evidence to you without a court order of some kind, a department should be able to run a search in its computer system to see if property still exists and is in their possession. Finally, if the police department no longer has the evidence, it could be in the custody of the prosecutor, court, county coroner, or in some instances (rape kits) the hospital that examined the victim.*

In many cases, although the actual physical evidence (i.e., the bloody t-shirt; the soiled underpants) has been destroyed, slides made during the criminal investigation for use by the crime lab may have been preserved. These slides take up far less space than physical evidence and laboratories routinely save them. Your investigation should include a phone call to the crime lab (public or private) that performed tests on the evidence.
Locating Evidence: Preservation Letter

Some of our DNA cases will reach the point where we have secured a testable sample. Once you determine that a sample still exists, a preservation letter memorializing the results of your investigation must be sent immediately.

Claims of Actual Innocence

Three Supreme Court decisions that we have come to rely upon, Brady v. Maryland, Arizona v. Youngblood, District Attorney's Office for the Third Judicial District v. Osborne, are located in the Appendix. You should read them for helpful insight into how courts have addressed claims of actual innocence.

c. Grading Criteria:

The Law School requires that we assign grades for each student at the end of the course. To best appreciate the system by which grades are assigned you should consider the goals of the clinic. You are being trained to be a skilled and responsible practicing attorney. The center of the clinical experience is your cases, for which you are responsible. You will, therefore, be graded on your ability to take responsibility for your cases and to do everything necessary to provide a zealous and legally sophisticated defense of your clients. To prepare for your cases the clinic also includes class reading and assignments designed to enable you to be proficient in both the analysis and representation provided in your cases. Finally, you are expected to learn from your experiences so that you will becomes a better attorney—both by learning in the clinic and learning the habits that will serve you in your professional life.

We have made an effort to set forth the criteria that we will consider in evaluating your performance in the clinic. We think it is important to do for two reasons: 1) the criteria will help us to provide consistent evaluation of all students in the clinic; 2) they will let you know what is expected of you and how your performances will be evaluated.

We have broken the criteria down into five areas, which we refer to as clinical planning, professional responsibility, skills development, educational responsibility, and reflection. We do not make any attempt to assign numerical percentages to these areas or to the criteria within them. Rather, we will use the criteria to evaluate your overall performances in the clinic. We have tried to be thorough, but you should not consider these factors to be the exclusive criteria for evaluation.

1. Clinical Planning:

This is a broad area that encompasses case planning, deliberation on alternatives, and judgment. Planning is the single most important feature of good lawyering. In the context of criminal defense representation, planning must occur in several areas. In developing and executing your theory of the case, you must plan investigation, research and examinations of witnesses. As you uncover new facts (or fail to uncover desired proof of expected facts) you
must adjust your plan so that it corresponds to these developments. Some activities in this area are:

- Developing a theory and strategy for each case, taking into consideration the application of evidence, statutes, regulations, and case law develop a plan for using facts and law to the benefit of the client.
- Modifying and reassessing strategy in light of subsequent developments.
- Refining and improving work between planning and final draft or performances.
- Considering consciously the ethical, strategic, and client specific issues in cases.
- Weighing consciously the risks and benefits attendant strategies.
- Making appropriate decisions and setting priorities given available information and resources.

To make this more concrete, we expect that, as the person chiefly responsible for the development of a case, you will come into supervision meetings having considered the various challenges you face and having identified several responses to them. You will be able to articulate these challenges and responses for your supervisor. We expect you to realize that rules of ethics, the law of evidence, common sense, and many other factors may favor some responses and constrain you in implementing others. We do not expect this process will come naturally nor that each of you will enter your first supervision meetings with a plan which an experienced lawyer would produce. We are here to help you in this process. However, we do not expect that you (your) planning will show a serious application of time and effort and that, as you progress in the clinic, you will take the lead in shaping the direction of the case and the supervision sessions.

2. Professional Responsibility

Professional responsibility is an indispensable feature of good lawyering. Knowledge of and adherence to ethical rules is obviously necessary to practice law. You will be expected to zealously represent your client and, of course, to preserve client confidences. You will also be expected to identify the ways in which these obligations and the others contained within the Mississippi Rules of Professional Conduct affect your work on any case. Again, as with any other issue, we expect that, having become familiar with the rules, you will recognize ethical concerns in cases, consider the choices presented, and discuss your plan of action with your supervisor.

This area is not limited to the ethical considerations of lawyering. It also includes attention to case and other clinic responsibilities, effort in the representation of clients, and management of one’s workload. Some specific factors are:
• Paying attention to ethical issues in cases and initiation of discussions with supervisor.

• Putting forth effort to provide zealous representation and the best possible defense.

• Taking personal responsibility for client’s case.

• Ensuring that cases are prepared for court hearings.

• Maintaining appropriate relationship with clients, other attorneys, and court officials.

• Meeting deadlines imposed by the court, your supervisor, or your own initiative.

• Attending and being punctual to professional obligations, including court appearances and meetings with clients, supervisors, witnesses, and other students.

• Maintain files accurately and precisely and complying with office procedures.

• Allocating time and effort to carry out tasks responsibly.

We believe that professional responsibility, as we have defined it, is one of the primary obligations of a lawyer. You should be aware that significant neglect of a client’s case will be grounds for failure, regardless of your other work in the clinic.

3. Skill Development

Work in the clinic provides the opportunity to develop a wide variety of skills. Your performance in these areas will be evaluated, including:

• Interviewing: structure, rapport, obtaining information. (To be evaluated within the constraints of our decision not to have supervisors at all client interviews.)

• Counseling: Helping client to understand his/her alternatives; keeping client informed; remaining sensitive to full range of client needs.

• Fact Investigation: Planning, thoroughness, accuracy, appropriate analysis of relevant sources.

• Writing: Organization, structure, appropriate for audience, concise, persuasive.

• Case Preparation: Incorporation of suggestions, completion of tasks, quality of
preparation.

- Hearing Performances: Execution of plan; skills in court; flexibility in dealing with unexpected developments.

4. Educational Responsibility:

Classroom work is an important aspect of your work in the clinic. Your thoughtful contributions will be essential to the success of the clinic. You are expected to be prepared to discuss all assigned reading, to participate in all simulations and remain in role for the length of the performance, and contribute to all discussions in class. We expect such participation in all class sessions. We do not want you to talk for the sake of talking any more than we would expect you to cross-examine a witness just for the sake of saying something. We choose the topics for class carefully, with an eye toward having the group learn with and from each other. We expect the same sort of preparation and participation from you in your supervision sessions.

This area includes:

- Preparation for class.

- Consistent participation in class. (Please note that it will be virtually impossible to receive an “A” in the Clinic if you do not participate in the class discussions).

- Quality of class contributions.

- Participation in simulations.
  - Remaining in a role.
  - Execution of assignment.
  - Discussion and analysis.

- Preparation for supervisory meetings

- Initiative and creativity in raising issues and planning cases.

5. Reflection

Reflection is the single most important feature of the clinic learning experience. You should engage in reflection during and after you do every task you complete in the clinic. What we mean by reflection is not simply reviewing what happened. Instead, we want you to engage in critical analysis of your work. We expect that you will ask yourselves questions such as those listed below, and be prepared to discuss them with your supervisor. Then, when you are engaged in your new task, you will use what you learned through reflection to guide your decision making.
• How did you come to make the decisions that you made? (E.g., Why did you choose one defense theory over another?)
• How did you come to see the choices that you thought you faced?
• Why didn’t you see other choices?
• What led other people (clients, fact finders, opposing counsel) to act as they did?
• How will the answers to these questions affect the way you approach your work in the future?
• What lessons can be drawn from this experience about the way in which the legal system actually works?
• How does that compare with your ideals of how the system ought to work?

6. The Grading Process

The following is a rough description of the quality of work that corresponds to the various grades. This is necessarily a general and limited description, but one that we hope will be useful in helping you to understand our grading criteria.

A: Consistently excellent work in all areas, with at least one outstanding piece of significant work. Shows initiative and creativity in planning and developing cases, rather than merely carrying out plans developed in supervision meetings or directions from your supervisor.

A-: Consistently excellent work in all areas. Shows initiative and creativity in planning and developing cases, rather than merely carrying out plans developed in supervision meetings or direction for your supervisor.

B+: Consistently very good work, or a mix of generally very good work, but with some weaknesses.

B: Competent and adequate work with some very good work, but with some weaknesses.

B-: On the whole, competent work, but with significant lapses or shortcomings.

Below B-: Seriously difficulties with performance; failing to make appropriate use of supervision; failing to meet responsibilities.

7. A Note on Effort

Participating in this clinic requires hard work. Ethical obligations of competence and zeal require attorneys to work hard on every case, and we expect that every student in the clinic will fulfill this obligation. It is likely that at the end of the clinic you will believe that you have worked harder in this course than in any other course in law school. While we believe that this hard work will enable you to learn more than you have in any other course, hard work alone
does not guarantee you an “A.” Hard work is a minimum requirement of this course. We will consider effort along with all of the other criteria described in this section to determine your final grade.
APPENDIX

A. Understanding DNA
B. Sample Initial Letter
C. Application for Aid
D. Sample Investigative Memo
E. Brady v. Maryland
F. Strickland v. Washington
G. Youngblood v. Arizona
H. Third Judicial Circuit v. Osborne
I. Mississippi DNA Preservation and testing Statute
J. Howard v. State
K. Mississippi Rules of Professional Conduct

A. Understanding DNA

MIP handles many cases involving biological evidence. This section is designed to be a brief introduction into the subject for those who may have limited experience with DNA.

1. What Is DNA?

*Please note:* This section is adapted from Donald E. Riley’s “DNA Testing: An Introduction for Non-Scientists, An Illustrated Explanation,” published in Scientific Testimony, April 6, 2005. If you are interested in an in-depth discussion of DNA, the full article is available at www.scientific.org/tutorials/articles/riley/riley.html.

DNA is material that governs inheritance of eye color, hair color, stature, bone density and many other human and animal traits. DNA is a long, but narrow string-like object. A one foot long string or strand of DNA is normally packed into a space roughly equal to a cube 1/millionth of an inch on a side. This is possible only because DNA is a very thin string. Our body’s cells each contain a complete sample of our DNA. One cell is roughly equal in size to the cube described in the previous paragraph. There are muscle cells, brain cells, liver cells, blood cells, sperm cells and others. Basically, every part of the body is made up of these tiny cells and each contains a sample or complement of DNA identical to that of every other cell within a given person. There are a few exceptions. For example, our red blood cells lack nuclear DNA. Blood itself can be typed because of the DNA contained in our white blood cells.

A strand of DNA is made up of tiny building-blocks. There are only four, different basic building-blocks. Scientists usually refer to these using four letters: A, T, G, and C. These four letters are short nicknames for more complicated building-block chemical names, but actually the letters (A,T, G and C) are used much more commonly than the chemical names so the latter...
will not be mentioned here. Another term for DNA’s building blocks is the term, “bases” or “base pairs.” A, T, G and C are bases.

For example, to refer to a particular piece of DNA, we might write: AATTGCGCTTTA AAAA. This is a perfectly acceptable way of describing a piece of DNA. Someone with a machine called a DNA synthesizer could actually synthesize the same piece of DNA from the information AATTGCGCTTTA AAAA alone. The sequence of bases (letters) can code for many properties of the body’s cells. The cells can read this code. Some DNA sequences encode important information for the cell. Such DNA is called, not surprisingly, “coding DNA.” Our cells also contain much DNA that doesn’t encode anything that we know about. If the DNA doesn’t encode anything, it is called non-coding DNA or sometimes, “junk DNA.” The DNA code, or genetic code, is passed through the sperm and egg to the offspring. A single sperm cell contains about three billion base pairs that follow each other in a well-defined sequence along the strand of DNA. Each egg cell also contains three billion bases arranged in a well-defined sequence very similar, but not identical to the sperm.

Both coding and non-coding DNA vary from one individual to another in specific locations. These DNA variations can be used to identify people or at least distinguish one person from another.

**What is a Locus?**

A locus (with a hard “c,” LOW-KUS) is simply a location in the DNA. The plural of locus is, loci (with a soft “c,” pronounced LOW-SEYE). Again, the DNA is a long string like object. A locus is simply a location in the DNA. Such locations, or loci, reside at specific places on chromosomes.

**What is a Chromosome?**

When a cell is getting ready to divide creating two daughter cells, it packs its DNA into bundles called chromosomes. Chromosomes are just bundles of DNA. For humans, there are consistently 23 pairs of chromosomes, each with a consistent size and shape.

Chromosomes are numbered. Chromosome number 1 is the largest chromosome; chromosome number 2 a little smaller and so on. Among the 23 pairs of chromosomes there is a pair called the sex chromosomes. This is something of a misnomer, since there are many functions on the “sex” chromosomes that have nothing to do with sex. In females, the sex-chromosome pair consists of two similar size chromosomes called X chromosomes. Males have one X and one small Y chromosome.

**What are alleles?**

Alleles (ALL-EELS’) are just variations at a particular site (locus) on a chromosome. Since each chromosome has a similar chromosome partner (except for males with their X and Y chromosomes) each locus is duplicated. Loci can vary a bit. If a person has two identical alleles at that locus, they are said to be homozygous (HOMO-ZEYE’-GUS). If there is a difference, they are said to be heterozygous (HETERO-ZEYE’-GUS).
3. When Is DNA Testing Appropriate?

When considering whether DNA testing will exonerate a particular inmate, the standard in California is whether a favorable result from testing the biological evidence from the crime scene would raise a “reasonable probability” that the defendant’s sentence or verdict would have been different had the DNA results been available at the time of trial. Whether test results in a given case might be sufficient to meet this standard or to sufficiently demonstrate innocence for other purposes depends on the facts of the case.

Examples of when DNA testing may not be appropriate:

- In a rape case where the defendant’s claim is that it was consensual sex; or in a murder case where the defendant claims he acted in self-defense.
- In a rape case where the victim did not report the rape until a substantial amount of time had passed after the attack.
- In a rape case where the semen was tested prior to trial and it matched the inmate.
- Be aware, however, of the possibility of bad labs, corrupt testing or false positives in the original test if an older form of DNA testing was used.
- In a murder case where the victim was attacked and killed in the living room, and the inmate wants a hair tested that was found in an upstairs bathroom to show it was not his hair (evidence not sufficiently connected to crime scene to be material). For a DNA test result to meet the standard, the circumstantial evidence must suggest that the DNA to be tested came from the attacker.

Examples of when DNA testing generally may be appropriate:

- Biological evidence in question is obviously highly probative simply because of where it was found or the type of material that it is.

Examples:

1. Semen taken from the victim shortly after a rape.
2. Biological material found under the fingernails of a murder victim that did not come from the victim, and the evidence suggests that the attacker struggled with the victim and victim probably inflicted injuries on the attacker.
3. A pubic hair found in a rape victim’s genital area that an expert testified did not come from the victim.

Evidence made probative by the way prosecution presented it at trial (remember, a piece of evidence that would not otherwise be probative can be made probative by the way the prosecution argued the case at trial).

Examples:

1. Cigarette butt found at scene. Normally this would not be a probative piece of evidence, as anyone could have left a cigarette there before the attack.
   - However, if the prosecution argued at trial that the cigarette butt was highly persuasive evidence that the inmate committed the crime, because it was his
brand and a rare brand, then testing the butt and having the defendant excluded as the donor of the saliva on the filter would be worthwhile.

2. Blood found on inmate’s clothing. If the prosecution argued that the defendant was guilty because he was found with large amounts of blood on his clothing when he was arrested after the attack, then a DNA result showing that this blood belonged to a friend who had just been cut and the defendant was trying to stop the bleeding, was animal blood (defendant had been hunting or cleaning fish), or at least that it did not come from the victim would be worthwhile and might be sufficient if combined with other exculpatory evidence.

3. Defendant was matched to evidence at crime scene through junk science. For example, an “expert” testified microscopic comparison showed that the hair found clutched in the murder victim’s hand belonged to the defendant. DNA testing may prove this testimony to be inaccurate. Or, an expert testified that the bite marks left on the victim match the defendant’s teeth. DNA testing the saliva taken from the bite or from the clothing on top of the bite might prove this to be incorrect. (DNA testing has clearly illustrated that “bite mark” analysis is highly suspect).

4. Trial evidence shows that attacker touched or might have left skin cells or other biological material on several pieces of evidence. In these cases, if unknown DNA is found on all the items, and they match each other, and they do not belong to the inmate, an argument for exoneration can be made.

Example:
Female victim was strangled with panty hose and male attacker accidentally left his baseball hat at the scene (victim testifies that it fell off attacker’s head and he left it there).

If (1) the panty hose is tested and a male DNA profile is found from attacker having touched the pantyhose, and  
(2) the hat band is tested and a male DNA pattern is found, and  
(3) the two DNA profiles match one another, and  
(4) this profile does not belong to the inmate in question, then a strong case for innocence has been developed.

Alternative Suspect cases:
If you have an alternative suspect, testing nearly anything from the crime scene and matching it to him might be highly probative. If this alternative suspect is a friend of the victim and would likely have left something with his DNA on the scene for innocent reasons, then this might not work. However, if you have a case where the alternative suspect did not know the victim and had no innocent reason to be at the crime scene, then matching him to nearly anything will be highly probative.
4. Types of DNA Testing

There are three types of DNA testing that are frequently used in forensic testing:

- STR (often called “nuclear”)
- YSTR (also called y-chromosome testing)
- MtDNA (also called mitochondrial)

Note: PCR is sometimes referred to as a type of DNA testing. That is not technically accurate, as PCR is simply a process used to amplify small amounts of DNA for testing. STR, YSTR and MtDNA all use PCR.

**STR testing**
STR/Nuclear is the most common type used by crime labs, and has been around for many years.

Advantages:

- DNA profiles generated could potentially be entered into CODIS, the FBI database. You may be able to get a “cold hit” to another offender. This would allow one to find the true culprit and exonerate an innocent person at the same time.
- It’s extremely unlikely to find two unrelated individuals with a complete 16 loci DNA profile match, so we can get very clear exclusions and inclusions.
- Cheaper than other methods of DNA testing.

Disadvantages:

- Cannot be used for hair unless fleshy root is left on shaft.
- Sometimes degraded DNA will not reveal a full profile
- Sometimes difficult to get a clear, conclusive reading, particularly when the item tested might have both female and male DNA on it. If the ratio of female to male DNA is high, STR will sometimes not even register that male DNA is present because of the “overwhelm factor.”

**YSTR testing**
YSTR has been around for just a few years. It reads the DNA profile in the Y chromosome of men. Thus, this type cannot be used for female DNA.

Advantages:

- The biggest advantage of YSTR is that it ignores female DNA, and thus is perfect for items that have mixtures of both genders. Because YSTR ignores the female’s DNA, one can get a clean reading on the male even when small male traces are present and mixed with a high concentration of female DNA. Often good for vaginal swabs or female panties, as they will likely contain more female DNA than male.
- Anecdotally seems to be more sensitive and able to test smaller amounts of
biological material than STR (typically only need 1/5th of what is required for STR). Some believe that YSTR also can pick up a DNA profile from old, degraded biological material where STR testing would not be able to.

- All men have the same YSTR profile as their father. So, for example, if you’re trying to match the DNA to an alternative suspect, and he is hard to find, you can go get the DNA of the suspect’s father, son or brother (if they have the same father), and it will be the same.
- Very powerful in its ability to exclude.

Disadvantages:
- More expensive than STR
- Cannot put profile in FBI database to get a cold hit
- Each male does not have a totally unique YSTR profile, so numbers and statistics are not as persuasive or compelling as STR for inclusions or matches to alternative suspects or for combining several pieces of evidence at a crime scene (each male from same paternal lineage will have same YSTR profile). For example, there may be 1,000 men in the U.S., or maybe more, who have the same YSTR profile. It becomes a matter of how rare the profile is (how prevalent or rare the defendant’s male lineage markers are in the general population).

**Mitochondrial testing**
Mitochondrial has also only been around for a few years (early to mid 1990s). It is most often used for hairs, bone and teeth.

Advantages:
- Allows you to test hairs that cannot be tested using standard PCR/STR technology.
- Everyone, both male and female, has the same mitochondria DNA profile as their mother (everyone in the same maternal line will have the same MtDNA profile). Thus, if you are trying to match to an alternative suspect, you can get the DNA from that suspect’s mother or anyone born to her (suspect’s brothers and sisters).
- The profile is from the mitochondria of the cell, and this degrades at a slower pace than other parts of the cell, so can be good for old, degraded types of biological material.
- Very powerful in ability to exclude.

Disadvantages:
- More expensive than STR 50
- Cannot put profile in FBI database to get a cold hit
- MtDNA profiles are similar to YSTR—they run in family lines on the maternal side, while YSTR is paternal, so inclusions and matches are not as persuasive as STR.
- Cannot interpret mixtures—biggest limitation.
How to choose which type to use in a case:
- If you are simply testing public hair from a rape kit, the only type that will be available is Mito, unless the hair has a fleshy root still attached, which is not common.
- If you are testing something that is likely to have a female/male mixture, and you are trying to get the profile of the male, YSTR is usually the best if STR fails.
- If you are testing a sample that you believe has a good quantity of DNA from a single male donor in it, or if your goal is to put the profile in the FBI database to get a cold hit, then STR might be the way to go.
- Keep in mind that each person has a different profile for each type of testing. For example, a man’s STR profile will be different from his YSTR profile and his Mito profile. A woman’s STR profile will be different from her Mito profile. Thus, your goal is to test several items at a crime scene with the hope that they all match the same person and that it will not be your inmate. You may need to utilize multiple testing methods to cover all the evidence you have.

Questions to Ask Before Testing:
Before conducting DNA testing, it is important to consider the ramifications of such testing. For example, the samples could have been contaminated at some point during the criminal process.

Questions to consider include:

- How was the evidence collected? Who collected the evidence? What type of evidence is there? Was the evidence examined? By whom? For what? What was not examined, and why? Could it be useful in your theory of the case?

- Where was the evidence stored before trial? How was the evidence stored? How was the evidence handled during trial? Was the evidence envelope opened? Was it handled without gloves? Did the jury handle it? Was the evidence replaced in the original container? What testing has already been done to the evidence?

- What happened to the evidence after trial? Was it used as an exhibit? Is it still in police custody? Could the evidence be in another possible location?
B. SAMPLE INITIAL LETTER

[Inmate]
MSP
P. O. Box 1057
Parchman, MS 38738

July 12, 2011

Dear [Inmate]:

We are in receipt of your request for aid.

Please fill out the enclosed application materials and return them to our offices as soon as possible.

Please rest assured that your application will get a close reading by our office staff. We will read your application as soon as it is practicably possible. At the moment, our office has over 700 pending requests for aid. As soon as we read it and come to a decision with respect to the steps that we should take thereafter, we will be in immediate touch with you.

Thank you in advance for your understanding, cooperation and patience.

Sincerely,

W. Tucker Carrington
Director
C. INITIAL APPLICATION FOR AID

INSTRUCTIONS:
This form will assist us in finding out whether we can help you. Please fill out every section completely and to the best of your knowledge. Do not leave out any information that you believe is important in your case. If you do not know the answer to a question, respond with D/K (don’t know). If a question does not apply to your case, mark it N/A (not applicable). Please be aware that we can only accept complete and signed forms. Once you have finished the entire form, please send it to our office.

George C. Cochran Innocence
Project Post Office Box 1848
University, MS 38677

I. GENERAL INFORMATION

<table>
<thead>
<tr>
<th>Personal Information</th>
<th>CASE Information</th>
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<tbody>
<tr>
<td>Inmate Name:</td>
<td>Trial Court:</td>
</tr>
<tr>
<td>Inmate #:</td>
<td>Trial Court Case No:</td>
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<td>County of Conviction:</td>
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<tr>
<td>Prisoner Mailing Address</td>
<td>Date of Trial:</td>
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<tr>
<td>Address:</td>
<td>Have you filed an Appeal?</td>
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<tr>
<td>City:State:Zip Code:</td>
<td>YES __ NO __</td>
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<tr>
<td>Social Security Number:</td>
<td>Appeal Case Number:</td>
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<tr>
<td>Date of Birth:</td>
<td>Second Appeal Case Number:</td>
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<td>Primary Language: Race:</td>
<td>Have you filed a Habeas Appeal: YES __ NO __</td>
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<tr>
<td>Highest Level of Education:</td>
<td>Habeas Appeal Number:</td>
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Information Release and Waiver

By signing below, I authorize Mississippi Innocence Project to assign one or more law students, working under the direct and immediate supervision of an attorney, to investigate my case. This includes, but is not limited to, authorizing correspondence and/or telephone calls to prior counsel, prosecutors, and/or witnesses. I authorize any and all entities and persons, including my former attorney(s), investigator(s), and appellate programs who worked on my case, to release to the Mississippi Innocence Project or to its staff or student representatives, any and all records, files, reports, and information of any kind related to me or to any criminal case involving me, including police reports, witness statements, postconviction pleadings, and correctional records, presentencing reports and other documents in prison social services and legal files, legal papers, court documents, medical records, laboratory analyses, probation reports, attorneys files and records, and any other information necessary to the Project's work on my behalf. I understand there may be statutes, rules, and regulations that protect the confidentiality of some of the records, files, reports, and information covered by this release; it is my specific intent to waive the protection of all such statutes, rules, and regulations so that confidential information can be shared with the Mississippi Innocence Project.

I understand that by conducting an initial investigation, the Mississippi Innocence Project is not agreeing to represent me. I further understand that at any point Mississippi Innocence Project, at its sole discretion, may determine that further investigation is not warranted, and is under no obligation to continue to represent me.

By my signature below, I represent that this waiver is voluntary and given without any reservation. This authorization is effective until revoked by the undersigned in writing.

Signature _______________________________ Date __________________________
Screening Agreement

I understand that the information that I have provided in the form entitled “Innocence Screening Form” is for the sole purpose of facilitating review of the facts and circumstances of my case by representatives of the Mississippi Innocence Project, including any attorney who may eventually review the screening form. I understand that I am not “represented” by any attorney at the Mississippi Innocence Project unless that person expressively notifies me in writing that I am to be represented by the office and that the office is enrolling my case. I understand that any records or statements that may be gathered in the course of this screening process remain confidential to me, and are covered by the attorney-client privilege.

Signature ___________________________ Date ___________________________

Witness _______________________________
Please fill out the following chart as accurately as possible. Use the space provided for each question. You will have the opportunity to explain charge later in the form.

<table>
<thead>
<tr>
<th>Crimes you were convicted of at the Trial</th>
<th>Total Sentence (Years and Months)</th>
<th>Time Served (Years and Months)</th>
<th>Time Remaining (Years and Months)</th>
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Did you plead guilty to any of the charges above?  YES __ NO __

If YES, which ones?
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

Are you factually innocent of all the charges listed above?  YES __ NO __

If NO, please tell us the charges for which you are innocent.
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

Were there multiple defendants for the charges that you claim innocence?  YES __ NO __

If YES, please list the names and convictions for each person.
________________________________________________________________________
________________________________________________________________________
What was the race of the victim?

Has any NEW EVIDENCE proving your innocence become available since your conviction?

YES  NO

If YES, briefly list this evidence and how it can prove your innocence.

Have you been convicted of or plead guilty to any prior felonies?

YES  NO

If YES, please list each felony charge and date of sentencing.

Have you been subject to any prison disciplinary action during any period of incarceration?

YES  NO

If YES, please list and describe each instance of prison disciplinary action.
Please tell us your attorney's name and contact information for the following, if applicable.

<table>
<thead>
<tr>
<th>Name and Firm</th>
<th>Address</th>
<th>Phone Number</th>
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<tr>
<td>Pre-Trial Attorney</td>
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<td>Original (First) Trial</td>
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<td>Habeas Appeal</td>
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<td>Prior Convictions</td>
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Please tell us your prosecuting attorney's name and contact information for the following, if applicable.

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<tr>
<th>Name and Firm</th>
<th>Address</th>
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<td>Pre-Trial Attorney</td>
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<td>Category</td>
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<tr>
<td>Prior Convictions</td>
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**II. Inmate’s Statement of the Facts**

Please use the space below to briefly explain your version of the facts of your case. You will have the chance to explain details later in this form as well.

________________________________________________________________________
________________________________________________________________________
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III. FACTS OF THE CASE

Please answer each question as completely as possible. Use additional paper to answer fully if you need to.

At any time, were you present at the scene of the crime?    YES ___ NO ___

If YES, when were you there? (Check all that apply)  Before ___ During ___ After ___

Explain your answer:
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

Please tell us where and when the crime you were charged with happened. Provide the specific address or location of the crime and the specific time of day the crime occurred.
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

Address:
City:    State:    Zip Code:

Explain the scene of the crime as best you can, particularly if location is in rural area.
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
Please explain who else was involved in the crime and how they were involved.


Please list the name and age of all victims in the crime you were charged with.


What reasons do you believe led to your being charged with this crime?


Please explain why you are innocent.
IV. PROCEDURAL HISTORY

What kind of trial did you have or did you make a plea bargain? (Check One)

Jury Trial _____ Bench Trial (judge only) _____ Plea Bargain _____

If you accepted a plea, please tell us what charges this was for?

____________________________________________________________________
____________________________________________________________________

What was the date of your conviction?
Day ________ Month ________ Year ______

Have you appealed to the Mississippi Court of Appeals? YES ____ NO ____

Case Number: __________ Date filed: __________ Date Decided: __________
Result of Appeal (Check one):  Denied __ Accepted __ Pending __

Have you appealed this case to the Mississippi Supreme Court? YES __ NO __

Case Number: __________ Date filed: __________ Date Decided: __________

Result of Appeal (Check one):  Denied __ Accepted __ Pending __

Have you filled an appeal to a Federal Court? YES __ NO __

Court ______ Case # ______ Date of Filing __________

Result of Appeal (Check one):  Denied __ Accepted __ Pending __

Court ______ Case # ______ Date of Filing __________

Result of Appeal (Check one):  Denied __ Accepted __ Pending __

Please tell us your federal appellate attorney’s name and contact information.
Name: ____________________________ Address: ____________________________
City: __________ State: __________ Zip Code: __________ Phone: __________

Were any of your attorneys appointed by the court? If so, please list which ones.
________________________________________
________________________________________
________________________________________

Are you currently being represented by an attorney? YES __ NO __
Name: ____________________________ Address: ____________________________
City: __________ State: __________ Zip Code: __________ Phone: __________

Does your attorney know you have sought our help? YES __ NO __

V. FACTS OF YOUR ARREST

What was the date and time of your arrest?
Day ______ Month ______ Year ______ Time: ____________________________

Where were you arrested?
________________________________________
________________________________________
________________________________________

Address: ____________________________

50
City: State: Zip Code:

Please explain how and where you were arrested.

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

Please list the law enforcement officers involved in the investigation of your case and in your arrest.

Name: Department:

Address:

City: State: Zip Code:

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

Name: Department:

Address:

City: State: Zip Code:

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

Did the police or Investigating Detective interview you before you were arrested?

YES ___ NO ___

If YES, please indicate how many times and how long each interview lasted.

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

Did the police or Investigating Detective interview you after you were arrested?

YES ___ NO ___

If YES, please indicate how many times and how long each interview lasted.

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________
When was the first time you spoke to your lawyer?

Did you give a recorded statement? YES  NO
How was it recorded (Check all that apply) Audio ___ Video ___

Who did you give this statement to?

______________________________________________________________

______________________________________________________________

______________________________________________________________

Did you provide a written statement? YES ___ NO ___

If YES, did you sign it? YES ___ NO ___

If you gave a statement, please explain why and what you told the police?

______________________________________________________________

______________________________________________________________

______________________________________________________________

______________________________________________________________

______________________________________________________________

Did any of the victims identify you? YES ___ NO ___

If YES, please explain who identified you; how, when, and where.

______________________________________________________________

______________________________________________________________

______________________________________________________________

______________________________________________________________

Did anyone else identify you? YES ___ NO ___

If YES, please explain who identified you; how, when, and where.

______________________________________________________________

______________________________________________________________

______________________________________________________________

______________________________________________________________

53
Is your case one of mistaken identity?  
YES ___  NO ___
If YES, please explain why.
VI. Plea Agreement

*If you plead guilty to the crime or crimes with which you were charged, or plead guilty to a lesser charge, please answer the following questions. If you went to trial, please skip the following section of questions.*

When did you accept a plea bargain?

_____________________________________________________________________________________________________________________________________

What kind of plea was it?

_____________________________________________________________________________________________________________________________________

Did your attorney advise you to take a Plea Bargain?  

YES  __  NO  __

If YES, did your attorney tell you why you should accept the plea bargain?

_____________________________________________________________________________________________________________________________________

If NO, why did you choose to accept the agreement?

_____________________________________________________________________________________________________________________________________

Was your attorney with you in court when you plead guilty?  

YES  __  NO  __

Did you tell your attorney you were innocent?  

YES  __  NO  __

If your first language is not English, was your plea agreement explained to you in your first language?  

YES  __  NO  __

If your Plea was in writing, did you sign it?  

YES  __  NO  __

IF YES, was your attorney present?  

_____________________________________________________________________________________________________________________________________

_____________________________________________________________________________________________________________________________________

_____________________________________________________________________________________________________________________________________
Did you understand what you were signing? YES __ NO __
If NO, why did you sign it?

Did the judge ask you if you understood the plea agreement? YES __ NO __
If NO, did he tell you anything about your plea agreement?

Were you told that you could take back your guilty plea? YES __ NO __
If YES, what were you told?

Did you try to take back your plea? YES __ NO __
If YES, tell us why.

VII. FACTS OF YOUR TRIAL

What was the name of the Trial Judge?
Did you testify on your own behalf at trial?  
YES ___ NO ___

If NO, why not?

The following questions deal with people associated with your trial. If you have ANY information about a person’s location, please write it down. If you do not know a specific address, tell us what you do know about where the person lives or stays.

Did any of the alleged victims testify at trial?  
YES ___ NO ___

Please supply the following information for any victims of the crime who testified.

Name:                  Where they live: 
Way to contact them: 

Name:                  Where they live: 
Way to contact them: 

Name:                  Where they live: 
Way to contact them: 

Name:                  Where they live: 
Way to contact them: 

Did any eyewitnesses testify on your behalf?  
YES ___ NO ___

Please supply the following names for the eyewitnesses that testified.

Name:                  Where they live: 
Way to contact them: 

Name:                  Where they live: 
Way to contact them: 

Name:                  Where they live: 
Way to contact them: 

Name:                  Where they live: 
Way to contact them:
<table>
<thead>
<tr>
<th>Name:</th>
<th>Where they live:</th>
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Did any eyewitnesses testify on the prosecution’s behalf?  **YES**  **NO**

Please supply the following names for these eyewitnesses.

<table>
<thead>
<tr>
<th>Name:</th>
<th>Where they live:</th>
<th>Way to contact them:</th>
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Please list any EXPERTS that testified on behalf of your defense?

<table>
<thead>
<tr>
<th>Name:</th>
<th>Address:</th>
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What did they testify about?
Please list any EXPERTS that testified for the Prosecution.

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What did they testify about?

Please list anyone else that testified at your trial

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**B. For the Prosecution:**

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**Were you examined by a psychologist, psychiatrist or social worker?**

- Yes __ NO __

  **If YES, did that person testify?**

- Yes __ NO __

  **If NO, why?**
Please give a summary of that report:


Did that person write a report of their examination of you? YES __ NO __


Please describe the makeup of your jury. Please note the major race and if they were mostly men or women.


How long did it take the jury to make a decision?


VIII. EVIDENCE

Was any evidence, physical or biological, recovered from the crime scene? YES __ NO __

If YES, please check all that apply:

Hair __ Semen __Blood ____ Fingernail Scrapings ____ Fingerprints ____ Saliva ____
Skin__
Hat __ Gloves ___ Shoes ___ Mask ___ Shoeprints ___ Footprints ___ Undergarments ___ Sheets/Bedcover ___ Drinking Containers ___ Cigarette butt ___ Carpet/Rug ___ Chewing Gum ___ Gun ___ Knife ___ Broken Glass ___ Other:

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<th>(This will help us locate this evidence)</th>
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Were any biological samples taken from the victim? YES __ NO __
If YES, what samples were taken?

Were any body fluids found on the victim’s clothes? YES __ NO __
If YES, what was obtained?

Were any biological samples taken from you? YES __ NO __
If YES, what samples were taken?

Were any bodily fluids found on you? YES __ NO __
If YES, what was obtained?

Was a rape kit obtained from the victim? YES __ NO __
If YES, what samples were obtained (vaginal, anal, saliva, etc.)

Was testing performed on any of the biological evidence obtained for your trial. YES __ NO __
If YES, please explain what kind of testing was performed. (Ex. Blood group (A,B,O), DNA, hair comparison, etc.)

Do you have a report of the test results? YES __ NO __

What did the tests show?

Who arranged the testing? Prosecution __ Defense ____ Other ____

Who or what laboratory performed the test?
Name: Address:
City: State: Zip Code: Phone:

Was a second test performed on the materials? YES __ NO __

If YES, please indicate what kind.

What did the results of the second test show?
If a second test was performed on the evidence, who arranged it?

Prosecution __ Defense ___ Other ___

Who or what laboratory performed the second test?
Name:  
Address:  
City:  
State:  
Zip Code:  
Phone:  

Were any of the test results **NOT** used at trial?  
**YES**  **NO**  
If YES, please tell us why they were not used and what they showed.

Please list the evidence **used at trial** that you believe supports your claim of innocence.

List any other evidence or testimony that you believe will show your innocence. For each of these items, please tell us if it was used or not at trial.

Please tell us if you believe any of the witnesses of victims had any reason to lie about the crime?

Do you have an alibi that will prove that you could not have committed the crime?
Was this alibi raised at trial?  
If NO, why not?

YES  __  NO  __
IX. POST CONVICTION EVIDENCE

Do you have or know of any new evidence that would prove your innocence?  

YES ___ NO ___

*If NO new evidence has been discovered since your trial, skip the following section of questions.*

Biological Evidence

Do you know of any NEW biological evidence (Blood, body fluids, hair, etc.) that will prove your innocence?  

YES ___ NO ___

If YES, please indicate what this evidence is.

________________________________________________________________________________________

________________________________________________________________________________________

________________________________________________________________________________________

________________________________________________________________________________________

________________________________________________________________________________________

Do you know of any biological evidence that your attorney had at the time of your trial BUT WAS NOT TESTED OR EVALUATED?  

YES ___ NO ___

Is this evidence still available?  

YES ___ NO ___

If YES, please indicate what this evidence is.

________________________________________________________________________________________

________________________________________________________________________________________

________________________________________________________________________________________

________________________________________________________________________________________

Where is the evidence located?

________________________________________________________________________________________

________________________________________________________________________________________

________________________________________________________________________________________

________________________________________________________________________________________
Who has this evidence?

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Why do you believe this evidence can prove your innocence?

Would you be willing to submit to a DNA test knowing the test could confirm your guilt or innocence in this case and potentially others?  

YES ___  NO ___

Have you ever been told that the evidence used in your trial was going to be destroyed?  

YES ___  NO ___

If YES, when was the evidence destroyed?
**Non-Biological Evidence**

Do you have any physical evidence (murder weapon, clothing, etc.) other than a biological sample, that will prove your innocence? **YES ____ NO ____**

If YES, please indicate what that evidence is.
Who has this evidence and where is it located?

Name: ____________________________  Address: ____________________________

City: ____________________________  State: ____________________________  Zip Code: ____________________________  Phone: ____________________________

Please indicate how this evidence can prove your innocence.

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
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Has a victim or witness come forward to exonerate you since the end of your trial?

YES __  NO __

If YES, who is this person?

________________________________________________________________________
________________________________________________________________________
How has their story changed?
Why did they change their story?

What other evidence exists, not mentioned above, do you believe would prove your innocence?

Do you know who committed the crime you were wrongly convicted of?

YES  NO  

If YES, who was this person?

Where are they today?

Name:  
Address:  
City:  
State:  
Zip Code:  
Phone:

X. PERSONAL INFORMATION

What was the highest level of education that you completed?
Please list any schools you have attended:
Did you have a job at the time of your arrest?  
YES ___ NO ___ 
If YES, please indicate where.

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Please provide family and friends, not listed before, that you believe have information about your arrest, trial or the crime that you were convicted of.

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INVESTIGATIVE MEMORANDUM

TO: File

FROM: Students

RE: 

DATE: August 28, 2016

I. CASE INFORMATION
   A. Name:
   B. Case #:
   C. DOB:
   D. Charge: 2 capital murder counts; 1 aggravated assault count; Miss. Code Ann. §§ 97-3-73, 97-3-19(2)(e), 97-3-7(2)(b)
   E. Offense Date
   F. Arrest Date
   G. Conviction Date
H. Sentence  
2 consecutive life sentences and 20 years

I. Parole Eligibility  
No

J. County:  
Coahoma County  
P.O. Box 579  
Clarksdale, MS 38614  
Phone: (662) 624-3000  

K. Victim Information:  
Victims:  
a. Name  
Address & details  
*located 135 ft from Tommy Hooper’s (Vester’s brother) residence

L. Pre--Trial Information:  
Pre--Trial Attorney:  
1. Name  
(Information below was found at:  
http://www.msbar.org/lawyerdirectory.php;  
he was 1227 Main St  
Tunica MS 38676  
P O Box 2459  
Tunica, MS 38676  
(662) 357-9595  
(662) 357-9599

M. Trial Information:  
1. Trial Docket #:  
2. Trial Court:  
Coahoma Circuit Court  
District 11  
Charles A. Oakes (Clerk)
3. **Trial Judge:** Larry O. Lewis

4. **Judge/Jury:** Client had a jury trial.

5. **Defense Attorney:**
   - Name
   - Miss. Bar No.
   - Address
   - Greenville, MS 38702
   - (662) 335-6001 Office
   - (662) 378-8958 Fax

6. **Prosecutor:**
   - Lawrence Y. Mellon (Information found below at)
     - Office of the District Attorney
     - 200 S Court St 3rd Fl
     - Cleveland MS 38732
     - P O Box 848
     - Cleveland, MS 38732-0848
     - (662) 843-8000 Office
     - (662) 846-1711
     - da11circt@hotmail.com

7. **Investigating Detective/Officers:**
   a. Sheriff Andrew Thompson
      - Coahoma County Sheriff’s Office
      - 63 Sunflower Ave
      - Clarksdale, Mississippi 38614
      - (662) 624-2411

      County Jail, Clarksdale, MS
      - (662) 624---3085
      - http://www.usm.edu/mssac/counties/coahoma_county.htm

   b. Deputy Neal Mitchell
      - Exact contact Information Unknown; See information above for Coahoma County Sheriff’s Office Generally.
c. Deputy Eric Williams
   Exact contact Information Unknown; See information above for Coahoma County Sheriff's Office Generally.

d. Grant Graham
   Forensic Scientist / Team Leader
   Gulfport / Technical Assistance Section
   10451 Larkin Smith Dr.
   P O Box 2159
   Gulfport, MS 39505-2159
   (228) 832-9641 Office
   (228) 832-2960 Fax
   ggraham@mdps.state.ms.us

8. Co--Defendants:
   None

9. Alibi:
   a. Name
      (Girlfriend at time; and mother of child)
      Information Unknown; attempted whitepages.com search, but there was no listing. Talk with client’s mother. See investigative memo.

   b. Name
      (Friend)
      Clarksdale, MS
      MDOC #: K9830
      Race: Black
      Sex: Male
      DOB: Feb. 4, 1975
      Height: 5’9”
      Weight: 185 lbs.
      Complexion: Medium Brown
      Build: Medium
      Hair Color: Black
      Entry Date: Feb. 17, 2005
      Location: North Mississippi Earned Release Supervision, June 11, 2007
      Unit: Marshall ERS
      Sentence: 2 years for 1 count of the non--residential burglary, 2 years for 1 count of the residential burglary, 4 years for 1 count of
the residential burglary, total sentence length of 6 years
Served: 3 years
County: Coahoma
Tentative Release: April 4, 2008
*His picture may be found online at:
http://www.mdoc.state.ms.us/InmateDetails.asp?PassedId=105998

c. Name
Clarksdale, MS
Information Unknown; attempted whitepages.com search, but there was no listing. See investigative memo.

d. Name
(Client’s mother)
Address

10.Statement:
Yes. Statement was taken by Sheriff Andrew Thompson. He both tape recorded and wrote it out, and then client signed it. He was only interviewed once, and it lasted 45 min. His lawyer was not with him when he gave/signed his statement, and he did not speak with a lawyer until almost 1 week later. Client says he gave a statement, because he had nothing to hide, since he was innocent and only wanted to help them discern that he was not the perpetrator of the crime. Statement is based on information supplied from client upon the initial application.

*Refer to investigation files for date, substance, and under what conditions statement was given.

11.Informant: No

12.Tests: Ballistics
Alcohol

N. Direct Appeal Information:
2. Docket #: 2005-KA-00068-COA
3. Date Filed: September 29, 2004
4. Denial Date: October 10, 2006
5. Delivered by: Myers, P.J.

6. Appellant’s Atty: Name
   Miss. Bar No.
   Address

7. Brief: 2005 WL 4888717 (Miss.)--This is client’s attorney's brief, which ultimately found no reversible error.

8. Appellee’s Atty: Deirdre McCrory, Special Assistant Atty General
   MS Bar No. 2293
   450 High St.
   Office of the Attorney General
   P.O. Box 220
   Jackson, MS 39205-0220
   (601) 359-3680 Office
   (601) 359-3796 Fax
   dmccr@ago.state.ms.us


O. Post Conviction Relief Information:

1. State PCR: Not filed

2. Federal Habeas: Not filed; filing deadline October 10, 2007

P. Prior Convictions:

No prior felony conviction, but possible prior misdemeanors. The investigation will disclose whether NAME had any prior misdemeanor convictions.

II. CLIENT CONTACT & OTHER INFORMATION

A. Client Background

NAME is a 31 year old African American male with English as his first language. He has a medium build, with a height of 6’2” and weight of 200 lbs. NAME has brown eyes and black, low--cut hair, with a medium brown complexion. His most recent prisoner
profile depicts no other facial hair than a mustache. He was convicted of two capital murders and one aggravated assault. NAME had a jury trial and is not eligible for parole. NAME had no prior felonious charges. Currently, he is serving consecutive life sentences for the murders and 20 years for the aggravated assault charge. He is serving his time at the Mississippi Department of Correctional Facilities. His last location change was on July 9, 2007.

SSN:
Age: 31
Race: Black
Language: English
Height: 6' 2"
Weight: 200
Complexion: Medium Brown
Build: Medium
Eye Color: Brown
Hair Color: Black, low-cut
Facial Hair: Mustache

Family: NAME
ADDRESS

B. Address & Phone Number
Current Address:
D.C.F.
Building CA--52
3800 County Road 540
Greenwood, MS 38930

Previous/ Home Address:

C. Education
Client had a ninth grade education.

Roundaway Elementary
*Roundaway is listed online as a historical site, so it is likely that this school is closed

Coahoma County High School
1535 Lee Drive
Clarksdale, MS 38614
(662) 627-7378
*Coahoma County High School offers grades 7-12

D. Employment
See investigative memo

E. Physical Health ---- examination revealed that he was “good to stand trial”. Talk with Johnnie Attorney to find out why client was examined before trial. For further information, look at investigation files.

F. Mental Health
NAME examination revealed that he was “good to stand trial”. Talk with attorney to find out why client was examined before trial. For further information, look at investigation files.

III. STATE’S CASE

At approximately 10:00 p.m. on October 3, 2003, NAME, along with a few other individuals including Johnny Scott, participated in a craps game at Vester NAME’s grocery store, V’s Grocery, in Roundaway, MS. (Roundaway is an unincorporated community near Clarksdale, MS). While there, NAME began drinking gin and beer, while losing in the craps game. According to NAME’s testimony NAME “acted like he owned the world when he drank,” and he “drank quite a bit that night.” (Appellant’s Br. 4, available at 2005 WL 4888717). After running out of his own money, NAME allegedly borrowed $10 from a patron named Robert Jennings, known as “Doobie,” and $20 to $30 from a patron named Clarence NAME. According to testimony at trial, NAME became increasingly upset about losing and stated, “I’m gonna get my [-----]ing money back, my mother [-----]ing money back.” And shortly before midnight NAME left, leaving only Vester NAME and Johnny Scott in the store, as most of the other patrons had left around 10:45 p.m. NAME left a total of two times during the night.

Then at approximately midnight, Vester NAME testified that she saw NAME stop his car in the middle of the road in front of her store for a short period of time before pulling away. While NAME and Scott were preparing to leave, NAME claims NAME returned to the store. When NAME entered the store NAME testified that she asked him, “NAME, you come back for some more action,” to which NAME just replied, “Hum.” Scott who had been facing NAME, turned to gather some money he had placed on the table behind him, when NAME fatally shot him in the back of the head, turned the gun on Triplet, and began demanding money.

After NAME handed NAME the money in her hand, he told her to give him the money from the cash register, all the while continuing to aim the gun at her, while she pleaded with him to stop. NAME then testified that she saw through the store window Brandon Henry Lott enter the parking lot, sit for a period of time, exit his running vehicle with the music still playing, and proceed to the front door. After handing the money from the cash register, a little over $300, NAME shot NAME in the face. NAME then walked to the end of the table where NAME had fallen. NAME said at that point she saw a black gun
with NAME that she had never seen before. Brandon Henry Lott then unknowingly entered the store at which point NAME shot and killed him, leaving his body lying in the doorway. Although NAME said she did not see NAME shoot Lott, she had seen Lott exit his car and head towards the store before NAME shot her in the mouth. NAME attempted to get up from the floor twice, but NAME shot her twice in the stomach, so decided to play dead.

NAME testified that once NAME left, she pulled herself from the floor, found her keys in the cash register, grabbed a bottle of water from the refrigerator, walked over Lott’s body, got in her van, which was in the store parking lot, drove to Tommy Curtis Hooper’s home (Tommy Curtis Hooper is NAME’s brother), which was only approximately one hundred yards from the store, and blew the horn. Freddie Hooper, another of NAME’s brothers, came out and then went to get Tommy Curtis Hooper. When Tommy Curtis Hooper saw NAME’s state he yelled to her, “Who did this,” to which NAME replied, “NAME.” (Appellant’s Br. 7–8, available at 2005 WL 4888717). NAME ended up staying in the hospital for 10 days.

While NAME was waiting on the ambulance, Tommy Curtis Hooper went over to V’s Grocery, because NAME “had a lot of stuff in the store,” and “he didn’t want to leave the door open so anybody could walk in there.” (Appellant’s Br. 8, available at 2005 WL 4888717). When her arrived several people were standing in front of the store, including several sheriff deputies. Tommy Curtis Hooper was asked to identify Brandon Henry Lott, which he did. He also told the sheriff deputies that he and his sister knew NAME for about 15 years, and that NAME had gone to high school with him. He told them that on an earlier occasion he had seen NAME with a big black pistol on his car seat.

Deputy Eric Williams was the first to be dispatched to the incident. He testified that when he saw NAME sitting in the driver’s seat of the van badly wounded from several gun shots, he asked her, “who did this,” to which she replied, “NAME.” Williams then got on the radio to alert the other units to be on the lookout for the suspect. Williams stayed with NAME until the ambulance arrived. Then Williams went to the store and took several photographs until the Mississippi Crime Lab arrived around noon (see investigation section below for a list of photos).

Sheriff Andrew Thompson went to speak with NAME in the emergency room of the hospital around 2:00 to 2:30 a.m. NAME told Thompson the assailant was NAME NAME. At around 2:30 to 2:45 a.m., Thompson dispatched two sheriffs’ deputies to arrest and detain NAME. Apparently after NAME’S mother, NAME NAME, called the police and indicated that he was at home, NAME was picked--up, taken to the Sheriff’s Office, and charged with two counts of murder and one count of aggravated assault. According to Thompson, both Lott’s and Scott’s vehicles were still at the V’s Grocery, while NAME’ was found at the Wade Walton Apartment complex, where NAME’ girlfriend, Latasha Amos, lived.

Grant Graham, a senior crime scene analyst from the Mississippi Crime Lab in Biloxi, arrived at V’s Grocery on the afternoon of October 4, 2003, and began processing
the scene. He drew two crime scene diagrams depicting the locations of collected items of evidence; he collected 4 Smith and Wesson, .4 Caliber shell casings, that had been fired and a single red-stained $1 bill from the hand of Brandon Henry Lott; he observed a pattern of blood called a “flow,” which in his opinion demonstrated neither of the victims were moved and that both victims were laying in close physical proximity to where they were standing when they were shot; and he also observed a large blood stain contact transfer pattern next to the refrigerator.

At trial NAME presented four alibi witnesses, Latasha Amos -- his girlfriend at the time and the mother of his child, George NAME and NAME Buchanan -- both friends, and NAME NAME --- his mother.

Amos testified that on the night of October 3, 2003 at about midnight NAME called her with his cell phone and told her he was at C.W.’s Club. Then around 12:45 p.m., Amos saw NAME arrive in his car, appearing normal, without any blood on him, and his usual demeanor. Amos said that NAME watched tv for about an hour and a half until his brother, Gary Watson, picked him up from her apartment. Amos said NAME did not indicate where he was going, and she did not see him again that night. Amos received a phone call from NAME in that morning saying he was being arrested.

NAME, who lived in Clarksdale, but was being detained at the Coahoma County Jail at the time of trial, stated that he had known NAME for 6 years. On the night of October, 3, 2003, NAME arrived at C.W.’s Club at about 11:00 p.m. He was still at C.W.’s Club when NAME arrived there at about 12:00 a.m. NAME had recently been released from the penitentiary and was glad to see him. NAME stated that he and NAME talked until about 12:40 a.m., when NAME said he had to leave to go over to his fiancé’s apartment. NAME asked NAME to give him a ride home, so he could take his parents to the casino. NAME took NAME to 607 Walnut in the Riverton area. Additionally, while at C.W.’s Club, NAME saw his brother, NAME Buchanan, and a couple of his friends. When he got in NAME car, NAME said NAME appeared calm -- they laughed an joked, was wearing black Dickies and a gray shirt, and he did not see a gun.

NAME Buchanan testified that he had lived in Clarksdale all of his life and had known NAME about 4 or 5 years. Buchanan testified that he remember seeing NAME at C.W.’s Club on October 10, 2003 at a little past 8:00 p.m. However, Buchanan did not remember seeing his brother, NAME at C.W.’s Club.

NAME NAME’S testified that on the night of October 3, 2003/ morning of October 4, 2003, while lying in bed, she heard on the police scanner that NAME had hurt some people. NAME NAME immediately called NAME’ cell phone at his girlfriend’s house and told him what she had heard. NAME NAME then called her other son, Gary Watson, who was on his way home from work and told him to pick--up appellant and bring him home. The two sons arrived home about 20 to 25 minutes later. When NAME arrived, NAME noticed that he was wearing the same clothes he had left in earlier that night, that they appeared to be free of blood, that NAME appeared to be free of scratches and bruises. NAME NAME did say that NAME appeared to be upset when she told him what
she had heard. She said NAME stayed at home until the police came to arrest him, and he did not resist. NAME also testified that she knew Brandon Henry Lott, because he had been to her house and was a friend of her other son, Ivan, and her husband. NAME also stated she had known Johnny Scott and that he used to hang out with her brothers and was like a member of the family. She also said that she later saw Triplet and Tommy Hooper, and flagged them down to ask them what had happened. NAME responded that she couldn’t recall that and that she didn’t remember.

NAME was convicted of two capital murder counts and 1 aggravated assault account on August 20, 2004, and sentenced to two consecutive life sentences and twenty years to run consecutively without parole. He filed a direct appeal both through his attorney, Johnnie E. Attorney, Jr. and by a pro se supplemental brief on September 29, 2004. This appeal was denied on October 10, 2006, in large part because NAME’s attorney filed a brief with the court certifying that after “scouring the record,” he had concluded there were no arguable issues to support the appeal. (Appellant’s Br. 15, available at 2005 WL 4888717). The State claimed that this essentially meant “there are no non-frivolous issues to present to the court.” (Appellee’s Br. 1--2, available at 2006 WL 3244750).

Although the jury found NAME guilty, they were unable to agree unanimously on punishment for Counts I and II, and thus, the court sentenced him to serve two life sentences and a term of twenty years to run consecutively without parole. (Appellant’s Br. 1--2, available at 2005 EL 4888717).

IV. CLIENT’S INNOCENCE CLAIM

NAME claims there were several witnesses whose testimonies corroborated that he could not have been at V's Grocery at the time the incident occurred. NAME also asserts that NAME's testimony at trial was riddled with contradictions and falsehoods. He also asserts that of the 28 items collected at the crime scene none led to the identification of NAME. He also says that a ballistics gun residue test was performed on him that was not submitted into evidence at trial. Additionally NAME claims his car was sent to the crime lab and tested, and the evidence collected the was not submitted at trial. And although the victims were shot with a .40 caliber gun, which is the type which he used own, the police have had it in their possession since November 2001, while the victims were shot in October 2003. Also the clothes collected from him when he was arrested were tested, of which the results were not submitted at trial.

NAME also believes that NAME is being told to identify him, because as soon as she was released from the hospital, NAME went to NAME'S home and admitted that she didn’t know exactly what happened on the night of October 3, 2003. NAME also believes that NAME’s brother, Freddie Hooper, was sent to a psychiatric institution to keep him from testifying that NAME told him she didn’t know what happened the night of the incident, which Freddie Hooper told NAME NAME at NAME NAME’S home.
Additionally there are at least two items of evidence, which were not submitted at trial, which NAME believes will help his claim. First, NAME says that a beer can that was found in one of the pool table pocket's at V's Grocery was collected from the crime scene under which D.N.A. evidence was found. NAME believes that there is evidence this can was placed there after the shooting, and thus the D.N.A. found underneath it might reveal another culprit or at least eliminate him as the perpetrator. And second, a statement from John NAME, an individual who spoke with NAME after the incident, which could discredit NAME's testimony.

At this juncture, it seems like the only evidence on which Sander was convicted is NAME's testimony. With the above additional evidence it may be possible to assert an actual innocence claim.

V. INVESTIGATION

1. Interview NAME' mother NAME concerning her alibi testimony. Ask Ms. NAME about her conversations with both NAME and Freddie Hooper re NAME not remember exactly what happened. Ask Ms. NAME about whether NAME had any history of violence, if he had a misdemeanor criminal record, and if so what they were for and what they were about. Attempt to determine her knowledge of NAME' relationships with the three victims, and whether they were good or bad. Determine whether she knows of any motivation for NAME to lie about NAME involvement, and if not why she thinks NAME would testify as such. Find about the last time she saw NAME before he left that evening, what his demeanor was like, what he was wearing, what his plans were, etc. Ask about what she noticed when he returned before he was arrested. Attempt to discern what her relationship with NAME is like, and how much she knew about the details of her son's life. Ms NAME may be located at 2450 Harry Black Rd., Clarksdale, MS 38614; (662) 621--2105 Home. Ms NAME works from 4 p.m. to 12 a.m. every day. But is free prior to that and on weekends.

2. Talk to NAME’ trial and appellate attorney, Johnnie E. Attorney, Jr. (Miss. Bar No. 6919). See if he will forward us NAME' his trial transcript, NAME’ files, and any information he would be willing to give us on the case. Attorney should have copies of the case files and trial transcripts. Additionally, have NAME' write Attorney a letter requesting Attorney forward his files onto us. Attorney’ brief asserting that no reversible error could be found may be accessed at 2005 WL 4888717. Attorney is currently serving as a Mississippi State Senator. His email address is e mail address. His home office address is: ADDRESS; home number NUMBER, work NUMBER, fax NUMBER.

   a. Ask Attorney about NAME’ clothes and have a crime lab perform testing on the clothing. NAME says that these clothes were tested by the crime lab, but either no testing was done or the results were not submitted at trial. Additionally discern what additional information we would like to know about the trial, and formulate questions prior to speaking with the
prosecutor. NAME’s prosecutor at trial was Lawrence Y. Mellon. He might be able to be contacted with the following information which was obtained from the: http://www.msbar.org/lawyerdirectory.php. Office of the District Attorney, 200 S Court St 3rd Fl, Cleveland MS 38732, P O Box 848, Cleveland, MS 38732--0848; (662) 843--8000 Office; (662) 846--1711.

3. After reviewing the evidence and trial transcript, interview NAME, the client. Determine what he can remember about that night, what his relationships were with the victims and alibis, why NAME would incorrectly identify him, where the beer can is, how to locate anyone we can’t find. Also determine in what capacity he might be able to assist in the investigation. He is currently located at: D.C.F., Bldg. CA--52, 3800 County Rd. 540, Greenwood, MS 38930. Meet with Tucker to determine how to obtain access to incarcerated individuals.

4. Get a copy of all physical and mental examinations of NAME after arrest, before trial, and during conviction. Ask NAME to please write to all individuals who may possess such information to release that information to us. The doctor who performed an alcohol test on him right after arrest is Dr. Steven Hayne. We don’t have his contact information at this juncture and so must ask NAME or Attorney if they know where we might find this information.

5. Talk to NAME. She is the only surviving eye witness and owner of V’s Grocery. Contact information (*whitepages.com) ADDRESS & CONTACT INFO.

6. Talk to NAME, NAME’s bisexual brother. NAME, NAME’s mother, believes that NAME has important information to the case. She says that he is at the “crazy house in Jackson”. Additionally NAME has told us in his application that he told NAME NAME that he spoke with NAME about what happened and that she told him she didn’t know. There are several mental hospitals in and near Jackson, but the most well--known is Whitfield. It is located 15 miles south of Jackson. For more information: (601) 351--8018, Address: Public Relations, Mississippi State Hospital P.O. Box 157--A Whitfield, MS 39193. Some of the other institutions include: Brentwood (601) 936--2024; Pine Grove (601) 355--5600; Alliance Health Center (601) 483--6211; Central MS Medical Center (601) 376--2600; and St. Dominic Behavioral Health Service (601)200---3090.

7. Interview NAME. The client believes that John made a statement that can discredit NAME’s testimony. First determine from NAME where he thinks he may be contacted, what information he believes his statement may contain, then formulate and discern the information you will want to retrieve from NAME. Possible Contact information may be: ADDRESS & CONYACT INFO (*obtained from whitepages.com).

8. Determine exact location of C.W.’s Club. Find out more information about this establishment and who frequents it, if it still exists. See how long it takes to get from there to 607 Walnut St, Clarksdale, MS 38614--5047 (the place NAME
dropped of NAME), Wade Walton Apartment Complex (where NAME was living at the time), etc. See if this will corroborate any of the alibi testimony, or what this says about the plausibility of the alibi testimony. According to Attorney’s brief it is located at on the corner of Tallahatchie and Fourth streets. I cannot find any current contact information about this place.

Locate and obtain all physical evidence collected at the crime scene and copies of the results from all evidentiary tests. NAME said that there was a ballistics and gun residue test as well as an alcohol test performed. Forensic Scientist Grant Graham processed the crime scene. According to Attorney’s direct appeal brief, Mr. Graham performed the following tasks and came to the following conclusions: He collected evidence and drew two crime scene diagrams which were offered and introduced into evidence as State’s Exhibits S--2 and S--3, which depicted the location of items of evidence he found. He found four (4) Smith & Wesson, .40 Caliber shell casings on the floor that had been fired—they had prime marks or firing pin marks in the primer on them. He marked them and they were offered and received into evidence as State’s Exhibits S--4(a), S--4(b), S--4(c), and S--4(d). He was never given a weapon to compare them to—a weapon was never found and identified as the murder/assault weapon. He found and recovered a single red—stained one—dollar bill in the right hand of the victim who was laying just inside the door, Brandon Lott, which was offered and received as State’s Exhibit S--5. He observed a pattern of blood which was called a “flow” pattern—it originated at a victim and flowed due to gravity underneath a table. Due to the flow patterns, it was his opinion that neither of the murder victims moved after they were shot. The patterns also indicated that both victims were standing in close general proximity to where they were found laying, when they were shot in the head. Head wounds bleed profusely, and if they were standing someplace else, there would have been indications of that fact. He also observed a large bloodstain contact transfer pattern next to the refrigerator, of which the source had been removed. The pattern was about two feet square, and the refrigerator door was open. If that pattern came from a person, that person was no longer present. None of the items of evidence/exhibits offered or observations provided any identification of the Appellant as the perpetrator of the crimes charge. Ask Mr. Graham what he can remember of the crime scene, the evidence he collected, and the results he came to. Additionally, ask Mr. Graham what he knows about the beer can collected at the crime scene with the D.N.A. evidence Mr. Graham may be contacted at: 10451 Larkin Smith Dr., P O Box 2159, Gulfport, MS 39505---2159; (228) 832---9641 Office; (228) 832---2960 Fax; ggraham@mdps.state.ms.us.

The following individuals we should probably contact, but must first we probably should look at other evidence, speak with either NAME or NAME NAME, or find out more concrete contact information before proceeding, so that we can formulate what they may possess:
a. *Any relatives of NAME*, one of the victims who used to work with NAME at V’s Grocery. Contact Information Unknown; investigation will reveal this information.

b. NAME, a.k.a Pat. He is NAME’s brother. His home is located very close to V’s Grocery. This is where NAME came after the shooting. He also gave statements to the police concerning NAME’s and his knowledge of the victims and NAME. Contact information (*whitepages.com): CONTACT INFO

c. *Any relatives of NAME*. He was the victim who unknowingly entered the store during the incident and was shot and killed. There is no eye--witness to his shooting. CONTACT INFO

Talk to the investigating detective on the case, Sheriff Andrew Thompson. Obtain a copy of NAME’S statement. According to NAME Thompson both took notes and tape recorded the interview he conducted with NAME. NAME made this statement once he was arrested without an attorney present. Ensure that there were no constitutional violations. Ask him what he can remember about NAME at the time of making the statement. Discern who the arresting officers were, so that hopefully we can discern any information about how NAME conducted himself at the time of arrest. Additionally Thompson created a drawing of the area where the store, "V’s Grocery" is located, which was offered and introduced as State’s Exhibit S--1. See about obtaining a copy of this. If need be attempt to find out how to get in contact with Deputy Neal Mitchell and Deputy Eric Williams, who NAME identified as the investigating officers. Contact Thompson at (662) 624--3081. The address listed for the sheriff’s office is: P.O. Box 1182 Clarksdale, MS 38614. Determine if any other officers were working on the case who would be willing to talk with us and provide us with useful information.

Find out Deputy Eric Williams contact information and interview him. He was the first officer dispatched to the crime scene. Not only did he speak with NAME right before she went to the hospital, when she allegedly identified NAME NAME, he also took several photographs of the crime scene some of which were submitted into evidence at trial. Attempt to determine if any coercion occurred in get her to identify NAME, and what motivation there would be for such coercion. According to Attorney direct appeal brief he took pictures of the following things: 1. S--6(a)&(b), which showed the front of the Store on Myles Road, 2. S--7(a),which showed Brandon Lott’s body laying in the doorway of the store, 3. S--7(b),which was taken from inside the store towards the doorway and which shows the refrigerator at the door, a portion of the pool table, and a foot of Mr. Scott, 4. S--7(c), which showed a close--up of Mr. Lott depicting a bullet hole in the side of his head in the area of his ear, 4. S--8(a)&(b), which were photographs of Johnny Scott laying on the floor with (b) being a close--up, 5. S--9(a)&(a), which were photographs of Vester NAME sitting in the van as Deputy Williams found her when he arrived on the scene, and 6. S--10(a)&(b), which were photographs of shell casings laying on the floor of the store.
Find or retrieve a statement or some type of record from the police confirming that they have had NAME NAME’ 40 caliber gun since November 2001. The victims in the case were killed with a 40 caliber gun and NAME has not had this gun since 2001, almost two years before the incident.

Determine the exact location of V’s Grocery. Go there and take pictures of the crime scene/see if any other valuable information may be revealed. Discern exact distance between it and Tommy Curtis Hooper’s home (NAME’s brother), NAME’s home, NAME’/NAME NAME’S Home, C.W.’s Club, etc.

Find out how to obtain in record of prior misdemeanor convictions, see if NAME has any, and if so get copies of them.

Find out if NAME was employed before the incident. His social security is 428--43--3666. This may be useful in finding an employment record. Additionally, interviewing NAME NAME (his mother, see below) and NAME himself might be helpful in obtaining this sort of information.

If need be contact the Coahoma County Circuit Court to discern costs of obtain any additionally necessary documents filed on behalf of NAME. The Coahoma County Circuit Court Clerk is Charles A. Oakes (Clerk). He can be contacted at: P.O. Drawer 849, Clarksdale, MS 38614--0849; (662) 624--3014 Office; (662) 624--3075 fax; oakes@gmi.net. Additionally, if need be obtain access to all documents filed in the MSSC and MSCOA on NAME behalf.

Helpful internet sites during investigation:

http://www.coahomacounty.net/
http://www.darksdale.com/chamber/
http://www.rootsweb.com/~mscoahom/
http://www.darksdalewebinfo.com/jsp/user_page.jsp?pageid=4176
http://www.darksdale.com/directory/
E.SELECTED CASES

1. Brady v. Maryland

Supreme Court of the United States

John L. BRADY, Petitioner,

v.

STATE OF MARYLAND.

No. 490.
Argued March 18 and 19, 1963.
Decided May 13, 1963.

Proceeding for post-conviction relief. Dismissal of the petition by the trial court was affirmed by the Maryland Court of Appeals, 226 Md. 422, 174 A.2d 167, which remanded the case for retrial on the question of punishment but not the question of guilt. On certiorari, the Supreme Court, speaking through Mr. Justice Douglas, held that where the question of admissibility of evidence relating to guilt or innocence was for the court under Maryland law, and the Maryland Court of Appeals held that nothing in the suppressed confession of petitioner's confederate could have reduced petitioner's offense below murder in the first degree, the decision of that court to remand the case, because of such confession withheld by the prosecution, for retrial on the issue of punishment only did not deprive petitioner of due process.

Affirmed.

Mr. Justice Harlan and Mr. Justice Black dissented.

West Headnotes

[1] KeyCite Citing References for this Headnote

 creditor 170B Federal Courts
 creditor 170BVII Supreme Court
 creditor 170BVII(E) Review of Decisions of State Courts
 creditor 170Bk503 k. Finality of Determination. Most Cited Cases

(Formerly 106k393)


[2] KeyCite Citing References for this Headnote

 creditor 110 Criminal Law
 creditor 110XX Trial
 creditor 110XX(A) Preliminary Proceedings
Prosecution's action, on defendant's request to examine extra-judicial statements made by defendant's confederate, in withholding one such statement, in which confederate admitted he had done actual killing, denied due process as guaranteed by Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

[3] KeyCite Citing References for this Headnote

Suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution. U.S.C.A.Const. Amend. 14.

[4] KeyCite Citing References for this Headnote

Under Maryland law, despite constitutional provision that jury in criminal case are judges of law, as well as of fact, trial courts pass upon admissibility of evidence which jury may consider on issue of innocence or guilt of accused. Const.Md. art. 15, § 5.

[5] KeyCite Citing References for this Headnote
State courts, state agencies and state legislatures are final expositors of state law under our federal regime. Const. Md. art 15, § 5.

KeyCite Citing References for this Headnote

Where question of admissibility of evidence relating to guilt or innocence was for court under Maryland law, and Maryland Court of Appeals ruled that suppressed confession of confederate would not have been admissible on issue of guilt or innocence since nothing in confession could have reduced petitioner's offense below murder in first degree, remandment of case, because of such confession withheld by prosecution, for retrial on issue of punishment but not on issue of guilt did not deprive petitioner of due process. Code Md.1957, art. 27, § 413; Code Supp.Md. art. 27, § 645A et seq.; Const.Md. art. 15, § 5; U.S.C.A.Const. Amend. 14.

**1195 *84 E. Clinton Bamberger, Jr., Baltimore, Md., for petitioner.

Thomas W. Jamison, III, Baltimore, Md., for respondent.

Opinion of the Court by Mr. Justice DOUGLAS, announced by Mr. Justice BRENNAN.

Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. 220 Md. 454, 154 A.2d 434. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict 'without capital punishment.' Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

[1] Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. Petitioner's appeal from a denial of that motion was dismissed by the Court of Appeals without prejudice to relief under the Maryland *85 Post Conviction Procedure Act. 222 Md. 442, 160 A.2d 912. The petition for post-conviction relief was dismissed by the trial court; and on appeal the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and
remanded the case for a retrial of the question of punishment, not the question of guilt. 226 Md. 422, 174 A.2d 167. The case is here on certiorari, 371 U.S. 812, 83 S.Ct. 164, 166, 82 L.Ed. 204. FN1

FN1. Neither party suggests that the decision below is not a ‘final judgment’ within the meaning of 28 U.S.C. s 1257(3), and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that ‘Final judgment in a criminal case means sentence. The sentence is the judgment’ (Berman v. United States, 302 U.S. 211, 58 S.Ct. 164, 82 L.Ed. 204) cannot be applied here. If in fact the Fourteenth Amendment entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt ‘that presents a serious and unsettled question’ (Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528) that ‘is fundamental to the further conduct of the case’ (United States v. General Motors Corp., 323 U.S. 373, 357, 375, 89 L.Ed. 311). This question is ‘independent of, and unaffected by’ (Radio Station WOW v. Johnson, 326 U.S. 120, 126, 65 S.Ct. 1475, 1479, 89 L.Ed. 2092) what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See Largent v. Texas, 318 U.S. 418, 421-422, 63 S.Ct. 667, 668-669, 87 L.Ed. 873. Cf. Local No. 438 Const. and General Laborers' Union v. Curry, 371 U.S. 542, 549, 83 S.Ct. 531, 536, 9 L.Ed.2d 514.

**1196 The crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words ‘without capital punishment.’ 3 Md.Ann. Code, 1957, Art. 27, s 413. In Maryland, by reason of the state constitution, the jury in a criminal case are ‘the Judges of Law, as well as of fact.’ Art. XV, s 5. The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment.

*[2] We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals—United States ex rel. Almeida v. Baldi, 195 F.2d 815, 33 A.L.R.2d 1407, and United States ex rel. Thompson v. Dye, 221 F.2d 763—which, we agree, state the correct constitutional rule.

This ruling is an extension of Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791, where the Court ruled on what nondisclosure by a prosecutor violates due process:

‘It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.’ In Pyle v. Kansas, 317 U.S. 213, 215-216, 63 S.Ct. 177, 178, 87 L.Ed. 214, we phrased the rule in broader terms:

‘Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791.’

*[2] The Third Circuit in the Baldi case construed that statement in Pyle v. Kansas to mean that the ‘suppression of evidence favorable’ to the accused was itself sufficient to amount to a denial of due process. 195 F.2d, at 820. In Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217, we extended the test formulated in Mooney v. Holohan when we said: ‘The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.’ And see Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9; Wilde v. Wyoming, 362 U.S. 607, 80 S.Ct. 900, 4 L.Ed.2d 985; Cf. Durley v. Mayo, 351 U.S. 277, 285, 76 S.Ct. 806, 811, 100 L.Ed. 1178 (dissenting opinion).
We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: *The United States wins its point whenever justice is done its citizens in the courts.* A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not *the result of guile,* to use the words of the Court of Appeals. 226 Md., at 427, 174 A.2d, at 169.

*FN2.* Judge Simon E. Sobeloff when Solicitor General put the idea as follows in an address before the Judicial Conference of the Fourth Circuit on June 29, 1954: *‘The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts.’*

The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment. In justification of that ruling the Court of Appeals stated:

‘There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. * * * (I)t would be *too dogmatic* for us to say that the jury would not have attached any significance to this evidence in considering the punishment of the defendant Brady.

‘Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady. * * *

‘The appellant's sole claim of prejudice goes to the punishment imposed. If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first degree. We, therefore, see no occasion to retry that issue.’ 226 Md., at 429–430, 174 A.2d, at 171. (Italics added.)

*89* If this were a jurisdiction where the jury was not the judge of the law, a different question would be presented. But since it is, how can the Maryland Court of Appeals state that nothing in the suppressed confession could have reduced petitioner's offense ‘below murder in the first degree’? If, as a matter of Maryland law, juries in criminal cases could determine the admissibility of such evidence on the issue of innocence or guilt, the question would seem to be foreclosed.

But Maryland's constitutional provision making the jury in criminal cases the *Judges of Law* does not mean precisely what it seems to say. The present status of that provision was reviewed recently in *Giles v. State,* 229 Md. 370, 183 A.2d 359, appeal dismissed, 372 U.S. 767, 83 S.Ct. 1102, where the several exceptions, added by statute or carved out by judicial construction, are reviewed. One of those exceptions, material here, is that *‘Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused.’* 229 Md., at 383, 183 A.2d, at p. 365. The cases cited make up a long line going back nearly a century, *Wheeler v. State,* 42 Md. 563, 570,
instructions to the jury were advisory only, ‘except in regard to questions as to what shall be considered as evidence.’ And the court ‘having such right, it follows of course, that it also has the right to prevent counsel from arguing against such an instruction.’ Bell v. State, 57 Md. 108, 120. And see Beard v. State, 71 Md. 275, 280, 17 A. 1044, 1045, 4 L.R.A. 675; Dick v. State, 107 Md. 11, 21, 68 A. 286, 290. Cf. Vogel v. State, 163 Md. 267, 162 A. 705.


*90 We usually walk on treacherous ground when we explore state law, FN4 for state courts, state agencies, and state legislatures are its final expositors under our federal regime. But, as we read the Maryland decisions, it is the court, not the jury, that passes on the ‘admissibility of evidence’ pertinent to ‘the issue of the innocence or guilt of the accused.’ Giles v. State, supra. In the present case a unanimous Court of Appeals has said that nothing in the suppressed confession ‘could have reduced the appellant Brady's offense below murder in the first degree.’ We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record. FN5 But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a *91 bifurcated trial (cf. Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337) denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment.

FN4. For one unhappy incident of recent vintage see Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4, 60 S.Ct. 215, 84 L.Ed. 447, 537, that replaced an earlier opinion in the same case, 309 U.S. 703.

FN5. *In the matter of confessions a hybrid situation exists. It is the duty of the Court to determine from the proof, usually taken out of the presence of the jury, if they were freely and voluntarily made, etc., and admissible. If admitted, the jury is entitled to hear and consider proof of the circumstances surrounding their obtention, the better to determine their weight and sufficiency. The fact that the Court admits them clothes them with no presumption for the jury's purposes that they are either true or were freely and voluntarily made. However, after a confession has been admitted and read to the jury the judge may change his mind and strike it out of the record. Does he strike it out of the jury's mind?’ Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa.L.Rev. 34, 39. See also Bell v. State, supra, 57 Md. at 120; Vogel v. State, 163 Md., at 272, 162 A., at 706-707.

Affirmed.

Separate opinion of Mr. Justice WHITE.

1. The Maryland Court of Appeals declared, ‘The suppression or withholding by the State of material evidence exculpatory to an accused is a violation **1199 of due process' without citing the United States Constitution or the Maryland Constitution which also has a due process clause. FN6 We therefore cannot be sure which Constitution was invoked by the court below and thus whether the State, the only party aggrieved by this portion of the judgment, could even bring the issue here if it desired to do so. See New York City v. Central Savings Bank, 306 U.S. 661, 59 S.Ct. 790, 83 L.Ed. 1058; Minnesota v. National Tea Co., 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920. But in any event, there is no cross-petition by the State, nor has it challenged the correctness of the ruling below that a new trial on punishment was called for by the requirements of due process. In my view, therefore, the Court should not reach the due process question which it decides. It certainly is not the case, as it may be suggested, that without it we would have only a state law question, for assuming the court below was correct in finding a violation of petitioner's rights in the suppression of evidence, the federal question he wants decided here still remains, namely, whether denying him a new trial on guilt as well as punishment deprives him of equal protection. There is thus a federal question to deal with in this Court, cf. Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939. *92 wholly aside from the due process question involving the suppression of evidence. The
majority opinion makes this unmistakably clear. Before dealing with the due process issue it says, ‘The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment.’ After discussing at some length and disposing of the suppression matter in federal constitutional terms it says the question still to be decided is the same as it was before: ‘The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment.’


The result, of course, is that the due process discussion by the Court is wholly advisory.

2. In any event the Court's due process advice goes substantially beyond the holding below. I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for now, to the rule-making or legislative process after full consideration by legislators, bench, and bar.

3. I concur in the Court's disposition of petitioner's equal protection argument.

Mr. Justice HARLAN, whom Mr. Justice BLACK joins, dissenting.

I think this case presents only a single federal question: did the order of the Maryland Court of Appeals granting a new trial, limited to the issue of punishment, violate petitioner's Fourteenth Amendment right to equal protection?

FN1. I agree with my Brother WHITE that there is no necessity for deciding in this case the broad due process questions with which the Court deals at pp. 1196-1197 of its opinion.

The Court, however, holds that the Fourteenth Amendment was not infringed because it considers the Court of Appeals' opinion, and the other Maryland cases dealing with Maryland's constitutional provision making juries in criminal cases 'the Judges of Law, as well as of fact,' as establishing that the Boblit statement would not have been admissible at the original trial on the issue of petitioner's guilt. This indeed seems to be the clear implication of this Court's opinion.

FN2. Section 645G provides in part: 'If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper.' Rule 870 of the Maryland Rules of Procedure, to fashion appropriate relief meeting the peculiar circumstances of this case, rather than from the view that the Boblit statement would have been relevant at the original trial on the issue of petitioner's guilt.

But I cannot read the Court of Appeals' opinion with any such assurance. That opinion can as easily, and perhaps more easily, be read as indicating that the new trial limitation followed from the Court of Appeals' concept of its power, under s 645G of the Maryland Post Conviction Procedure Act, Md.Code, Art. 27 (1960 Cum.Supp.) and Rule 870 of the Maryland Rules of Procedure, to fashion appropriate relief meeting the peculiar circumstances of this case, rather than from the view that the Boblit statement would have been relevant at the original trial only on the issue of punishment. 226 Md., at 430, 174 A.2d, at 171. This interpretation is indeed fortified by the Court of Appeals' earlier general discussion as to the admissibility of third-party confessions, which falls short of saying anything that is dispositive of the crucial issue here. 226 Md., at 427-429, 174 A.2d, at 170.

FN3. It is noteworthy that the Court of Appeals did not indicate that it was limiting in any way the authority of Day v. State, 196 Md. 384, 76 A.2d 729. In that case two defendants were jointly tried and convicted of felony murder. Each admitted participating in the felony but accused the other of the homicide. On appeal the defendants attacked the trial court's denial of a severance, and the State argued that neither defendant was harmed by the
statements put in evidence at the joint trial because admission of the felony amounted to admission of guilt of felony murder. Nevertheless the Court of Appeals found an abuse of discretion and ordered separate new trials on all issues.

Nor do I find anything in any of the other Maryland cases cited by the Court (ante, p. 1197) which bears on the admissibility vel non of the Boblit statement on the issue of guilt. None of these cases suggests anything more relevant here than that a jury may not ‘overrule’ the trial court on questions relating to the admissibility of evidence. Indeed they are by no means clear as to what happens if the jury in fact undertakes to do so. In this very case, for example, the trial court charged that ‘in the final analysis the jury are the judges of both the law and the facts, and the verdict in this case is entirely the jury's responsibility.’ (Emphasis added.)

Moreover, uncertainty on this score is compounded by the State's acknowledgment at the oral argument here that the withheld Boblit statement would have been admissible at the trial on the issue of guilt.\footnote{In response to a question from the Bench as to whether Boblit's statement, had it been offered at petitioner's original trial, would have been admissible for all purposes, counsel for the State, after some colloquy, stated: ‘It would have been, yes.’ In this state of uncertainty as to the proper answer to the critical underlying issue of state law, and in view of the fact that the Court of Appeals did not in terms \(^\text{95}\) address itself to the equal protection question, I do not see how we can properly resolve this case at this juncture. I think the appropriate course is to vacate the judgment of the State Court of Appeals and remand the case to that court for further consideration in light of the governing constitutional principle stated at the outset of this opinion. Cf. \textit{Minnesota v. National Tea Co.}, 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920.}

2. Strickland v. Washington

Supreme Court of the United States
Charles E. STRICKLAND, Superintendent, Florida State Prison, et al., Petitioners
v.
David Leroy WASHINGTON.

No. 82-1554.
Decided May 14, 1984.

See 467 U.S. 1267, 104 S.Ct. 3562.

Defendant, who received death penalty for murder conviction, filed petition for writ of habeas corpus. The United States District Court for the Southern District of Florida, C. Clyde Atkins, Chief Judge, denied relief, and the Court of Appeals, 673 F.2d 879, affirmed in part and vacated in part. On rehearing en banc, 693 F.2d 1243, the Court of Appeals, Vance, Circuit Judge, reversed and remanded. On certiorari, the Supreme Court, Justice O'Connor, held that: (1) proper standard for attorney performance is that of reasonably effective assistance; (2) defense counsel's strategy at sentencing hearing was reasonable and, thus, defendant was not denied effective assistance of counsel; and (3) even assuming challenged conduct of counsel was unreasonable, defendant suffered insufficient prejudice to warrant setting aside his death sentence.

Reversed.

Justice Brennan concurred in part and dissented in part and filed opinion.

Justice Marshall dissented and filed opinion.

West Headnotes

[1] KeyCite Citing References for this Headnote

197 Habeas Corpus
1971 In General
1971(D) Federal Court Review of Petitions by State Prisoners
1971(D)3 Partial Exhaustion
197k352 k. Dismissal. Most Cited Cases
(Formerly 197k45.3(1.20), 197k45.3(1))

Rule requiring dismissal of mixed habeas corpus petitions containing exhausted and unexhausted claims, though to be strictly enforced, is not jurisdictional.
Government violates right to effective assistance of counsel when it interferes in certain ways with ability of counsel to make independent decisions about how to conduct defense. U.S.C.A. Const.Amend. 6.

Benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined proper functioning of adversarial process that trial cannot be relied on as having produced a just result. U.S.C.A. Const.Amend. 6.

A capital sentencing proceeding is sufficiently like a trial in its adversarial format and in existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial, which is to ensure that adversarial testing process works to produce a just result under standards governing decision. U.S.C.A. Const.Amend. 6.
A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components: first, defendant must show that counsel's performance was deficient, requiring showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed defendant by the Sixth Amendment and, second, defendant must show that the deficient performance prejudiced the defense by showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. U.S.C.A. Const.Amend. 6.

[6] KeyCite Citing References for this Headnote

Counsel's function in representing a criminal defendant is to assist defendant, and hence counsel owes client duty of loyalty, a duty to avoid conflicts of interest. U.S.C.A. Const.Amend. 6.

[7] KeyCite Citing References for this Headnote

Counsel's function in representing a criminal defendant is to assist defendant, and hence counsel owes client duty of loyalty, a duty to avoid conflicts of interest. U.S.C.A. Const.Amend. 6.
From counsel's function as assistant to defendant derive the overarching duty to advocate defendant's cause and more particular duties to consult with defendant on important decisions and to keep defendant informed of important developments in course of the prosecution.  

**U.S.C.A. Const.Amend. 6.**
Court must indulge strong presumption that counsel's conduct falls within wide range of reasonable professional assistance; that is, defendant must overcome presumption that, under those circumstances, challenged action might be considered sound trial strategy. U.S.C.A. Const.Amend. 6.

A convicted defendant making a claim of ineffective assistance must identify acts or omissions of counsel that are alleged not to have been result of reasonable professional judgment and, then, court must determine whether, in light of all circumstances, identified acts or omissions were outside wide range of professional competent assistance; in making that determination, court should keep in mind that counsel's function is to make adversarial testing process work in the particular case. U.S.C.A. Const.Amend. 6.
Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. U.S.C.A. Const.Amend. 6.

[14] KeyCite Citing References for this Headnote

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110K1888 k. Determination. Most Cited Cases
(Formerly 110k641.13(1))

110 Criminal Law KeyCite Citing References for this Headnote
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1891 k. Preparation for Trial. Most Cited Cases
(Formerly 110k641.13(6))

Inquiry into counsel's conversations with defendant may be critical to proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. U.S.C.A. Const.Amend. 6.

[15] KeyCite Citing References for this Headnote

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.10 Counsel for Accused
110k1166.10(1) k. In General. Most Cited Cases
(Formerly 110k1166.11(5), 110k1166.11)

An error by counsel, even if professionally unreasonable, does not warrant setting aside judgment in a criminal proceeding if the error had no effect on the judgment. U.S.C.A. Const.Amend. 6.

[16] KeyCite Citing References for this Headnote

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1163 Presumption as to Effect of Error
110k1163(2) k. Conduct of Trial in General. Most Cited Cases
Actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice. **U.S.C.A. Const.Amend. 6.**

[17] **KeyCite Citing References for this Headnote**

**110** Criminal Law
  **110XXIV** Review
  **110XXIV(Q)** Harmless and Reversible Error
  **110k1163** Presumption as to Effect of Error
  **110k1163(2)** k. Conduct of Trial in General. **Most Cited Cases**

As relating to Sixth Amendment claims of ineffective assistance of counsel, prejudice is presumed only if defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance. **U.S.C.A. Const.Amend. 6.**

[18] **KeyCite Citing References for this Headnote**

**110** Criminal Law
  **110XXIV** Review
  **110XXIV(Q)** Harmless and Reversible Error
  **110k1163** Presumption as to Effect of Error
  **110k1163(2)** k. Conduct of Trial in General. **Most Cited Cases**

Actual ineffectiveness claims alleging a deficiency in attorney performance are subject to general requirement that defendant affirmatively prove prejudice. **U.S.C.A. Const.Amend. 6.**

[19] **KeyCite Citing References for this Headnote**

**110** Criminal Law
  **110XXXI** Counsel
  **110XXXI(C)** Adequacy of Representation
    **110XXXI(C)1** In General
      **110k1879** Standard of Effective Assistance in General
      **110k1883** k. Prejudice in General. **Most Cited Cases**
      (Formerly 110k641.13(1))

To succeed on a Sixth Amendment claim of ineffective assistance of counsel, defendant must show that there is a “reasonable probability,” which is a probability sufficient to undermine confidence in the outcome, that, but for counsel's unprofessional errors, result of the proceeding would have been different. **U.S.C.A. Const.Amend. 6.**

[20] **KeyCite Citing References for this Headnote**

**110** Criminal Law
  **110XXIV** Review
In making determination whether specified errors of counsel resulted in required prejudice for a defendant to succeed on a Sixth Amendment claim, a court should presume, absent challenge to judgment on grounds of evidentiary insufficiency, that judge or jury acted according to law. U.S.C.A. Const.Amend. 6.

[21] KeyCite Citing References for this Headnote

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1958 Death Penalty
  110k1959 k. In General. Most Cited Cases
    (Formerly 110k641.13(7))

When a defendant challenges a death sentence on ground of ineffective assistance of counsel, question is whether there is a reasonable probability that, absent the errors, sentencer, including appellate court, to extent it independently reweighs the evidence, would have concluded that balance of aggravating and mitigating circumstances did not warrant death. U.S.C.A. Const.Amend. 6.

[22] KeyCite Citing References for this Headnote

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
  110k1879 Standard of Effective Assistance in General
  110k1886 k. Death Penalty Cases. Most Cited Cases
    (Formerly 110k641.13(1))

In determining whether defendant was denied effective assistance of counsel in death sentence case, court must consider totality of the evidence before judge or jury. U.S.C.A. Const.Amend. 6.

[23] KeyCite Citing References for this Headnote

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
  110k1888 k. Determination. Most Cited Cases
A court need not determine whether counsel's performance was deficient before examining prejudice suffered by defendant as result of alleged deficiencies. U.S.C.A. Const.Amend. 6.


In capital murder case, defense counsel's strategy at sentencing hearing of not seeking out character witnesses or requesting a psychiatric examination or presentence report was reasonable and, thus, defendant was not denied effective assistance of counsel. U.S.C.A. Const.Amend. 6.
Even assuming challenged conduct of defense counsel at sentencing hearing was unreasonable, defendant suffered insufficient prejudice to warrant setting aside his death sentence because, given overwhelming aggravating factors, there was no reasonable probability that omitted evidence would have changed conclusion that aggravating circumstances outweighed mitigating circumstances and, hence, sentence imposed. U.S.C.A. Const.Amend. 6.

Syllabus

FNa1. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondent pleaded guilty in a Florida trial court to an indictment that included three capital murder charges. In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. The trial judge told respondent that he had “a great deal of respect for people who are willing to step forward and admit their responsibility.” In preparing for the sentencing hearing, defense counsel spoke with respondent about his background, but did not seek out character witnesses or request a psychiatric examination. Counsel's decision not to present evidence concerning respondent's character and emotional state reflected his judgment that it was advisable to rely on the plea colloquy for evidence as to such matters, thus preventing the State from cross-examining respondent and from presenting psychiatric evidence of its own. Counsel did not request a presentence report because it would have included respondent's criminal history and thereby would have undermined the claim of no significant prior criminal record. Finding numerous aggravating circumstances and no mitigating circumstance, the trial judge sentenced respondent to death on each of the murder counts. The Florida Supreme Court affirmed, and respondent then sought collateral relief in state court on the ground, inter alia, that counsel had rendered ineffective assistance at the sentencing proceeding in several respects, including his failure to request a psychiatric report, to investigate and present character witnesses, and to seek a presentence report. The trial court denied relief, and the Florida Supreme Court affirmed. Respondent then filed a habeas corpus petition in Federal District Court advancing numerous grounds for relief, including the claim of ineffective assistance of counsel. After an evidentiary hearing, the District Court denied relief, concluding that although counsel made errors in judgment in failing to investigate mitigating evidence further than he did, no prejudice to respondent's sentence resulted from any such error in judgment. The Court of Appeals
ultimately reversed, stating that the Sixth Amendment accorded criminal defendants a right *669 to counsel rendering “reasonably effective assistance given the totality of the circumstances.” After outlining standards for judging whether a defense counsel fulfilled the duty to investigate nonstatutory mitigating circumstances and whether counsel's errors were sufficiently prejudicial to justify reversal, the Court of Appeals remanded the case for application of the standards.

Held:

1. The Sixth Amendment right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding—such as the one provided by Florida law—that is sufficiently like a trial in its adversarial format and in the existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial. Pp. 2063–2064.

2. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or setting aside of a death sentence requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Pp. 2064–2069.

(a) The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. Pp. 2064–2067.

(b) With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of **2056 the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Pp. 2067–2069.

*670 3. A number of practical considerations are important for the application of the standards set forth above. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course
should be followed. The principles governing ineffectiveness claims apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. And in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d), but is a mixed question of law and fact. Pp. 2069–2070.

4. The facts of this case make it clear that counsel's conduct at and before respondent's sentencing proceeding cannot be found unreasonable under the above standards. They also make it clear that, even assuming counsel's conduct was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence. Pp. 2070–2071.

693 F.2d 1243 (5th Cir.1982), reversed.

Carolyn M. Snurkowski, Assistant Attorney General of Florida, argued the cause for petitioners. On the briefs were Jim Smith, Attorney General, and Calvin L. Fox, Assistant Attorney General.

Richard E. Shapiro argued the cause for respondent. With him on the brief was Joseph H. Rodriguez.*

Justice O'CONNOR delivered the opinion of the Court.
This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

I
A
During a 10–day period in September 1976, respondent planned and committed three groups of crimes, which included three brutal stabbing murders, torture, kidnaping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnaping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first-degree murder and multiple counts of robbery, kidnaping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery. Respondent waived his right to a jury trial, again acting against counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.

In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. App. 50–53. He also stated, however, that he accepted responsibility for the crimes. E.g., id., at 54, 57. The trial judge told respondent that he had “a great deal of respect for people who are willing to step forward and admit their responsibility” but that he was making no statement at all about his likely sentencing decision. Id., at 62.

Counsel advised respondent to invoke his right under Florida law to an advisory jury at his capital sentencing hearing. Respondent rejected the advice and waived the right. He chose instead to be sentenced by the trial judge without a jury recommendation.

In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out
character witnesses for respondent. App. to Pet. for Cert. A265. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems. Id., at A266.

Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state. That decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes. See id., at A282. It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent's background and about his claim of emotional stress: the plea colloquy communicated sufficient information about these subjects, and by forgoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross-examining respondent on his claim and from putting on psychiatric evidence of its own. Id., at A223–A225.

Counsel also excluded from the sentencing hearing other evidence he thought was potentially damaging. He successfully moved to exclude respondent's "rap sheet." Id., at A227; App. 311. Because he judged that a presentence report might prove more detrimental than helpful, as it would have included respondent's criminal history and thereby would have undermined the claim of no significant history of criminal activity, he did not request that one be prepared. App. to Pet. for Cert. A227–A228, A265–A266.

At the sentencing hearing, counsel's strategy was based primarily on the trial judge's remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty. Id., at A265–A266. Counsel also argued that respondent had no history of criminal activity and that respondent committed the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances. He further argued that respondent should be spared death because he had surrendered, confessed, and offered to testify against a codefendant and because respondent was fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances. The State put on evidence and witnesses largely for the purpose of describing the details of the crimes. Counsel did not cross-examine the medical experts who testified about the manner of death of respondent's victims.

The trial judge found several aggravating circumstances with respect to each of the three murders. He found that all three murders were especially heinous, atrocious, and cruel, all involving repeated stabblings. All three murders were committed in the course of at least one other dangerous and violent felony, and since all involved robbery, the murders were for pecuniary gain. All three murders were committed to avoid arrest for the accompanying crimes and to hinder law enforcement. In the course of one of the murders, respondent knowingly subjected numerous persons to a grave risk of death by deliberately stabbing and shooting the murder victim's sisters-in-law, who sustained severe—in one case, ultimately fatal—injuries.

With respect to mitigating circumstances, the trial judge made the same findings for all three capital murders. First, although there was no admitted evidence of prior convictions,
respondent had stated that he had engaged in a course of stealing. In any case, even if
respondent had no significant history of criminal activity, the aggravating circumstances
“would still clearly far outweigh” that mitigating factor. Second, the judge found that, during
all three crimes, respondent was not suffering from extreme mental or emotional disturbance
and could appreciate the criminality of his acts. Third, none of the victims was a participant in,
or consented to, respondent's conduct. Fourth, respondent's participation in the crimes
was neither minor nor the result of duress or domination by an accomplice. Finally,
respondent's age (26) could not be considered a factor in mitigation, especially when viewed in
light of respondent's planning of the crimes and disposition of the proceeds of the various
accompanying thefts.

In short, the trial judge found numerous aggravating circumstances and no (or a single
comparatively insignificant) mitigating circumstance. With respect to each of the three
convictions for capital murder, the trial judge concluded: “A careful consideration of all
matters presented to the court impels the conclusion that there are insufficient mitigating
circumstances ... to outweigh the aggravating circumstances.” See Washington v. State, 362
So.2d 658, 663–664 (Fla.1978), (quoting trial court findings), cert. denied, 441 U.S. 937, 99
S.Ct. 2063, 60 L.Ed.2d 666 (1979). He therefore sentenced respondent to death on each of the
three counts of murder and to prison terms for the other crimes. The Florida Supreme Court
upheld the convictions and sentences on direct appeal.

B
Respondent subsequently sought collateral relief in state court on numerous grounds, among
them that counsel had rendered ineffective assistance at the sentencing proceeding. Respondent
challenged counsel's assistance in six respects. He asserted that counsel was ineffective
because he failed to move for a continuance to prepare for sentencing, to request a psychiatric
report, to investigate and present character witnesses, to seek a presentence investigation
report, to present meaningful arguments to the sentencing judge, and to investigate the medical
examiner's reports or cross-examine the medical experts. In support of the claim, respondent
submitted 14 affidavits from friends, neighbors, and relatives stating that they would have
testified if asked to do so. He also submitted one psychiatric report and one psychological
report stating that respondent, though not under the influence of extreme mental or
emotional disturbance, was “chronically frustrated and depressed because of his economic
dilemma” at the time of his crimes. App. 7; see also id., at 14.

The trial court denied relief without an evidentiary hearing, finding that the record evidence
conclusively showed that the ineffectiveness claim was meritless. App. to Pet. for Cert. A206–
A243. Four of the assertedly prejudicial errors required little discussion. First, there were no
grounds to request a continuance, so there was no error in not requesting one when respondent
pleaded guilty. Id., at A218–A220. Second, failure to request a presentence investigation was
not a serious error because the trial judge had discretion not to grant such a request and
because any presentence investigation would have resulted in admission of respondent's “rap
sheet” and thus would have undermined his assertion of no significant history of criminal
activity. Id., at A226–A228. Third, the argument and memorandum given to the sentencing
judge were “admirable” in light of the overwhelming aggravating circumstances and absence
of mitigating circumstances. Id., at A228. Fourth, there was no error in failure to examine the
medical examiner's reports or to cross-examine the medical witnesses testifying on the manner of death of respondent's victims, since respondent admitted that the victims died in the ways shown by the unchallenged medical evidence. Id., at A229.

The trial court dealt at greater length with the two other bases for the ineffectiveness claim. The court pointed out that a psychiatric examination of respondent was conducted by state order soon after respondent's initial arraignment. That report states that there was no indication of major mental illness at the time of the crimes. Moreover, both the reports submitted in the collateral proceeding state that, although respondent was “chronically frustrated and depressed because of his economic dilemma,” he was not under the influence of extreme mental or emotional disturbance. All three reports thus directly undermine the contention made at the sentencing hearing that respondent was suffering from extreme mental or emotional disturbance during his crime spree. Accordingly, counsel could reasonably decide not to seek psychiatric reports; indeed, by relying solely on the plea colloquy to support the emotional disturbance contention, counsel denied the State an opportunity to rebut his claim with psychiatric testimony. In any event, the aggravating circumstances were so overwhelming that no substantial prejudice resulted from the absence at sentencing of the psychiatric evidence offered in the collateral attack.

The court rejected the challenge to counsel's failure to develop and to present character evidence for much the same reasons. The affidavits submitted in the collateral proceeding showed nothing more than that certain persons would have testified that respondent was basically a good person who was worried about his family's financial problems. Respondent himself had already testified along those lines at the plea colloquy. Moreover, respondent's admission of a course of stealing rebutted many of the factual allegations in the affidavits. For those reasons, and because the sentencing judge had stated that the death sentence would be appropriate even if respondent had no significant prior criminal history, no substantial prejudice resulted from the absence at sentencing of the character evidence offered in the collateral attack.

Applying the standard for ineffectiveness claims articulated by the Florida Supreme Court in Knight v. State, 394 So.2d 997 (1981), the trial court concluded that respondent had not shown that counsel's assistance reflected any substantial and serious deficiency measurably below that of competent counsel that was likely to have affected the outcome of the sentencing proceeding. The court specifically found: “[A]s a matter of law, the record affirmatively demonstrates beyond any doubt that even if [counsel] had done each of the ... things [that respondent alleged counsel had failed to do] at the time of sentencing, there is not even the remotest chance that the outcome would have been any different. The plain fact is that the aggravating circumstances proved in this case were completely overwhelming....” App. to Pet. for Cert. A230.

The Florida Supreme Court affirmed the denial of relief. Washington v. State, 397 So.2d 285 (1981). For essentially the reasons given by the trial court, the State Supreme Court concluded that respondent had failed to make out a prima facie case of either “substantial deficiency or possible prejudice” and, indeed, had “failed to such a degree that we believe, to the point of a moral certainty, that he is entitled to no relief....” Id., at 287. Respondent's claims were “shown
conclusively to be without merit so as to obviate the need for an evidentiary hearing.” Id., at 286.

C

Respondent next filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. He advanced numerous grounds for relief, among them ineffective assistance of counsel based on the same errors, except for the failure to move for a continuance, **2060 as those he had identified in state court. The District Court held an evidentiary hearing to inquire into trial counsel's efforts to investigate and to present mitigating circumstances. Respondent offered the affidavits and reports he had submitted in the state collateral proceedings; he also called his trial counsel to testify. The State of Florida, over respondent's objection, called the trial judge to testify.

The District Court disputed none of the state court factual findings concerning trial counsel's assistance and made findings of its own that are consistent with the state court findings. The account of trial counsel's actions and decisions given above reflects the combined findings. On the legal issue of ineffectiveness, the District Court concluded that, although trial counsel made errors in judgment in failing to *679 investigate nonstatutory mitigating evidence further than he did, no prejudice to respondent's sentence resulted from any such error in judgment. Relying in part on the trial judge's testimony but also on the same factors that led the state courts to find no prejudice, the District Court concluded that “there does not appear to be a likelihood, or even a significant possibility,” that any errors of trial counsel had affected the outcome of the sentencing proceeding. App. to Pet. for Cert. A285–A286. The District Court went on to reject all of respondent's other grounds for relief, including one not exhausted in state court, which the District Court considered because, among other reasons, the State urged its consideration. Id., at A286–A292. The court accordingly denied the petition for a writ of habeas corpus.

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit affirmed in part, vacated in part, and remanded with instructions to apply to the particular facts the framework for analyzing ineffectiveness claims that it developed in its opinion. 673 F.2d 879 (5th Cir.1982). The panel decision was itself vacated when Unit B of the former Fifth Circuit, now the Eleventh Circuit, decided to rehear the case en banc. 679 F.2d 23 (1982). The full Court of Appeals developed its own framework for analyzing ineffective assistance claims and reversed the judgment of the District Court and remanded the case for new factfinding under the newly announced standards. 693 F.2d 1243 (1982).

The court noted at the outset that, because respondent had raised an unexhausted claim at his evidentiary hearing in the District Court, the habeas petition might be characterized as a mixed petition subject to the rule of Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), requiring dismissal of the entire petition. The court held, however, that the exhaustion requirement is “a matter of comity rather than a matter of jurisdiction” and hence admitted of exceptions. The court agreed with the District Court that this case came within an exception to the mixed petition rule. 693 F.2d, at 1248, n. 7.

*680 Turning to the merits, the Court of Appeals stated that the Sixth Amendment right to assistance of counsel accorded criminal defendants a right to “counsel reasonably likely to
render and rendering reasonably effective assistance given the totality of the circumstances.”  

Id., at 1250. The court remarked in passing that no special standard applies in capital cases such as the one before it: the punishment that a defendant faces is merely one of the circumstances to be considered in determining whether counsel was reasonably effective. Id., at 1250, n. 12. The court then addressed respondent's contention that his trial counsel's assistance was not reasonably effective because counsel breached his duty to investigate nonstatutory mitigating circumstances.

The court agreed that the Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options. The court observed that counsel's investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight, and that “[t]he amount of pretrial investigation that is reasonable defies precise measurement.” Id., at 1251. Nevertheless, putting guilty-plea cases to one side, the court attempted to classify cases presenting issues concerning the scope of the duty to investigate before proceeding to trial.

If there is only one plausible line of defense, the court concluded, counsel must conduct a “reasonably substantial investigation” into that line of defense, since there can be no strategic choice that renders such an investigation unnecessary. Id., at 1252. The same duty exists if counsel relies at trial on only one line of defense, although others are available. In either case, the investigation need not be exhaustive. It must include “‘an independent examination of the facts, circumstances, pleadings and laws involved.’ ” Id., at 1253 (quoting Rummel v. Estelle, 590 F.2d 103, 104 (CA5 1979)). The scope of the duty, however, depends on such facts as the strength of the government's case and the likelihood that pursuing certain leads may prove more harmful than helpful. 693 F.2d, at 1253, n. 16.

If there is more than one plausible line of defense, the court held, counsel should ideally investigate each line substantially before making a strategic choice about which lines to rely on at trial. If counsel conducts such substantial investigations, the strategic choices made as a result “will seldom if ever” be found wanting. Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment. Id., at 1254.

If counsel does not conduct a substantial investigation into each of several plausible lines of defense, assistance may nonetheless be effective. Counsel may not exclude certain lines of defense for other than strategic reasons. Id., at 1257–1258. Limitations of time and money, however, may force early strategic choices, often based solely on conversations with the defendant and a review of the prosecution's evidence. Those strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based. Thus, “when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial.” Id., at 1255 (footnote omitted). Among the factors relevant to deciding whether particular strategic choices are reasonable are the experience of
the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense. \textit{Id.}, at 1256–1257, n. 23.

Having outlined the standards for judging whether defense counsel fulfilled the duty to investigate, the Court of Appeals turned its attention to the question of the prejudice to the defense that must be shown before counsel's errors justify reversal of the judgment. The court observed that only in cases of outright denial of counsel, of affirmative government interference in the representation process, or of inherently prejudicial conflicts of interest had this Court said that no special showing of prejudice need be made. \textit{Id.}, at 1258–1259. For cases of deficient performance by counsel, where the government is not directly responsible for the deficiencies and where evidence of deficiency may be more accessible to the defendant than to the prosecution, the defendant must show that counsel's errors “resulted in actual and substantial disadvantage to the course of his defense.” \textit{Id.}, at 1262. This standard, the Court of Appeals reasoned, is compatible with the “cause and prejudice” standard for overcoming procedural defaults in federal collateral proceedings and discourages insubstantial claims by requiring more than a showing, which could virtually always be made, of some conceivable adverse effect on the defense from counsel's errors. The specified showing of prejudice would result in reversal of the judgment, the court concluded, unless the prosecution showed that the constitutionally deficient performance was, in light of all the evidence, harmless beyond a reasonable doubt. \textit{Id.}, at 1260–1262.

The Court of Appeals thus laid down the tests to be applied in the Eleventh Circuit in challenges to convictions on the ground of ineffectiveness of counsel. Although some of the judges of the court proposed different approaches to judging ineffectiveness claims either generally or when raised in federal habeas petitions from state prisoners, \textit{Id.}, at 1264–1280 (opinion of Tjoflat, J.); \textit{Id.}, at 1280 (opinion of Clark, J.); \textit{Id.}, at 1285–1288 (opinion of Roney, J., joined by Fay and Hill, JJ.); \textit{Id.}, at 1288–1291 (opinion of Hill, J.), and although some believed that no remand was necessary in this case, \textit{Id.}, at 1281–1285 (opinion of Johnson, J., joined by Anderson, J.); \textit{Id.}, at 1285–1288 (opinion of Roney, J., joined by Fay and Hill, JJ.); \textit{Id.}, at 1288–1291 (opinion of Hill, J.), a majority of the judges of the en banc court agreed that the case should be remanded for application of the newly announced standards. Summarily rejecting respondent's claims other than ineffectiveness of counsel, the court accordingly reversed the judgment of the District Court and remanded the case. On remand, the court finally ruled, the state trial judge's testimony, though admissible “to the extent that it contains personal knowledge of historical facts or expert opinion,” was not to be considered admitted into evidence to explain the judge's mental processes in reaching his sentencing decision. \textit{Id.}, at 1262–1263; see \textit{Fayerweather v. Ritch}, 195 U.S. 276, 306–307, 25 S.Ct. 58, 67–68, 49 L.Ed. 193 (1904).

D

Petitioners, who are officials of the State of Florida, filed a petition for a writ of certiorari seeking review of the decision of the Court of Appeals. The petition presents a type of Sixth Amendment claim that this Court has not previously considered in any generality. The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused. E.g., \textit{United States v. Cronic}, 466 U.S.
With the exception of *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), however, which involved a claim that counsel's assistance was rendered ineffective by a conflict of interest, the Court has never directly and fully addressed a claim of “actual ineffectiveness” of counsel's assistance in a case going to trial. Cf. *United States v. Agurs*, 427 U.S. 97, 102, n. 5, 96 S.Ct. 2392, 2397, n. 5, 49 L.Ed.2d 342 (1976).

In assessing attorney performance, all the Federal Courts of Appeals and all but a few state courts have now adopted the “reasonably effective assistance” standard in one formulation or another. See *Trapnell v. United States*, 725 F.2d 149, 151–152 (CA2 1983); App. B to Brief for United States in *United States v. Cronic*, supra, at pp. 3a–6a; Sarno, *Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client*, 2 A.L.R. 4th 99–157, §§ 7–10 (1980). Yet this Court has not had occasion squarely to decide whether that is the proper standard. With respect to the prejudice that a defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in *United States v. Cronic*, supra, at 7a–10a; Sarno, supra, at 83–99, § 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard articulated by Judge Leventhal in his plurality opinion in *United States v. Decoster*, 199 U.S.App.D.C. 359, 371, 374–375, 624 F.2d 196, 208, 211–212 (en banc), cert. denied, 444 U.S. 944, 100 S.Ct., at 302, 62 L.Ed.2d 311 (1979), and adopted by the State of Florida in *Knight v. State*, 394 So.2d, at 1001, a standard that requires a showing that specified deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F.2d, at 1261–1262.

[1] For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. 462 U.S. 1105, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). We agree with the Court of Appeals that the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See *Rose v. Lundy*, 455 U.S., at 515–520, 102 S.Ct., at 1201–04. We therefore address the merits of the constitutional issue.

II

In a long line of cases that includes *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory
process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the “ample opportunity to meet the case of the prosecution” to which they are entitled. See Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942); see Powell v. Alabama, supra, 287 U.S. at 68–69, 53 S.Ct. 63–64.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); Gideon v. Wainwright, supra; Johnson v. Zerbst, supra. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

[2] *686 For that reason, the Court has recognized that “the right to counsel is the right to the effective assistance of counsel.” See McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, e.g., Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (bar on attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) (bar on summation at bench trial); **2064 Brooks v. Tennessee, 406 U.S. 605, 612–613, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593–596, 81 S.Ct. 756, 768–770, 5 L.Ed.2d 783 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render “adequate legal assistance,” Cuyler v. Sullivan, 446 U.S., at 344, 100 S.Ct., at 1716. Id., at 345–350, 100 S.Ct., at 1716–1719 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective).

[3] The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases—that is, those presenting claims of “actual ineffectiveness.” In giving meaning to the requirement, however, we must take its purpose—to ensure a fair trial—as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

[4] The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may
involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see *687 Barclay v. Florida, 463 U.S. 939, 952–954, 103 S.Ct. 3418, 3425, 77 L.Ed.2d 1134 (1983); Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III

[5] A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

A

[6] As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See Trapnell v. United States, 725 F.2d, at 151–152. The Court indirectly recognized as much when it stated in McMann v. Richardson, supra, 397 U.S., at 770, 771, 90 S.Ct., at 1448, 1449, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not “a reasonably competent attorney” and the advice was not “within the range of competence demanded of attorneys in criminal cases.” See also Cuyler v. Sullivan, supra, 446 U.S., at 344, 100 S.Ct., at 1716. When a convicted defendant*688 complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to “counsel,” not specifying particular requirements of effective assistance. It relies**2065 instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See Michel v. Louisiana, 350 U.S. 91, 100–101, 76 S.Ct. 158, 163–164, 100 L.Ed. 83 (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

[7] [8] [9] Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, 446 U.S., at 346, 90 S.Ct., at 1717. From counsel's function as assistant to the defendant derive the overarching duty to advocate
the defendant's cause and the more particular duties to consult with the defendant on important
decisions and to keep the defendant informed of important developments in the course of the
prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render
the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., at 68–69, 53
S.Ct., at 63–64.

[10] These basic duties neither exhaustively define the obligations of counsel nor form a
checklist for judicial evaluation of attorney performance. In any case presenting an
ineffectiveness claim, the performance inquiry must be whether counsel's assistance was
reasonable considering all the circumstances. Prevailing norms of practice as reflected in
American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4–
1.1 to 4–8.6 (2d ed. 1980) (“The Defense Function”), are guides to determining what is
reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct
can satisfactorily take *689 account of the variety of circumstances faced by defense counsel
or the range of legitimate decisions regarding how best to represent a criminal defendant. Any
such set of rules would interfere with the constitutionally protected independence of counsel
and restrict the wide latitude counsel must have in making tactical decisions. See United States
v. Decoster, 199 U.S.App.D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed
guidelines for representation could distract counsel from the overriding mission of vigorous
advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee
of the Sixth Amendment is not to improve the quality of legal representation, although that is a
goal of considerable importance to the legal system. The purpose is simply to ensure that
criminal defendants receive a fair trial.

[11] Judicial scrutiny of counsel's performance must be highly deferential. It is all too
tempting for a defendant to second-guess counsel's assistance after conviction or adverse
sentence, and it is all too easy for a court, examining counsel's defense after it has proved
unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf.
fair assessment of attorney performance requires that every effort be made to eliminate the
distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged
conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the
difficulties inherent in making the evaluation, a court must indulge a strong presumption that
counsel's conduct falls within the wide range of reasonable professional assistance; that is, the
defendant must overcome the presumption that, under the circumstances, the challenged action
“might be considered sound trial strategy.” See Michel v. Louisiana, supra, 350 U.S., at 101,
76 S.Ct., at 164. There are countless ways to provide effective assistance in any given case.
Even the best criminal defense attorneys would not defend a particular client in the same way.
See *690 **2066 Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death

The availability of intrusive post-trial inquiry into attorney performance or of detailed
guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.
Criminal trials resolved unfavorably to the defendant would increasingly come to be followed
by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even
willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid
requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

[12] Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

[13] These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

[14] 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. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, supra, at 372–373, 624 F.2d, at 209–210.

B

[15] An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. United States v. Morrison, 449 U.S. 361, 364–365, 101 S.Ct. 665, 667–668, 66 L.Ed.2d 564 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a
defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

[16] In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, 466 U.S., at 659, and n. 25, 104 S.Ct., at 2046–2047, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. 466 U.S., at 658, 104 S.Ct., at 2046. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

[17] One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S., at 345–350, 100 S.Ct., at 1716–1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed.Rule Crim.Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel “actively represented conflicting interests” and that “an actual conflict of interest adversely affected his lawyer's performance.” Cuyler v. Sullivan, supra, 446 U.S., at 350, 348, 100 S.Ct., at 1719, 1718 (footnote omitted).

[18] *693 Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela–Bernal, 458 U.S. 858, 866–867, 102 S.Ct. 3440, 3446–3447, 73 L.Ed.2d 1193 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors “impaired the presentation of the defense.” Brief for Respondent 58.
That standard, however, provides no workable principle. Since any error, if it is indeed an error, “impairs” the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding.

On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. See Brief for United States as Amicus Curiae 19–20, and nn. 10, 11. Nevertheless, the standard is not quite appropriate.

Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. United States v. Johnson, 327 U.S. 106, 112, 66 S.Ct. 464, 466, 90 L.Ed. 562 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

[19] Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 427 U.S., at 104, 112–113, 96 S.Ct., at 2397, 2401–2402, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, United States v. Valenzuela-Bernal, supra, 458 U.S., at 872–874, 102 S.Ct., at 3449–3450. The defendant must show that there is 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.

[20] In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, “nullification,” and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the
performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

[21] The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a **2069 reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

[22] [23] In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to *696 be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV
A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. Cf. Trapnell v. United States, 725 F.2d, at 153 (in several years of applying “farce and mockery” standard along with “reasonable competence” standard, court “never found that the result of a case hinged on the choice of a particular standard”). In particular, the minor differences in the lower courts' precise formulations of the performance standard are insignificant: the different *697 formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier
burden on defendants than the tests laid down today. The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case.

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

**2070** [24] The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. As indicated by the “cause and prejudice” test for overcoming procedural waivers of claims of error, the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment. See United States v. Frady, 456 U.S. 152, 162–169, 102 S.Ct. 1584, 1591–1595, 71 L.Ed.2d 816 (1982); Engle v. Isaac, 456 U.S. 107, 126–129, 102 S.Ct. 1558, 1570–1572, 71 L.Ed.2d 783 (1982). An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus, see *698 id., at 126, 102 S.Ct., at 1570*, no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

[25] Finally, in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of “basic, primary, or historical fac[t],” Townsend v. Sain, 372 U.S. 293, 309, n. 6, 83 S.Ct. 745, 755, n. 6, 9 L.Ed.2d 770 (1963). Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. See Cuyler v. Sullivan, 446 U.S., at 342, 100 S.Ct., at 1714. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

V
Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles. The record makes it possible to do so. There are no conflicts between the state and federal courts over findings of fact, and the principles we have articulated are sufficiently close to the principles applied both in the Florida courts and in the District Court that it is clear that the factfinding was not affected by erroneous legal principles. See Pullman–Standard v. Swint, 456 U.S. 273, 291–292, 102 S.Ct. 1781, 1791–1792, 72 L.Ed.2d 66 (1982).
Application of the governing principles is not difficult in this case. The facts as described above, see supra, at 2056–2060, make clear that the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable. They also make clear that, even assuming the *699 challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence.

[26] With respect to the performance component, the record shows that respondent's counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. Although counsel understandably felt hopeless about respondent's prospects, see App. 383–384, 400–401, nothing in the record indicates, as one possible reading of the District Court's opinion suggests, see App. to Pet. for Cert. A282, that counsel's sense of hopelessness distorted his professional judgment. Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.

The trial judge's views on the importance of owning up to one's crimes were well **2071 known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. Respondent had already been able to mention at the plea colloquy the substance of what there was to know about his financial and emotional troubles. Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in. On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

[27] With respect to the prejudice component, the lack of merit of respondent's claim is even more stark. The evidence that respondent says his trial counsel should have offered at the *700 sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. As the state courts and District Court found, at most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his “rap sheet” would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.

Our conclusions on both the prejudice and performance components of the ineffectiveness inquiry do not depend on the trial judge's testimony at the District Court hearing. We therefore need not consider the general admissibility of that testimony, although, as noted supra, at 2069,
that testimony is irrelevant to the prejudice inquiry. Moreover, the prejudice question is resolvable, and hence the ineffectiveness claim can be rejected, without regard to the evidence presented at the District Court hearing. The state courts properly concluded that the ineffectiveness claim was meritless without holding an evidentiary hearing.

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. Respondent's sentencing proceeding was not fundamentally unfair.

*701 We conclude, therefore, that the District Court properly declined to issue a writ of habeas corpus. The judgment of the Court of Appeals is accordingly

Reversed.

Justice BRENNAN, concurring in part and dissenting in part.
I join the Court's opinion but dissent from its judgment. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see Gregg v. Georgia, 428 U.S. 153, 227, 96 S.Ct. 2909, 2971, 49 L.Ed.2d 859 (1976) (BRENNAN, J., dissenting), I would vacate respondent's death sentence and remand the case for further proceedings. FN1

Autry v. Estelle, 464 U.S. 1, 6, 104 S.Ct. 20, 23, 78 L.Ed.2d 1 (1983) (STEVENS, J.,
dissenting) (suggesting that Court's practice in reviewing applications in death cases “injects
uncertainty and disparity into the review procedure, adds to the burdens of counsel, distorts the
deliberative process within this Court, and increases the risk of error”). It is difficult to believe
that the decision whether to put an individual to death generates any less emotional pressure
among juries, trial judges, and appellate courts than it does among Members of this Court.

This case and United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657, present
our first occasions to elaborate the appropriate standards for judging claims of ineffective
assistance of counsel. In Cronic, the Court considers such claims in the context of cases “in
which the surrounding circumstances [make] it so unlikely that any lawyer could provide
effective assistance that ineffectiveness [is] properly presumed without inquiry into actual
performance at trial,” at 661, 104 S.Ct., at 2048. This case, in contrast, concerns claims of
ineffective assistance based on allegations of specific errors by counsel—claims which, by
their very nature, require courts to evaluate both the attorney’s performance and the effect of
that performance on the reliability and fairness of the proceeding. Accordingly, a defendant
making a claim of this kind must show not only that his lawyer's performance was inadequate
but also that he was prejudiced thereby. See also Cronic, at 659, n. 26, 104 S.C.t., at 2047, n.
26.

I join the Court's opinion because I believe that the standards it sets out today will both provide
helpful guidance to courts considering claims of actual ineffectiveness of counsel and also
permit those courts to continue their efforts to achieve progressive development of this area of
the law. Like all federal courts and most state courts that have previously addressed the matter,
see ante, at 2062, the Court concludes that “the proper standard for attorney performance is
that of reasonably effective assistance.” Ante, at 2064. And, *703 rejecting the strict “outcome-
determinative” test employed by some courts, the Court adopts as the appropriate standard for
prejudice a requirement that the defendant “show that there is a reasonable probability that, but
for counsel's unprofessional errors, the result of the proceeding would have been different,”
defining a “reasonable probability” as “a probability sufficient to undermine confidence in the
outcome.” Ante, at 2068. I believe these standards are sufficiently precise to permit meaningful
distinctions between those attorney derelictions that deprive defendants of their constitutional
rights and those that do not; at the same time, the standards are sufficiently flexible to
accommodate the wide variety of situations giving rise to claims of this kind.

With respect to the performance standard, I agree with the Court's conclusion that a
“particular set of detailed rules for counsel's conduct” would be inappropriate. Ante, at 2065.
Precisely because the standard of “reasonably effective assistance” adopted today requires that
counsel's performance be measured in light of the particular circumstances of the case, I do not
believe our decision “will stunt the development of constitutional doctrine in this area,” post, at
2076 (MARSHALL, J., dissenting). Indeed, the Court's suggestion that today's decision is
largely consistent with the approach taken by the lower courts, ante, at 2069, simply indicates
that those courts may continue to develop governing principles on a case-by-case basis in the
common-law tradition, as they have in the past. Similarly, the prejudice standard announced
today does not erect an insurmountable obstacle to meritorious claims, but rather simply
requires courts carefully to examine trial records in light of both the nature and seriousness of counsel's errors and their effect in the particular circumstances of the case. Ante, at 2069. FN2

FN2. Indeed, counsel's incompetence can be so serious that it rises to the level of a constructive denial of counsel which can constitute constitutional error without any showing of prejudice. See Cronic, 466 U.S., at 659–660, 104 S.Ct., at 2047; Javor v. United States, 724 F.2d 831, 834 (CA9 1984) ("Prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at all").

*704 II

Because of their flexibility and the requirement that they be considered in light of the particular circumstances of the case, the standards announced today can and should be applied with concern for the special considerations that must attend review of counsel's performance in a capital sentencing proceeding. In contrast to a case in which a finding of ineffective assistance requires a new trial, a conclusion that counsel was ineffective with respect to only the penalty phase of a capital trial imposes on the State the far lesser burden of reconsideration of the sentence alone. On the other hand, the consequences to the defendant of incompetent assistance at a capital sentencing could not, of course, be greater. Recognizing the unique seriousness of such a proceeding, we have repeatedly emphasized that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Zant v. Stephens, 462 U.S. 862, 874, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983) (quoting Gregg v. Georgia, 428 U.S., at 188–189, 96 S.Ct., at 2932–2933 (opinion of Stewart, Powell, and Stevens, JJ.)).

For that reason, we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding. As Justice MARSHALL emphasized last Term:


**2074 "Because of th[e] basic difference between the death penalty and all other punishments, this Court has consistently recognized that there is 'a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.' Ibid." Barefoot v. Estelle, 463 U.S. 880, 913–914, 103 S.Ct. 3383, 3405, 77 L.Ed.2d 1090 (1983) (dissenting opinion).
See also id., at 924, 103 S.Ct., at 3405 (BLACKMUN, J., dissenting). In short, this Court has taken special care to minimize the possibility that death sentences are “imposed out of whim, passion, prejudice, or mistake.” Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S.Ct. 869, 878, 71 L.Ed.2d 1 (1982) (O'CONNOR, J., concurring).

In the sentencing phase of a capital case, “[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.” Jurek v. Texas, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). For that reason, we have repeatedly insisted that “the sentencer in capital cases must be permitted to consider any relevant mitigating factor.” Eddings v. Oklahoma, 455 U.S., at 112, 102 S.Ct., at 875. In fact, as Justice O'CONNOR has noted, a sentencing judge's failure to consider relevant aspects of a defendant's character and background creates such an unacceptable risk that the death penalty was unconstitutionally imposed that, even in cases where the matter was not raised below, the “interests of justice” may impose on reviewing courts “a duty to remand [the] case for resentencing.” Id., at 117, n., and 119, 102 S.Ct., at 877, n., and 878 (O'CONNOR, J., concurring).

*706 Of course, “[t]he right to present, and to have the sentencer consider, any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing.” Comment, 83 Colum.L.Rev. 1544, 1549 (1983). See, e.g., Burger v. Zant, 718 F.2d 979 (CA11 1983) (defendant, 17 years old at time of crime, sentenced to death after counsel failed to present any evidence in mitigation), stay granted, 466 U.S. 902, 104 S.Ct. 1676, 80 L.Ed.2d 151 (1984). Accordingly, counsel's general duty to investigate, ante, at 2066, takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care.

That the Court rejects the ineffective-assistance claim in this case should not, of course, be understood to reflect any diminution in commitment to the principle that “‘the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.’” Eddings v. Oklahoma, supra, 455 U.S., at 112, 102 S.Ct., at 875 (quoting Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.)). I am satisfied that the standards announced today will go far towards assisting lower federal courts and state courts in discharging their constitutional duty to ensure that every criminal defendant receives the effective assistance of counsel guaranteed by the Sixth Amendment.

Justice MARSHALL, dissenting.

The Sixth and Fourteenth Amendments guarantee a person accused of a crime the right to the aid of a lawyer in preparing and presenting his defense. It has long been settled that “the right to counsel is the right to the effective assistance*707 of counsel.” McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, n. 14, 25 L.Ed.2d 763 (1970). The state and lower federal courts have developed standards for distinguishing effective from inadequate**2075
assistance.\textsuperscript{FN1} Today, for the first time, this Court attempts to synthesize and clarify those standards. For the most part, the majority's efforts are unhelpful. Neither of its two principal holdings seems to me likely to improve the adjudication of Sixth Amendment claims. And, in its zeal to survey comprehensively this field of doctrine, the majority makes many other generalizations and suggestions that I find unacceptable. Most importantly, the majority fails to take adequate account of the fact that the locus of this case is a capital sentencing proceeding. Accordingly, I join neither the Court's opinion nor its judgment.


The opinion of the Court revolves around two holdings. First, the majority ties the constitutional minima of attorney performance to a simple “standard of reasonableness.” Ante, at 2065. Second, the majority holds that only an error of counsel that has sufficient impact on a trial to “undermine confidence in the outcome” is grounds for overturning a conviction. Ante, at 2068. I disagree with both of these rulings.

My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave \textsuperscript{*708} “reasonably” and must act like “a reasonably competent attorney,” ante, at 2065, is to tell them almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes “professional” representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel. In my view, the Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs.

The debilitating ambiguity of an “objective standard of reasonableness” in this context is illustrated by the majority's failure to address important issues concerning the quality of representation mandated by the Constitution. It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case. Is a “reasonably competent attorney” a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney? It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by locale?\textsuperscript{FN2} The majority offers no clues as to the proper responses to these questions.
Cf., e.g., Moore v. United States, 432 F.2d 730, 736 (CA3 1970) (defining the constitutionally required level of performance as “the exercise of the customary skill and knowledge which normally prevails at the time and place”).

The majority defends its refusal to adopt more specific standards primarily on the ground that “[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” Ante, at 2065. I agree that counsel must be afforded “wide latitude” when making “tactical decisions” regarding trial strategy, see ante, at 2065; cf. infra, at 2077–2078, but many aspects of the job of a criminal defense attorney are more amenable to judicial oversight. For example, much of the work involved in preparing for a trial, applying for bail, conferring with one's client, making timely objections to significant, arguably erroneous rulings of the trial judge, and filing a notice of appeal if there are colorable grounds therefor could profitably be made the subject of uniform standards.

The opinion of the Court of Appeals in this case represents one sound attempt to develop particularized standards designed to ensure that all defendants receive effective legal assistance. See 693 F.2d 1243, 1251–1258 (CA5 1982) (en banc). For other, generally consistent efforts, see United States v. Decoster, 159 U.S.App.D.C. 326, 333–334, 487 F.2d 1197, 1203–1204 (1973), disapproved on rehearing, 199 U.S.App.D.C. 359, 624 F.2d 196 (en banc), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979); Coles v. Peyton, 389 F.2d 224, 226 (CA4), cert. denied, 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968); People v. Pope, 23 Cal.3d 412, 424–425, 590 P.2d 859, 866, 152 Cal.Rptr. 732, 739 (1979); State v. Harper, 57 Wis.2d 543, 55–557, 205 N.W.2d 1, 6–9 (1973). By refusing to address the merits of these proposals, and indeed suggesting that no such effort is worthwhile, the opinion of the Court, I fear, will stunt the development of constitutional doctrine in this area.

I object to the prejudice standard adopted by the Court for two independent reasons. First, it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel. In view of all these impediments to a fair evaluation of the probability that the outcome of a trial was affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.


FN3. By refusing to address the merits of these proposals, and indeed suggesting that no such effort is worthwhile, the opinion of the Court, I fear, will stunt the development of constitutional doctrine in this area.

FN4. In view of all these impediments to a fair evaluation of the probability that the outcome of a trial was affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.
FN4. Cf. United States v. Ellison, 557 F.2d 128, 131 (CA7 1977). In discussing the related problem of measuring injury caused by joint representation of conflicting interests, we observed: “[T]he evil ... is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.” Holloway v. Arkansas, 435 U.S. 475, 490–491, 98 S.Ct. 1173, 1181–1182, 55 L.Ed.2d 426 (1978) (emphasis in original). When defense counsel fails to take certain actions, not because he is “compelled” to do so, but because he is incompetent, it is often equally difficult to ascertain the prejudice consequent upon his omissions.

Second and more fundamentally, the assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures. FN5 The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.

FN5. See United States v. Decoster, 199 U.S.App.D.C. 359, 454–457, 624 F.2d 196, 291–294 (en banc) (Bazelon, J., dissenting), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979); Note, 93 Harv.L.Rev., at 767–770. In Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967), we acknowledged that certain constitutional rights are “so basic to a fair trial that their infraction can never be treated as harmless error.” Among these rights is the right to the assistance of counsel at trial. Id., at 23, n. 8, 87 S.Ct., at 827, n. 8; see Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). FN6 In my view, the right *712 to effective assistance of counsel is entailed by the right to counsel, and abridgment of the former is equivalent to abridgment of the latter. FN7 I would thus hold that a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby.

FN6. In cases in which the government acted in a way that prevented defense counsel from functioning effectively, we have refused to require the defendant, in order to obtain a new trial, to demonstrate that he was injured. In Glasser v. United States, 315 U.S. 60, 75–76, 62 S.Ct. 457, 467–468, 86 L.Ed. 680 (1942), for example, we held: “To determine the precise degree of prejudice sustained by [a defendant] as a result of the court's appointment of [the same counsel for two codefendants with conflicting interests] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in
nice calculations as to the amount of prejudice arising from its denial.” As the Court today acknowledges, *United States v. Cronic*, 466 U.S., at 662, n. 31, 104 S.Ct., at 2048, n. 31, whether the government or counsel himself is to blame for the inadequacy of the legal assistance received by a defendant should make no difference in deciding whether the defendant must prove prejudice.


II

Even if I were inclined to join the majority's two central holdings, I could not abide the manner in which the majority elaborates upon its rulings. Particularly regrettable are the majority's discussion of the “presumption” of reasonableness to be accorded lawyers' decisions and its attempt to prejudge the merits of claims previously rejected by lower courts using different legal standards.

A

In defining the standard of attorney performance required by the Constitution, the majority appropriately notes that many problems confronting criminal defense attorneys admit of “a range of legitimate” responses. Ante, at 2065. And the majority properly cautions courts, when reviewing a lawyer's selection amongst a set of options, to avoid the hubris of hindsight. Ibid. The majority goes on, however, to suggest that reviewing courts should “indulge a strong presumption that counsel's conduct” was constitutionally acceptable, ibid.; see ante, at 2066, 2069, and should “appl[y] a heavy measure of deference to counsel's judgments,” ante, at 2066.

**2078** I am not sure what these phrases mean, and I doubt that they will be self-explanatory to lower courts. If they denote nothing more than that a defendant claiming he was denied effective assistance of counsel has the burden of proof, I *713* would agree. See *United States v. Cronic*, 466 U.S., at 658, 104 S.Ct., at 2046. But the adjectives “strong” and “heavy” might be read as imposing upon defendants an unusually weighty burden of persuasion. If that is the majority's intent, I must respectfully dissent. The range of acceptable behavior defined by “prevailing professional norms,” ante, at 2065, seems to me sufficiently broad to allow defense counsel the flexibility they need in responding to novel problems of trial strategy. To afford attorneys more latitude, by “strongly presuming” that their behavior will fall within the zone of reasonableness, is covertly to legitimate convictions and sentences obtained on the basis of incompetent conduct by defense counsel.

The only justification the majority itself provides for its proposed presumption is that undue receptivity to claims of ineffective assistance of counsel would encourage too many defendants to raise such claims and thereby would clog the courts with frivolous suits and “dampen the ardor” of defense counsel. See ante, at 2066. I have more confidence than the majority in the ability of state and federal courts expeditiously to dispose of meritless arguments and to ensure that responsible, innovative lawyering is not inhibited. In my view, little will be gained and much may be lost by instructing the lower courts to proceed on the assumption that a defendant's challenge to his lawyer's performance will be insubstantial.
For many years the lower courts have been debating the meaning of “effective” assistance of counsel. Different courts have developed different standards. On the issue of the level of performance required by the Constitution, some courts have adopted the forgiving “farce-and-mockery” standard,*FN8* while others have adopted various versions of the “reasonable competence” standard.*FN9* On the issue of the level of prejudice necessary to compel a new trial, the courts have taken a wide variety of positions, ranging from the stringent “outcome-determinative” test,*FN10* to the rule that a showing of incompetence on the part of defense counsel automatically requires reversal of the conviction regardless of the injury to the defendant.*FN11*

The Court today substantially resolves these disputes. The majority holds that the Constitution is violated when defense counsel's representation falls below the level expected of reasonably competent defense counsel, ante, at 2064–2067, and so affects the trial that there is a “reasonable probability” that, absent counsel's error, the outcome would have been different, ante, at 2067–2069.

Curiously, though, the Court discounts the significance of its rulings, suggesting that its choice of standards matters little and that few if any cases would have been decided differently if the lower courts had always applied the tests announced today. See ante, at 2069. Surely the judges in the state and lower federal courts will be surprised to learn that the distinctions they have so fiercely debated for many years are in fact unimportant.

The majority's comments on this point seem to be prompted principally by a reluctance**2079** to acknowledge that today's decision will require a reassessment of many previously rejected ineffective-assistance-of-counsel claims. The majority's unhappiness on this score is understandable, but its efforts to mitigate the perceived problem will be ineffectual. Nothing the majority says can relieve lower courts that hitherto*715* have been using standards more tolerant of ineffectual advocacy of their obligation to scrutinize all claims, old as well as new, under the principles laid down today.

III

The majority suggests that, “[f]or purposes of describing counsel's duties,” a capital sentencing proceeding “need not be distinguished from an ordinary trial.” Ante, at 2064. I cannot agree.

The Court has repeatedly acknowledged that the Constitution requires stricter adherence to procedural safeguards in a capital case than in other cases.
“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100–year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion) (footnote omitted).


The performance of defense counsel is a crucial component of the system of protections designed to ensure that capital punishment is administered with some degree of rationality. “Reliability” in the imposition of the death sentence can be approximated only if the sentencer is fully informed of “all possible relevant information about the individual defendant whose fate it must determine.” Jurek v. Texas, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). The job of amassing that information and presenting it *716 in an organized and persuasive manner to the sentencer is entrusted principally to the defendant's lawyer. The importance to the process of counsel's efforts, FN13 combined with the severity and irrevocability of the sanction at stake, require that the standards for determining what constitutes “effective assistance” be applied especially stringently in capital sentencing proceedings. FN14


FN14. As Justice BRENNAN points out, ante, at 2073, an additional reason for examining especially carefully a Sixth Amendment challenge when it pertains to a capital sentencing proceeding is that the result of finding a constitutional violation in that context is less disruptive than a finding that counsel was incompetent in the liability phase of a trial. It matters little whether strict scrutiny of a claim that ineffectiveness of counsel resulted in a death sentence is achieved through modification of the Sixth Amendment standards or through especially careful application of those standards. Justice BRENAN suggests that the necessary adjustment of the level of performance required of counsel in capital sentencing proceedings can be effected simply by construing the phrase, “reasonableness under prevailing professional norms,” in a manner that takes into account the nature of the impending penalty. Ante, at 2073–2074. Though I would prefer a more specific iteration of counsel's duties in this special context, FN15 I can accept that proposal. However, when instructing lower courts regarding**2080 the probability of impact upon the outcome that requires a resentencing, I think the Court would do best explicitly to modify the legal standard itself. FN16 In my view, a person on death row, whose counsel's performance fell below constitutionally acceptable levels, should not be compelled to demonstrate a “reasonable probability”*717 that he would have been given a life sentence if his lawyer had been competent, see ante, at 2068; if the defendant can establish a significant chance that the outcome would have been different, he surely should be entitled to a redetermination of his fate. Cf. United States v. Agurs, 427 U.S.
FN15. See Part I–A, supra. For a sensible effort to formulate guidelines for the conduct of defense counsel in capital sentencing proceedings, see Goodpaster, supra, at 343–345, 360–362.

FN16. For the purposes of this and the succeeding section, I assume, solely for the sake of argument, that some showing of prejudice is necessary to state a violation of the Sixth Amendment. But cf. Part I–B, supra.

FN17. As I read the opinion of the Court, it does not preclude this kind of adjustment of the legal standard. The majority defines “reasonable probability” as “a probability sufficient to undermine confidence in the outcome.” Ante, at 2068. In view of the nature of the sanction at issue, and the difficulty of determining how a sentencer would have responded if presented with a different set of facts, it could be argued that a lower estimate of the likelihood that the outcome of a capital sentencing proceeding was influenced by attorney error is sufficient to “undermine confidence” in that outcome than would be true in an ordinary criminal case.

IV
The views expressed in the preceding section oblige me to dissent from the majority’s disposition of the case before us. FN18 It is undisputed that respondent's trial counsel made virtually no investigation of the possibility of obtaining testimony from respondent's relatives, friends, or former employers pertaining to respondent's character or background. Had counsel done so, he would have found several persons willing and able to testify that, in their experience, respondent was a responsible, non-violent man, devoted to his family, and active in the affairs of his church. See App. 338–365. Respondent contends that his lawyer could have and should have used that testimony to “humanize” respondent, to counteract the impression conveyed by the trial that he was little more than a cold-blooded killer. Had this evidence been admitted, respondent argues, his chances of obtaining a life sentence would have been significantly better.

FN18. Adhering to my view that the death penalty is unconstitutional under all circumstances, Gregg v. Georgia, 428 U.S. 153, 231, 96 S.Ct. 2909, 2973, 49 L.Ed.2d 859 (1976) (MARSHALL, J., dissenting), I would vote to vacate respondent's sentence even if he had not presented a substantial Sixth Amendment claim.

*718 Measured against the standards outlined above, respondent's contentions are substantial. Experienced members of the death-penalty bar have long recognized the crucial importance of adducing evidence at a sentencing proceeding that establishes the defendant's social and familial connections. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 300–303, 334–335 (1983). The State makes a colorable—though in my view not compelling—argument that defense counsel in this case might have made a reasonable “strategic” decision not to present such evidence at the sentencing hearing on the assumption that an unadorned acknowledgment of respondent's responsibility for his crimes would be more likely to appeal to the trial judge, who was reputed to respect persons who accepted responsibility for their actions. FN19 But however justifiable **2081 such a choice might have been after counsel had fairly assessed the potential strength of the mitigating evidence available to him, counsel's failure to make any significant effort to find out what evidence might be garnered from respondent's relatives and acquaintances surely
cannot be described as “reasonable.” Counsel's failure to investigate is particularly suspicious in light of his candid admission that respondent's confessions and conduct in the course of the trial gave him a feeling of “hopelessness” regarding the possibility of saving respondent's life, see App. 383–384, 400–401.

FN19. Two considerations undercut the State's explanation of counsel's decision. First, it is not apparent why adducement of evidence pertaining to respondent's character and familial connections would have been inconsistent with respondent's acknowledgement that he was responsible for his behavior. Second, the Florida Supreme Court possesses—and frequently exercises—the power to overturn death sentences it deems unwarranted by the facts of a case. See State v. Dixon, 283 So.2d 1, 10 (Fla.1973). Even if counsel's decision not to try to humanize respondent for the benefit of the trial judge were deemed reasonable, counsel's failure to create a record for the benefit of the State Supreme Court might well be deemed unreasonable.

*719 That the aggravating circumstances implicated by respondent's criminal conduct were substantial, see ante, at 2071, does not vitiate respondent's constitutional claim; judges and juries in cases involving behavior at least as egregious have shown mercy, particularly when afforded an opportunity to see other facets of the defendant's personality and life. FN20 Nor is respondent's contention defeated by the possibility that the material his counsel turned up might not have been sufficient to establish a statutory mitigating circumstance under Florida law; Florida sentencing judges and the Florida Supreme Court sometimes refuse to impose death sentences in cases “in which, even though statutory mitigating circumstances do not outweigh statutory aggravating circumstances, the addition of nonstatutory mitigating circumstances tips the scales in favor of life imprisonment.” Barclay v. Florida, 463 U.S. 939, 958, 103 S.Ct. 3418, 3431, 77 L.Ed.2d 1134 (1983) (STEVENS, J., concurring in judgment) (emphasis in original).

FN20. See, e.g., Farmer & Kinard, The Trial of the Penalty Phase (1976), reprinted in 2 California State Public Defender, California Death Penalty Manual N–33, N–45 (1980). If counsel had investigated the availability of mitigating evidence, he might well have decided to present some such material at the hearing. If he had done so, there is a significant chance that respondent would have been given a life sentence. In my view, those possibilities, conjoined with the unreasonableness of counsel's failure to investigate, are more than sufficient to establish a violation of the Sixth Amendment and to entitle respondent to a new sentencing proceeding.

I respectfully dissent.

466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674
3. Youngblood v. Arizona

Supreme Court of the United States

ARIZONA, Petitioner,

v.

Larry YOUNGBLOOD

No. 86–1904.
Decided Nov. 29, 1988.
See 488 U.S. 1051, 109 S.Ct. 885.

Defendant was convicted by the Superior Court, Pima County, J. Richard Hannah, J., of child molestation, sexual assault, and kidnaping, and he appealed. The Arizona Court of Appeals, 153 Ariz. 50, 734 P.2d 592, reversed, and the State of Arizona petitioned for review. The Supreme Court of Arizona denied petition, and certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that failure of police to preserve potentially useful evidence was not denial of due process of law absent defendant's showing bad faith on part of police.

Reversed.

Justice Stevens filed an opinion concurring in the judgment.

Justice Blackmun filed a dissenting opinion, in which Justices Brennan and Marshall joined.

Opinion on remand, 164 Ariz. 61, 790 P.2d 759.

West Headnotes

[1] KeyCite Citing References for this Headnote

92 Constitutional Law
  92XXVII Due Process
  92XXVII(H) Criminal Law
    92XXVII(H)4 Proceedings and Trial
    92k4592 Disclosure and Discovery
    92k4594 Evidence
      92k4594(8) k. Duty to Preserve. Most Cited Cases
        (Formerly 92k268(5))

110 Criminal Law KeyCite Citing References for this Headnote
  110XXXI Counsel
    110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)3 Destruction or Loss of Information
110k2010 k. In General. Most Cited Cases
(Formerly 110k700(9))

Failure of police to preserve potentially useful evidence is not a denial of due process of law unless defendant can show bad faith on part of police; requiring defendant to show bad faith both limits extent of police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where interests of justice most clearly require it, that is, those cases in which police themselves by their conduct indicate that evidence could form basis for exonerating defendant. U.S.C.A. Const.Amend. 14.

[2] KeyCite Citing References for this Headnote

92 Constitutional Law
92XXVII Due Process
92XXVIII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4592 Disclosure and Discovery
92k4594 Evidence
92k4594(7) k. Duty to Conduct or Allow Testing or Other Analysis. Most Cited Cases
(Formerly 92k268(5))

110 Criminal Law KeyCite Citing References for this Headnote
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)3 Destruction or Loss of Information
110k2011 k. Excuse or Justification for Destruction or Loss. Most Cited Cases
(Formerly 110k700(9))

Defendant was not denied due process of law by failure of police, in investigating sexual assault of ten-year-old boy, to refrigerate boy's clothing and to perform tests on semen samples, thereby preserving potentially useful evidence for defendant, where there was no suggestion of bad faith on part of police; none of this information was concealed from defendant at trial, and evidence—such as it was—was made available to defendant's expert who declined to perform any tests on samples. U.S.C.A. Const.Amend. 14.

[3] KeyCite Citing References for this Headnote

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4592 Disclosure and Discovery
92k4594 Evidence
92k4594(7) k. Duty to Conduct or Allow Testing or Other Analysis. Most Cited Cases
(Formerly 92k268(5))

**333 Syllabus**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

51 The victim, a 10–year–old boy, was molested and sodomized by a middle-aged man for 1 1/2 hours. After the assault, the boy was taken to a hospital where a physician used a swab from a “sexual assault kit” to collect semen samples from the boy's rectum. The police also collected the boy's clothing, which they failed to refrigerate. A police criminologist later performed some tests on the rectal swab and the boy's clothing, but he was unable to obtain information about the identity of the boy's assailant. At trial, expert witnesses testified that respondent might have been completely exonerated by timely performance of tests on properly preserved semen samples. **334 Respondent was convicted of child molestation, sexual assault, and kidnapping in an Arizona state court. The Arizona Court of Appeals reversed the conviction on the ground that the State had breached a constitutional duty to preserve the semen samples from the victim's body and clothing.

Held: The Due Process Clause of the Fourteenth Amendment did not require the State to preserve the semen samples even though the samples might have been useful to respondent. Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. Here, the police's failure to refrigerate the victim's clothing and to perform tests on the semen samples can at worst be described as negligent. None of this information was concealed from respondent at trial, and the evidence—such as it was—was made available to respondent's expert, who declined to perform any tests on the samples. The Arizona Court of Appeals noted in its opinion—and this Court agrees—that there was no suggestion of bad faith on the part of the police. Moreover, the Due Process Clause was not violated because the State failed to perform a newer test on the semen samples. The police do not have a constitutional duty to perform any particular tests. Pp. 336–338.

153 Ariz. 50, 734 P.2d 592, reversed.
REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, post, p. 338. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, post, p. 339.

*52 John R. Gustafson argued the cause for petitioner. With him on the brief were Stephen D. Neely, James M. Howard, and Deborah Strange Ward.

Daniel F. Davis argued the cause and filed a brief for respondent.

Chief Justice REHNQUIST delivered the opinion of the Court. Respondent Larry Youngblood was convicted by a Pima County, Arizona, jury of child molestation, sexual assault, and kidnaping. The Arizona Court of Appeals reversed his conviction on the ground that the State had failed to preserve semen samples from the victim's body and clothing. 153 Ariz. 50, 734 P.2d 592 (1986). We granted certiorari to consider the extent to which the Due Process Clause of the Fourteenth Amendment requires the State to preserve evidentiary material that might be useful to a criminal defendant.

On October 29, 1983, David L., a 10–year–old boy, attended a church service with his mother. After he left the service at about 9:30 p.m., the boy went to a carnival behind the church, where he was abducted by a middle-aged man of medium height and weight. The assailant drove the boy to a secluded area near a ravine and molested him. He then took the boy to an unidentified, sparsely furnished house where he sodomized the boy four times. Afterwards, the assailant tied the boy up while he went outside to start his car. Once the assailant started the car, albeit with some difficulty, he returned to the house and again sodomized the boy. The assailant then sent the boy to the bathroom to wash up before he returned him to the carnival. He threatened to kill the boy if he told anyone about the attack. The entire ordeal lasted about 1 1/2 hours.

After the boy made his way home, his mother took him to Kino Hospital. At the hospital, a physician treated the boy for rectal injuries. The physician also used a “sexual assault kit” to collect evidence of the attack. The Tucson Police Department*53 provided such kits to all hospitals in Pima County for use in sexual assault cases. Under standard procedure, the victim of a sexual assault was taken to a hospital, where a physician used the kit to collect evidence. The kit included paper to collect saliva samples, a tube for obtaining a blood sample, microscopic slides for making**335 smears, a set of Q-Tip-like swabs, and a medical examination report. Here, the physician used the swab to collect samples from the boy's rectum and mouth. He then made a microscopic slide of the samples. The doctor also obtained samples of the boy's saliva, blood, and hair. The physician did not examine the samples at any time. The police placed the kit in a secure refrigerator at the police station. At the hospital, the police also collected the boy's underwear and T-shirt. This clothing was not refrigerated or frozen.

Nine days after the attack, on November 7, 1983, the police asked the boy to pick out his assailant from a photographic lineup. The boy identified respondent as the assailant.
Respondent was not located by the police until four weeks later; he was arrested on December 9, 1983.

On November 8, 1983, Edward Heller, a police criminologist, examined the sexual assault kit. He testified that he followed standard department procedure, which was to examine the slides and determine whether sexual contact had occurred. After he determined that such contact had occurred, the criminologist did not perform any other tests, although he placed the assault kit back in the refrigerator. He testified that tests to identify blood group substances were not routinely conducted during the initial examination of an assault kit and in only about half of all cases in any event. He did not test the clothing at this time.

Respondent was indicted on charges of child molestation, sexual assault, and kidnaping. The State moved to compel respondent to provide blood and saliva samples for comparison with the material gathered through the use of the sexual assault kit, but the trial court denied the motion on the *54 ground that the State had not obtained a sufficiently large semen sample to make a valid comparison. The prosecutor then asked the State's criminologist to perform an ABO blood group test on the rectal swab sample in an attempt to ascertain the blood type of the boy's assailant. This test failed to detect any blood group substances in the sample.

In January 1985, the police criminologist examined the boy's clothing for the first time. He found one semen stain on the boy's underwear and another on the rear of his T-shirt. The criminologist tried to obtain blood group substances from both stains using the ABO technique, but was unsuccessful. He also performed a P–30 protein molecule test on the stains, which indicated that only a small quantity of semen was present on the clothing; it was inconclusive as to the assailant's identity. The Tucson Police Department had just begun using this test, which was then used in slightly more than half of the crime laboratories in the country.

Respondent's principal defense at trial was that the boy had erred in identifying him as the perpetrator of the crime. In this connection, both a criminologist for the State and an expert witness for respondent testified as to what might have been shown by tests performed on the samples shortly after they were gathered, or by later tests performed on the samples from the boy's clothing had the clothing been properly refrigerated. The court instructed the jury that if they found the State had destroyed or lost evidence, they might “infer that the true fact is against the State's interest.” 10 Tr. 90.

The jury found respondent guilty as charged, but the Arizona Court of Appeals reversed the judgment of conviction. It stated that “‘when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process.’” 153 Ariz., at 54, 734 P.2d, at 596, quoting State v. Escalante, 153 Ariz. 55, 61, 734 P.2d 597, 603 (App.1986). The Court of Appeals *55 concluded on the basis of the expert testimony at trial that timely performance of tests with properly preserved semen samples could have produced results that might have completely exonerated respondent. The Court of Appeals **336 reached this conclusion even though it did “not imply any bad faith on the part of the State.” 153 Ariz., at 54, 734 P.2d, at 596. The Supreme Court of Arizona denied the State's petition for review, and we granted certiorari. 485 U.S. 903, 108 S.Ct. 1072, 99 L.Ed.2d 232 (1988). We now reverse.
Decision of this case requires us to again consider “what might loosely be called the area of constitutionally guaranteed access to evidence.” United States v. Valenzuela–Bernal, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982). In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), we held that “the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Id., at 87, 83 S.Ct., at 1196. In United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), we held that the prosecution had a duty to disclose some evidence of this description even though no requests were made for it, but at the same time we rejected the notion that a “prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel.” Id., at 111, 96 S.Ct., at 2401; see also Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972) (“We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case”).

There is no question but that the State complied with Brady and Agurs here. The State disclosed relevant police reports to respondent, which contained information about the existence of the swab and the clothing, and the boy's examination at the hospital. The State provided respondent's expert with the laboratory reports and notes prepared by the police criminologist, and respondent's expert had access to the swab and to the clothing.

*56 If respondent is to prevail on federal constitutional grounds, then, it must be because of some constitutional duty over and above that imposed by cases such as Brady and Agurs. Our most recent decision in this area of the law, California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), arose out of a drunk-driving prosecution in which the State had introduced test results indicating the concentration of alcohol in the blood of two motorists. The defendants sought to suppress the test results on the ground that the State had failed to preserve the breath samples used in the test. We rejected this argument for several reasons: first, “the officers here were acting in ‘good faith and in accord with their normal practice,’ ” id., at 488, 104 S.Ct., at 2533, quoting Killian v. United States, 368 U.S. 231, 242, 82 S.Ct. 302, 308, 7 L.Ed.2d 256 (1961); second, in the light of the procedures actually used the chances that preserved samples would have exculpated the defendants were slim, 467 U.S., at 489, 104 S.Ct., at 2534; and, third, even if the samples might have shown inaccuracy in the tests, the defendants had “alternative means of demonstrating their innocence.” Id., at 490, 104 S.Ct., at 2534. In the present case, the likelihood that the preserved materials would have enabled the defendant to exonerate himself appears to be greater than it was in Trombetta, but here, unlike in Trombetta, the State did not attempt to make any use of the materials in its own case in chief.FN*  

FN* In this case, the Arizona Court of Appeals relied on its earlier decision in State v. Escalante, 153 Ariz. 55, 734 P.2d 597 (1986), holding that “‘when identity is an issue at trial and the police permit destruction of evidence that could eliminate a defendant as the perpetrator, such loss is material to the defense and is a denial of due process.’ ” 153 Ariz. 50, 54, 734 P.2d 592, 596 (1986), quoting Escalante, supra, at 61, 734 P.2d, at 603 (emphasis added). The reasoning in Escalante and the instant case mark a sharp departure from
Trombetta in two respects. First, Trombetta speaks of evidence whose exculpatory value is “apparent.” 467 U.S., at 489, 104 S.Ct., at 2534. The possibility that the semen samples could have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality in Trombetta. Second, we made clear in Trombetta that the exculpatory value of the evidence must be apparent “before the evidence was destroyed.” Ibid. (emphasis added). Here, respondent has not shown that the police knew the semen samples would have exculpated him when they failed to perform certain tests or to refrigerate the boy's clothing; this evidence was simply an avenue of investigation that might have led in any number of directions. The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. Cf. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959).

*57 **337 Our decisions in related areas have stressed the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government. In United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), we said that “[n]o actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them.” Id., at 325, 92 S.Ct., at 466; see also United States v. Lovasco, 431 U.S. 783, 790, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752 (1977). Similarly, in United States v. Valenzuela–Bernal, supra, we considered whether the Government's deportation of two witnesses who were illegal aliens violated due process. We held that the prompt deportation of the witnesses was justified “upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution.” Id., 458 U.S., at 872, 102 S.Ct., at 3449.

[1] The Due Process Clause of the Fourteenth Amendment, as interpreted in Brady, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in Trombetta, supra, 467 U.S., at 486, 104 S.Ct., at 2532, that “[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.” Part of it stems from our unwillingness to read the “fundamental fairness” requirement of the Due Process Clause, see Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.
In this case, the police collected the rectal swab and clothing on the night of the crime; respondent was not taken into custody until six weeks later. The failure of the police to refrigerate the clothing and to perform tests on the semen samples can at worst be described as negligent. None of this information was concealed from respondent at trial, and the evidence—such as it was—was made available to respondent's expert who declined to perform any tests on the samples. The Arizona Court of Appeals noted in its opinion—and we agree—that there was no suggestion of bad faith on the part of the police. It follows, therefore, from what we have said, that there was no violation of the Due Process Clause.

The Arizona Court of Appeals also referred somewhat obliquely to the State's “inability to quantitatively test” certain semen samples with the newer P–30 test. **338 153 Ariz., at 54, 734 P.2d, at 596. If the court meant by this statement that the Due Process Clause is violated when the police fail to use a particular investigatory tool, we strongly disagree. The situation here is no different than a prosecution for drunken driving that rests on police observation alone; the defendant is free to argue to the finder of fact that a breathalyzer test might have been exculpatory, but the police do not have a constitutional duty to perform any particular tests.

The judgment of the Arizona Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

Justice STEVENS, concurring in the judgment.

Three factors are of critical importance to my evaluation of this case. First, at the time the police failed to refrigerate the victim's clothing, and thus negligently lost potentially valuable evidence, they had at least as great an interest in preserving the evidence as did the person later accused of the crime. Indeed, at that time it was more likely that the evidence would have been useful to the police—who were still conducting an investigation—and to the prosecutor—who would later bear the burden of establishing guilt beyond a reasonable doubt—than to the defendant. In cases such as this, even without a prophylactic sanction such as dismissal of the indictment, the State has a strong incentive to preserve the evidence.

Second, although it is not possible to know whether the lost evidence would have revealed any relevant information, it is unlikely that the defendant was prejudiced by the State's omission. In examining witnesses and in her summation, defense counsel impressed upon the jury the fact that the State failed to preserve the evidence and that the State could have conducted tests that might well have exonerated the defendant. See App. to Pet. for Cert. C21–C38, C42–C45; 9 Tr. 183–202, 207–208; 10 Tr. 58–61, 69–70. More significantly, the trial judge instructed the jury: “If you find that the State has ... allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest.” 10 Tr. 90. As a result, the uncertainty as to what the evidence might have proved was turned to the defendant's advantage.

Third, the fact that no juror chose to draw the permissive inference that proper preservation of the evidence would have demonstrated that the defendant was not the assailant suggests that the lost evidence was “immaterial.” Our cases make clear that “[t]he proper standard of
materiality must reflect our overriding concern with the justice of the finding of guilt,” and that a State's failure to turn over (or preserve) potentially exculpatory evidence therefore “must be evaluated in the context of the entire record.” United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976) (footnotes omitted); see also California v. Trombetta, 467 U.S. 479, 488, 104 S.Ct. 2528, 2533, 81 L.Ed.2d 413 (1984) (duty to preserve evidence “must be limited to evidence that might be expected to play a significant role in the suspect's defense”). In declining defense counsel's and the court's invitations to draw the permissive inference, the jurors in effect indicated that, in their view, the other evidence at trial was so overwhelming that it was highly improbable that the lost evidence was exculpatory. In Trombetta, this Court found no due process violation because “the chances [were] extremely low that preserved [breath] samples would have been exculpatory.” Id., at 489, 104 S.Ct., at 2534. In this case, the jury has already performed this calculus based on its understanding of the evidence introduced at trial. Presumably, in a case involving a closer question as to guilt or innocence, the jurors would have been more ready to infer that the lost evidence was exculpatory.

With these factors in mind, I concur in the Court's judgment. I do not, however, join the Court's opinion because it announces a proposition of law that is much broader than necessary to decide this case. It states that “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” Ante, at 337. In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair. This, however, is not such a case. Accordingly, I concur in the judgment.

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

The Constitution requires that criminal defendants be provided with a fair trial, not merely a “good faith” try at a fair trial. Respondent here, by what may have been nothing more than police ineptitude, was denied the opportunity to present a full defense. That ineptitude, however, deprived respondent of his guaranteed right to due process of law. In reversing the judgment of the Arizona Court of Appeals, this Court, in my view, misreads the import of its prior cases and unduly restricts the protections of the Due Process Clause. An understanding of due process demonstrates that the evidence which was allowed to deteriorate was “constitutionally material,” and that its absence significantly prejudiced respondent. Accordingly, I dissent.

The Court, with minimal reference to our past cases and with what seems to me to be less than complete analysis, announces that “unless a criminal defendant can show bad faith on the part of police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” Ante, at 337. This conclusion is claimed to be justified because it limits the extent of police responsibility “to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.” Ibid. The majority has identified clearly one type of violation, for police action affirmatively aimed at cheating the process
undoubtedly violates the Constitution. But to suggest that this is the only way in which the Due Process Clause can be violated cannot be correct. Regardless of intent or lack thereof, police action that results in a defendant's receiving an unfair trial constitutes a deprivation of due process.

The Court's most recent pronouncement in “what might loosely be called the area of constitutionally guaranteed access to evidence,” United States v. Valenzuela–Bernal, 458 U.S. 858, 867, 102 S.Ct. 1194, 73 L.Ed.2d 1193 (1982), is in California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). Trombetta addressed “the question whether the Fourteenth Amendment ... demands that the State preserve potentially exculpatory evidence on behalf of defendants.” Id., at 481, 104 S.Ct., at 2530. Justice MARSHALL, writing for the Court, noted that while the particular question was one of first impression, the general standards to be applied had been developed in a number of cases, including Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). FN1 Those *63 **340 cases in no way require that government actions that deny a defendant access to material evidence be taken in bad faith in order to violate due process.

FN1. The Court's discussion in Trombetta also noted other cases: In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1117 (1959), the prosecution failed to inform the defense and the trial court that one of its witnesses had testified falsely that he had not been promised favorable treatment in return for testifying. The Court noted that a conviction obtained by the knowing use of such testimony must fall, and suggested that the conviction is invalid even when the perjured testimony is “not the result of guile or a desire to prejudice ... for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.” Id., at 270, 79 S.Ct., at 1177, quoting People v. Savvides, 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 886–888, 136 N.E.2d 853, 854–855 (1956). In Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Court required a federal prosecutor to reveal a promise of nonprosecution if a witness testified, holding that “whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor.” Id., at 154, 92 S.Ct., at 766. The good faith of the prosecutor thus was irrelevant for purposes of due process. And in Roviaro v. United States, 355 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), the Court held that in some cases the Government must disclose to the defense the identity of a confidential informant. There was no discussion of any requirement of bad faith.

As noted by the majority, ante, at 336, the Court in Brady ruled that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S., at 87, 83 S.Ct., at 1196. The Brady Court went on to explain that the principle underlying earlier cases, e.g., Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935) (violation of due process when prosecutor presented perjured testimony), is “not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.” 373 U.S., at 87, 83 S.Ct., at 1196. The failure to turn over material evidence “casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not ‘the result of guile.’ ” Id., at 88, 83 S.Ct., at 1197 (quoting lower court opinion).
In *Trombetta*, the Court also relied on *United States v. Agurs*, 427 U.S., at 107, 96 S.Ct., at 2399, which required a prosecutor to turn over to the defense evidence that was “clearly supportive of a claim of innocence” even without a defense request. The Court noted that the prosecutor's duty was not one of constitutional dimension unless the evidence was such that its “omission deprived the defendant of a fair trial,” *id.*, at 108, 96 S.Ct., at 2399, and explained:

“Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it.... If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not *64 the character of the prosecutor.“ *Id.*, at 110, 96 S.Ct., at 2400 (footnote omitted).

**FN2.** The *Agurs* Court went on to note that the standard to be applied in considering the harm suffered by the defendant was different from the standard applied when new evidence is discovered by a neutral source after trial. The prosecutor is “the ‘servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.’ ” 427 U.S., at 111, 96 S.Ct., at 2401, quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). Holding the prosecution to a higher standard is necessary, lest the “special significance to the prosecutor's obligation to serve the cause of justice” be lost. 427 U.S., at 111, 96 S.Ct., at 2401.

*Agurs* thus made plain that the prosecutor's state of mind is not determinative. Rather, the proper standard must focus on the materiality of the evidence, and that standard “must reflect our overriding concern with the justice of the finding of guilt.” *Id.*, at 112, 96 S.Ct., at 2401.

**FN3.** Nor does *United States v. Valenzuela–Bernal*, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982), provide support for the majority's "bad faith" requirement. In that case a defendant was deprived of certain testimony at his trial when the Government deported potential witnesses after determining that they possessed no material evidence relevant to the criminal trial. These deportations were not the result of malice or negligence, but were carried out pursuant to immigration policy. *Id.*, at 863–866, 102 S.Ct., at 3444–3446. Consideration of the Government's motive was only the first step in the due process inquiry. Because the Government acted in good faith, the defendant was required to make “a plausible showing” that “the evidence lost would be both material and favorable to the defense.” *Id.*, at 873, 102 S.Ct., at 3449. In *Valenzuela–Bernal*, the defendant was not able to meet that burden. Under the majority's "bad faith" test, the defendant would have no opportunity to try.

**FN3.** 467 U.S., at 485, 104 S.Ct., at 2532, and then noted that the delivery of exculpatory evidence to the defendant “protect[s] the innocent from erroneous*65 conviction and ensure [s] the integrity of our criminal justice system.” *Ibid.* Although the language of *Trombetta* includes a quotation in which the words “in good faith” appear, those words, for two reasons, do not have the significance claimed for them by the majority. First, the words are the antecedent part of the fuller phrase “in good faith and in
accord with their normal practice.” *Id.*, at 488, 104 S.Ct., at 2533. That phrase has its source in *Killian v. United States*, 368 U.S. 231, 242, 82 S.Ct. 302, 308, 7 L.Ed.2d 256 (1961), where the Court held that the practice of discarding investigators’ notes, used to compile reports that were then received in evidence, did not violate due process. FN4 In both *Killian* and *Trombetta*, the importance of police compliance with *usual procedures* was manifest. Here, however, the same standard of conduct cannot be claimed. There has been no suggestion that it was the usual procedure to ignore the possible deterioration of important evidence, or generally to treat material evidence in a negligent or reckless manner. Nor can the failure to refrigerate the clothing be squared with the careful steps taken to preserve the sexual-assault kit. The negligent or reckless failure to preserve important evidence just cannot be “in accord with ... normal practice.”

FN4. In *Killian*, the notes in question related to witnesses' statements, were used to prepare receipts which the witnesses then signed, and were destroyed in accord with usual practice. 368 U.S., at 242, 82 S.Ct., at 308. Had it not been the usual practice of the agents to destroy their notes, or if no reports had been prepared from those notes before they were destroyed, a different question, closer to the one the Court decides today, would have been presented. Second, and more importantly, *Trombetta* demonstrates that the absence of bad faith does not end the analysis. The determination in *Trombetta* that the prosecution acted in good faith and according to normal practice merely prefaced the primary inquiry, which centers on the “constitutional materiality” of the evidence itself. 467 U.S., at 489, 104 S.Ct., at 2534. There is *nothing* in *Trombetta* that intimates that good faith alone should be the measure. FN5

FN5. The cases relied upon by the majority for the proposition that bad faith is necessary to show a due process violation, *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), and *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), concerned claims that preindictment delay violated due process. The harm caused by such delay is certainly more speculative than that caused by the deprivation of material exculpatory evidence, and in such cases statutes of limitations, not the Due Process Clause, provide the primary protection for defendants' interests. Those cases are a shaky foundation for the radical step taken by the Court today.

The cases in this area clearly establish that police actions taken in bad faith are not the only species of police conduct that can result in a violation of due process. As *Agurs* points out, it makes no sense to overturn a conviction because a malicious prosecutor withholds information that he mistakenly believes to be material, but **A427** which actually would have been of no help to the defense. 427 U.S., at 110, 96 S.Ct., 2400. In the same way, it makes no sense to ignore the fact that a defendant has been denied a fair trial because the State allowed evidence that was material to the defense to deteriorate beyond the point of usefulness, simply because the police were inept rather than malicious.

I also doubt that the “bad faith” standard creates the bright-line rule sought by the majority. Apart from the inherent difficulty a defendant would have in obtaining evidence to show a lack of good faith, the line between “good faith” and “bad faith” is anything but bright, and the majority's formulation may well create more questions than it answers. What constitutes bad faith for these purposes? Does a defendant have to show actual malice, or would recklessness, or the deliberate failure to establish standards for maintaining and preserving evidence, be
sufficient? Does “good faith police work” require a certain minimum of diligence, or will a lazy officer, who does not walk the few extra steps to the evidence refrigerator, be considered to be acting in good faith? While the majority leaves these questions for another day, its quick embrace of a “bad faith” standard has not brightened the line; it only has moved the line so as to provide fewer protections for criminal defendants.

II

The inquiry the majority eliminates in setting up its “bad faith” rule is whether the evidence in question here was “constitutionally material,” so that its destruction violates due process. The majority does not say whether “evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant,” ante, at 337, is, for purposes of due process, material. But because I do not find the question of lack of bad faith dispositive, I now consider whether this evidence was such that its destruction rendered respondent's trial fundamentally unfair.

*Trombetta* requires that a court determine whether the evidence possesses “an exculpatory value that was apparent before the evidence was destroyed,” and whether it was “of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” 467 U.S., at 481–482, 104 S.Ct., at 2530. In *Trombetta* neither requirement was met. But it is important to note that the facts of *Trombetta* differed significantly from those of this case. As such, while the basic standards set by *Trombetta* are controlling, the inquiry here must be more finely tuned.

In *Trombetta*, samples of breath taken from suspected drunk drivers had been discarded after police had tested them using an Intoxilyzer, a highly accurate and reliable device for measuring blood-alcohol concentration levels. Id., at 481–482, 104 S.Ct., at 2530. The Court reasoned that the likelihood of the posttest samples proving to be exculpatory was extremely low, and further observed that the defendants were able to attack the reliability of the test results by presenting evidence of the ways in which the Intoxilyzer might have malfunctioned. This case differs from *Trombetta* in that here no conclusive tests were performed on the relevant evidence. There is a distinct possibility in this case, one not present in *Trombetta*, that a proper test would have exonerated respondent, unrebutted by any other conclusive test results. As a consequence, although the discarded evidence in *Trombetta* had impeachment value (i.e., it might have shown that the test results were incorrect), here what was lost to the respondent was the possibility of complete exoneration. *Trombetta*’s specific analysis, therefore, is not directly controlling.

The exculpatory value of the clothing in this case cannot be determined with any certainty, precisely because the police allowed the samples to deteriorate. But we do know several important things about the evidence. First, the semen samples on the clothing undoubtedly came from the assailant. Second, the samples could have been tested, using technology available and in use at the local police department, to show either the blood type of the assailant, or that the assailant was a nonsecreter, i.e., someone who does not secrete a blood-type “marker” into other body fluids, such as semen. Third, the evidence was clearly important. A semen sample in a rape case where identity is questioned is always significant. See *Hilliard v. Spalding*, 719 F.2d 1443, 1446–1447 (CA9 1983); *People v. Nation*, 26 Cal.3d
Fourth, a reasonable police officer should have recognized that the clothing required refrigeration. Fifth, we know that an inconclusive test was done on the swab. The test suggested that the assailant was a nonsecreter, although it was equally likely that the sample on the swab was too small for accurate results to be obtained. And, sixth, we know that respondent is a secreter.

If the samples on the clothing had been tested, and the results had shown either the blood type of the assailant or that the assailant was a nonsecreter, its constitutional materiality would be clear. But the State's conduct has deprived the defendant, and the courts, of the opportunity to determine with certainty the import of this evidence: it has “interfere[d] with the accused's ability to present a defense by imposing on him a requirement which the government's own actions have rendered impossible to fulfill.” *Hilliard v. Spalding*, 719 F.2d, at 1446. Good faith or not, this is intolerable, unless the particular circumstances of the case indicate either that the evidence was not likely to prove exculpatory, or that the defendant was able to use effective alternative means to prove the point the destroyed evidence otherwise could have made.

I recognize the difficulties presented by such a situation. The societal interest in seeing criminals punished rightly requires that indictments be dismissed only when the unavailability of the evidence prevents the defendant from receiving a fair trial. In a situation where the substance of the lost evidence is known, the materiality analysis laid out in *Trombetta* is adequate. But in a situation like the present one, due process requires something more. Rather than allow a State's ineptitude to saddle a defendant with an impossible burden, a court should focus on the type of evidence, the possibility it might prove exculpatory, and the existence of other evidence going to the same point of contention in determining whether the failure to preserve the evidence in question violated due process. To put it succinctly, where no comparable evidence is likely to be available to the defendant, police must preserve physical evidence of a type that they reasonably should know has the potential, if tested, to reveal immutable characteristics of the criminal, and hence to exculpate a defendant charged with the crime.

*FN6* We noted in *California v. Trombetta*, 467 U.S. 479, 486, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984): “The absence of doctrinal development in this area reflects, in part, the difficulty of developing rules to deal with evidence destroyed through prosecutorial neglect or oversight. Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.” While the inquiry is a difficult one, I do not read *Trombetta* to say, nor do I believe, that it is impossible. Respect for constitutional rights demands that the inquiry be made.

*70* The first inquiry under this standard concerns the particular evidence itself. It must be of a type which is clearly relevant, a requirement satisfied, in a case where identity is at issue, by physical evidence which has come from the assailant. Samples of blood and other body fluids, fingerprints, and hair and tissue samples have been used to implicate guilty defendants, and to exonerate innocent suspects. This is not to say that all physical evidence of this type must be preserved. For example, in a case where a blood sample is found, but the circumstances make it unclear whether the sample came from the assailant, the dictates of due process might not compel preservation (although principles of sound investigation might certainly do so). But
in a case where there is no doubt that the sample came from the assailant, the presumption must be that it be preserved.

A corollary, particularly applicable to this case, is that the evidence embody some immutable characteristic of the assailant which can be determined by available testing methods. So, for example, a clear fingerprint can be compared to the defendant's fingerprints to yield a conclusive result; a blood sample, or a sample of body fluid which contains blood markers, can either completely exonerate or strongly implicate a defendant. As technology develops, the potential for this type of evidence to provide conclusive results on any number of questions will increase. Current genetic testing measures, frequently used in civil paternity suits, are extraordinarily precise. See *Clark v. Jeter*, 486 U.S. 456, 465, 108 S.Ct. 1910, 1916, 100 L.Ed.2d 465 (1988). The importance of these types of evidence is indisputable, and requiring police to recognize their importance is not unreasonable.

The next inquiry is whether the evidence, which was obviously relevant and indicates an immutable characteristic of the actual assailant, is of a type likely to be independently exculpatory. Requiring the defendant to prove that the particular piece of evidence probably would be independently exculpatory*71 would require the defendant to prove the content of something he does not have because of the State's misconduct. Focusing on the type of evidence solves this problem. A court will be able to consider the type of evidence and the available technology, as well as the circumstances of the case, to determine the likelihood that the evidence might have proved to be exculpatory. The evidence must also be without equivalent in the particular case. It must not be cumulative or collateral, cf. *United States v. Agurs*, 427 U.S., at 113–114, 96 S.Ct., at 2402–2403, and must bear directly on the question of innocence or guilt.

Due process must also take into account the burdens that the preservation of evidence places on the police. Law enforcement officers must be provided the option, as is implicit in *Trombetta*, of performing the proper tests on physical evidence and then discarding it. Once a suspect has been arrested the police, after a reasonable time, may inform defense counsel of plans to discard the evidence. When the defense has been informed of the existence of the evidence, after a reasonable time the burden of preservation may shift to the defense. There should also be flexibility to deal with evidence that is unusually dangerous or difficult to store.

*FN7* There is no need in this case to discuss whether the police have a duty to test evidence, or whether due process requires that police testing be on the “cutting edge” of technology. But uncertainty as to these questions only highlights the importance of preserving evidence, so that the defense has the opportunity at least to use whatever scientifically recognized tests are available. That is all that is at issue in this case.

III

Applying this standard to the facts of this case, I conclude that the Arizona Court of Appeals was correct in overturning respondent's conviction. The clothing worn by the victim contained samples of his assailant's semen. The appeals court found that these samples would probably be larger, less contaminated, and more likely to yield conclusive test results than would the samples collected by use of the assault kit. 153 Ariz. 50, 54, 734 P.2d 592, 596 (1986). The clothing*72 and the semen stains on the clothing therefore obviously were material.
Because semen is a body fluid which could have been tested by available methods to show an immutable characteristic of the assailant, there was a genuine possibility that the results of such testing might have exonerated respondent. The only evidence implicating respondent was the testimony of the victim.\textsuperscript{FN8} There was no other eyewitness, and the only other significant physical evidence, respondent's car, was seized by police, examined, turned over to a wrecking company, and then dismantled without the victim's having viewed it. The police also failed to check the car to confirm or refute elements of the victim's testimony.\textsuperscript{FN9}

\textsuperscript{FN8} This Court “has recognized the inherently suspect qualities of eyewitness identification evidence.” \textit{Watkins v. Sowders}, 449 U.S. 341, 350, 101 S.Ct. 654, 659, 66 L.Ed.2d 549 (1981) (BRENNAN, J., dissenting). Such evidence is “notoriously unreliable,” \textit{ibid.}; see \textit{United States v. Wade}, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149 (1967); \textit{Manson v. Brathwaite}, 432 U.S. 98, 111–112, 97 S.Ct. 2243, 2251–2252, 53 L.Ed.2d 140 (1977), and has distinct impacts on juries. “All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, ‘That's the one!’ ” E. Loftus, \textit{Eyewitness Testimony} 19 (1979). Studies show that children are more likely to make mistaken identifications than are adults, especially when they have been encouraged by adults. See generally Cohen & Harnick, \textit{The Susceptibility of Child Witnesses to Suggestion}, 4 Law and Human Behavior 201 (1980). Other studies show another element of possible relevance in this case: “Cross-racial identifications are much less likely to be accurate than same race identifications.” Rahaim & Brodsky, \textit{Empirical Evidence versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy}, 7 Law and Psych. Rev. 1, 2 (1982). These authorities suggest that eyewitness testimony alone, in the absence of corroboration, is to be viewed with some suspicion.

\textsuperscript{FN9} The victim testified that the car had a loud muffler, that country music was playing on its radio, and that the car was started using a key. Respondent and others testified that his car was inoperative on the night of the incident, that when it was working it ran quietly, that the radio did not work, and that the car could be started only by using a screwdriver. The police did not check any of this before disposing of the car. See \textbf{153 Ariz.} 50, 51–52, 734 P.2d 592, 593–594 (App.1986).

*73 Although a closer question, there was no equivalent evidence available to respondent. The swab contained a semen sample, but it was not sufficient to allow proper testing. Respondent had access to other evidence tending to show that he was not the assailant, but there was no other evidence that would have shown that it was physically impossible for respondent to have been the assailant. Nor would the preservation of the evidence here have been a burden upon the police. There obviously was refrigeration available, as the preservation of the swab indicates, and the items of clothing likely would not tax available storage space.

Considered in the context of the entire trial, the failure of the prosecution to preserve this evidence deprived respondent of a fair trial. It still remains “a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.” \textit{In re Winship}, 397 U.S. 358, 372, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (concurring opinion). The evidence in this case was far from conclusive, and the possibility that the evidence denied to respondent would have exonerated him was not remote. The result is that he
was denied a fair trial by the actions of the State, and consequently was denied due process of law. Because the Court's opinion improperly limits the scope of due process, and ignores its proper focus in a futile pursuit of a bright-line rule, I dissent.

FN10. Even under the standard articulated by the majority the proper resolution of this case should be a remand to consider whether the police did act in good faith. The Arizona Court of Appeals did not state in its opinion that there was no bad faith on the part of the police. Rather, it held that the proper standard to be applied was a consideration of whether the failure to preserve the evidence deprived respondent of a fair trial, and that, as a result, its holding did “not imply any bad faith on the part of the state.” Id., at 54, 734 P.2d, at 596. But there certainly is a sufficient basis on this record for a finding that the police acted in bad faith. The destruction of respondent's car by the police (which in itself may serve on remand as an alternative ground for finding a constitutional violation, see id., at 55, 734 P.2d, at 597 (question left open)) certainly suggests that the police may have conducted their investigation with an improper animus. Although the majority provides no guidance as to how a lack of good faith is to be determined, or just how egregious police action must be, the police actions in this case raise a colorable claim of bad faith. If the Arizona courts on remand should determine that the failure to refrigerate the clothing was part of an overall investigation marred by bad faith, then, even under the majority's test, the conviction should be overturned.

Arizona v. Youngblood
488 U.S. 51, 109 S.Ct. 333, 102 L. Ed. 2d 281, 57 USLW 4013
Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT et al., Petitioner,

v.

William G. OSBORNE.

No. 08-6.
Argued March 2, 2009.
Decided June 18, 2009.

Background: After the Court of Appeals of Alaska, 163 P.3d 973, Coats, C.J., affirmed the denial of his request for further DNA testing of evidence used to convict him, State prisoner brought § 1983 action to compel release of certain biological evidence so that it could be subjected to DNA testing. The United States District Court for the District of Alaska, Ralph R. Beistline, J., dismissed. Prisoner appealed. The United States Court of Appeals for the Ninth Circuit, 423 F.3d 1050, Brunetti, Circuit Judge, reversed. On remand, the District Court, 445 F.Supp.2d 1079, Beistline, J., awarded summary judgment for prisoner, and the Court of Appeals, 521 F.3d 1118, Brunetti, Circuit Judge, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Chief Justice Roberts, held that:
(1) ruling of Brady v. Maryland does not extend to the postconviction context, and
(2) Alaska law governing procedures for postconviction relief did not violate prisoner's due process rights.

Reversed and remanded for further proceedings.

Justice Alito filed concurring opinion, in which Justice Kennedy joined and in which Justice Thomas joined in part.

Justice Stevens filed dissenting opinion, in which Justices Ginsburg and Breyer joined, and in which Justice Souter joined in part.

Justice Souter filed dissenting opinion.

West Headnotes

[1] KeyCite Citing References for this Headnote

constitutional law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3867 k. Procedural Due Process in General. Most Cited Cases

State prisoner did not have a liberty interest in Alaska Governor's constitutional authority to grant pardons, commutations, and reprieves, and thus could not, on such basis, raise a due process challenge to the State's refusal to give him access to State's evidence for DNA testing; particular claimants were not entitled to executive clemency as a matter of State law. U.S.C.A. Const. Amend. 14; AS Const. Art. 3, § 21.

Under Alaska law, State prisoner's interest in demonstrating his innocence with new evidence provided a liberty interest, as required to raise a due process challenge to the State's refusal to give him access, in a postconviction relief proceeding, to State's evidence for DNA testing. U.S.C.A. Const. Amend. 14; AS 12.72.010(4), 12.72.020(b)(2).
Ruling of *Brady v. Maryland*, that due process requires prosecutors to disclose material exculpatory evidence to the defendant before trial, does not extend to the postconviction context. *U.S.C.A. Const.Amend. 14*.

A criminal defendant proved guilty after a fair trial does not have the same liberty interests, within the meaning of the Due Process Clause, as a free man. *U.S.C.A. Const.Amend. 14*.

When a State chooses to offer help to those seeking relief from convictions, due process does not dictate the exact form such assistance must assume. *U.S.C.A. Const.Amend. 14*.

Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.
Alaska law governing procedures for postconviction relief were not inconsistent with traditional principles of justice or any recognized principle of fundamental fairness, and thus did not violate the due process rights of a prisoner who was seeking access to certain evidence for DNA testing; Alaska law provided a substantive right to be released on a sufficiently compelling showing of new evidence that established actual innocence, provided for discovery in postconviction proceedings, and specified that such discovery was available to those seeking access to DNA evidence. U.S.C.A. Const.Amend. 14; AS 12.72.010(4), 12.72.020(b)(2).

Discovery available “for good cause” on any habeas claim of actual innocence satisfied any federal due process right to be released upon proof of “actual innocence.” U.S.C.A. Const.Amend. 5.
*2310 Syllabus FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Respondent Osborne was convicted of sexual assault and other crimes in state court. Years later, he filed this suit under 42 U.S.C. § 1983, claiming he had a due process right to access the evidence used against him in order to subject it to DNA testing at his own expense. The Federal District Court first dismissed his claim under Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383, holding that Osborne must proceed in habeas because he sought to set the stage for an attack on his conviction. The Ninth Circuit reversed, concluding that § 1983 was the proper vehicle for Osborne's claims. On remand, the District Court granted Osborne summary judgment, concluding that he had a limited constitutional right to the new testing under the unique and specific facts presented, i.e., that such testing had been unavailable at trial, that it could be accomplished at almost no cost to the State, and that the results were likely to be material. The Ninth Circuit affirmed, relying on the prosecutorial duty to disclose exculpatory evidence under, e.g., Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

Held: Assuming Osborne's claims can be pursued using § 1983, he has no constitutional right to obtain postconviction access to the State's evidence for DNA testing. Pp. 2316 - 2323.

(a) DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. The availability of new DNA testing technologies, however, cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt. The task of establishing rules to harness DNA's power to prove innocence without unnecessarily overthrowing the established criminal justice system belongs primarily to the legislature. See Washington v. Glucksberg, 521 U.S. 702, 719, 117 S.Ct. 2258, 138 L.Ed.2d 772. Forty-six States and the Federal Government have already enacted statutes dealing specifically with access to evidence *2311 for DNA testing. These laws recognize the value of DNA testing but also the need for conditions on accessing the State's evidence. Alaska is one of a handful of States yet to enact specific DNA testing legislation, but Alaska courts are addressing how to apply existing discovery and postconviction relief laws to this novel technology. Pp. 2316 - 2318.

(b) The Court assumes without deciding that the Ninth Circuit was correct that Heck does not bar Osborne's § 1983 claim. That claim can be rejected without resolving the proper application of Heck. Pp. 2318 - 2319.

(c) The Ninth Circuit erred in finding a due process violation. Pp. 2318 - 2323.

(i) While Osborne does have a liberty interest in pursuing the postconviction relief granted by the State, the Ninth Circuit erred in extending the Brady right of pretrial disclosure to the postconviction context. Osborne has already been found guilty and therefore has only a limited liberty interest in postconviction relief. See, e.g., Herrera v. Collins, 506 U.S. 390, 399, 113 S.Ct. 853, 122 L.Ed.2d 203. Instead of the Brady inquiry, the question is whether consideration of Osborne's claim within the framework of the State's postconviction relief procedures "offends some [fundamental] principle of justice" or "transgresses any recognized principle of fundamental fairness in operation." Medina v. California, 505 U.S. 437, 446, 448, 112 S.Ct. 2572, 120 L.Ed.2d 353. Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.

There is nothing inadequate about Alaska's postconviction relief procedures in general or its methods for applying those procedures to persons seeking access to evidence for DNA testing. The State provides a substantive right to be released on a sufficiently compelling showing of new evidence that establishes innocence. It also provides for discovery in postconviction proceedings, and has-through judicial decision-specified that such discovery is available to those seeking access to evidence for DNA testing. These procedures are similar to those provided by federal law and the laws of other States, and they satisfy due process. The same is true for Osborne's reliance on a claimed federal right to be released upon proof of "actual innocence." Even assuming such a right exists, which the Court has not decided and does not decide, there is no due process problem, given the procedures available to access evidence for DNA testing. Pp. 2319 - 2322.
The Court rejects Osborne's invitation to recognize a freestanding, substantive due process right to DNA evidence untethered from the liberty interests he hopes to vindicate with it. In the circumstances of this case, there is no such right. Generally, the Court is “reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.” *Collins v. Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261. There is no long history of a right of access to state evidence for DNA testing that might prove innocence. “The mere novelty of such a claim is reason enough to doubt that ‘substantive due process’ sustains it.” *Reno v. Flores*, 507 U.S. 292, 303, 113 S.Ct. 1439, 123 L.Ed.2d 1. Moreover, to suddenly constitutionalize this area would short-circuit what has been a prompt and considered legislative response by Congress and the States. It would shift to the Federal Judiciary responsibility for devising rules governing DNA access and creating a new constitutional code of procedures to answer the myriad questions that would *2312 arise. There is no reason to suppose that federal courts' answers to those questions will be any better than those of state courts and legislatures, and good reason to suspect the opposite. See, e.g., *Collins, supra*, at 125, 112 S.Ct. PP. 2322 - 2323.

521 F.3d 1118, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. ALITO, J., filed a concurring opinion, in which KENNEDY, J., joined, and in which THOMAS, J., joined as to Part II. STEVENS, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, and in which SOUTER, J., joined as to Part I. SOUTER, J., filed a dissenting opinion.

Kenneth M. Rosenstein, for Petitioners.

Neal K. Katyal, for United States as amicus curiae, by special leave of the Court, supporting the Petitioners.

Peter Neufeld, for Respondent.


Chief Justice ROBERTS delivered the opinion of the Court.

DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. The Federal Government and the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure-usually but not always through legislation.

Against this prompt and considered response, the respondent, William Osborne, proposes a different approach: the recognition of a freestanding and far-reaching constitutional right of access to this new type of evidence. The nature of what he seeks is confirmed by his decision to file this lawsuit in federal court under 42 U.S.C. § 1983, not within the state criminal justice system. This approach would take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause. There is no reason to constitutionalize the issue in this way. Because the decision below would do just that, we reverse.
This lawsuit arose out of a violent crime committed 16 years ago, which has resulted in a long string of litigation in the state and federal courts. On the evening of March 22, 1993, two men driving through Anchorage, Alaska, solicited sex from a female prostitute, K.G. She agreed to perform fellatio on both men for $100 and got in their car. The three spent some time looking for a place to stop and ended up in a deserted area near Earthquake Park. When K.G. demanded payment in advance, the two men pulled out a gun and forced her to perform fellatio on the driver while the passenger penetrated her vaginally, using a blue condom she had brought. The passenger then ordered K.G. out of the car and told her to lie face-down in the snow. Fearing for her life, she refused, and the two men choked her and beat her with the gun. When K.G. tried to flee, the passenger beat her with a wooden axe handle and shot her in the head while she lay on the ground. They kicked some snow on top of her and left her for dead. *521 F.3d 1118, 1122 (C.A.9 2008) (case below); Osborne v. State, 163 P.3d 973, 975-976 (Alaska App.2007) ( Osborne II ); App. 27, 42-44.

K.G. did not die; the bullet had only grazed her head. Once the two men left, she found her way back to the road, and flagged down a passing car to take her home. Ultimately, she received medical care and spoke to the police. At the scene of the crime, the police recovered a spent shell casing, the axe handle, some of K.G.'s clothing stained with blood, and the blue condom. Jackson v. State, No. A-5276 etc., 1996 WL 33686444 (Alaska App., Feb. 7, 1996); App. to Pet. for Cert. 117a.

Six days later, two military police officers at Fort Richardson pulled over Dexter Jackson for flashing his headlights at another vehicle. In his car they discovered a gun (which matched the shell casing), as well as several items K.G. had been carrying the night of the attack. Id., at 116a, 118a-119a. The car also matched the description K.G. had given to the police. Jackson admitted that he had been the driver during the rape and assault, and told the police that William Osborne had been his passenger. *521 F.3d, at 1122-1123, 423 F.3d 1050, 1051-1052 (C.A.9 2005); Osborne v. State, 110 P.3d 986, 990 (Alaska App.2005) ( Osborne I ). Other evidence also implicated Osborne. K.G. picked out his photograph (with some uncertainty) and at trial she identified Osborne as her attacker. Other witnesses testified that shortly before the crime, Osborne had called Jackson from an arcade, and then driven off with him. An axe handle similar to the one at the scene of the crime was found in Osborne's room on the military base where he lived.

The State also performed DQ Alpha testing on sperm found in the blue condom. DQ Alpha testing is a relatively inexact form of DNA testing that can clear some wrongly accused individuals, but generally cannot narrow the perpetrator down to less than 5% of the population. See Dept. of Justice, National Comm'n on the Future of DNA Evidence, The Future of Forensic DNA Testing 17 (NCJ 183697, 2000) (hereinafter Future of Forensic DNA Testing); Dept. of Justice, National Comm'n on the Future of DNA Evidence, Postconviction DNA Testing: Recommendations for Handling Requests 27 (NCJ 177626, 1999) (hereinafter Postconviction DNA Testing). The semen found on the condom had a genotype that matched a blood sample taken from Osborne, but not ones from Jackson, K. G., or a third suspect named James Hunter. Osborne is black, and approximately 16% of black individuals have such a genotype. App. 117-119. In other words, the testing ruled out Jackson and Hunter as possible sources of the semen, and also ruled out over 80% of other black individuals. The State also examined some pubic hairs found at the scene of the crime, which were not susceptible to DQ Alpha testing, but which state *2314 witnesses attested to be similar to Osborne's. App. to Pet. for Cert. 117a.

Osborne and Jackson were convicted by an Alaska jury of kidnapping, assault, and sexual assault. They were acquitted of an additional count of sexual assault and of attempted murder. Finding it "‘nearly miraculous’" that K.G. had survived, the trial judge sentenced Osborne to 26 years in prison, with 5 suspended. Id., at 128a. His conviction and sentence were affirmed on appeal. Id., at 113a-130a.

Osborne then sought postconviction relief in Alaska state court. He claimed that he had asked his attorney, Sidney Billingslea, to seek more discriminating restriction-fragment-length-polymorphism (RFLP) DNA testing during trial, and argued that she was constitutionally ineffective for not doing so. Billingslea testified that after investigation, she had concluded that further testing would do more harm than good. She planned to mount a defense of mistaken identity, and thought that the imprecision of the DQ Alpha test gave her “‘very good
numbers in a mistaken identity, cross-racial identification case, where the victim was in the dark and had bad eyesight.”  Osborne I, 110 P.3d, at 990. Because she believed Osborne was guilty, “insisting on a more advanced ... DNA test would have served to prove that Osborne committed the alleged crimes.”  Ibid. The Alaska Court of Appeals concluded that Billingslea's decision had been strategic and rejected Osborne's claim.  Id., at 991-992.

FN1. RFLP testing, unlike DQ Alpha testing, “has a high degree of discrimination,” although it is sometimes ineffective on small samples. Postconviction DNA Testing 26-27; Future of Forensic DNA Testing 14-16. Billingslea testified that she had no memory of Osborne making such a request, but said she was “willing to accept” that he had. Osborne I, 110 P.3d 986, 990 (Alaska App.2005).

In this proceeding, Osborne also sought the DNA testing that Billingslea had failed to perform, relying on an Alaska postconviction statute, Alaska Stat. § 12.72 (2008), and the State and Federal Constitutions. In two decisions, the Alaska Court of Appeals concluded that Osborne had no right to the RFLP test. According to the court, § 12.72 “apparently” did not apply to DNA testing that had been available at trial. Osborne I, 110 P.3d, at 992-993. The court found no basis in our precedents for recognizing a federal constitutional right to DNA evidence.  Id., at 993. After a remand for further findings, the Alaska Court of Appeals concluded that Osborne could not claim a state constitutional right either, because the other evidence of his guilt was too strong and RFLP testing was not likely to be conclusive. Osborne II, 163 P.3d, at 979-981. Two of the three judges wrote separately to say that “[i]f Osborne could show that he were in fact innocent, it would be unconscionable to punish him,” and that doing so might violate the Alaska Constitution.  Id., at 984-985 (Mannheimer, J., concurring).

FN2. It is not clear whether the Alaska Court of Appeals was correct that Osborne sought only forms of DNA testing that had been available at trial, compare Osborne I, supra, at 992, 995, with 521 F.3d 1118, 1123, n. 2 (C.A.9 2008), but it resolved the case on that basis.

The court relied heavily on the fact that Osborne had confessed to some of his crimes in a 2004 application for parole-in which it is a crime to lie.  Id., at 978-979, 981 (majority opinion) (citing Alaska Stat. § 11.56.210 (2002)). In this statement, Osborne acknowledged forcing K.G. to have sex at gunpoint, as well as beating her and covering her with snow.  *2315  Id., at 977-978, n. 11. He repeated this confession before the parole board. Despite this acceptance of responsibility, the board did not grant him discretionary parole.  App. to Pet. for Cert. 8a. In 2007, he was released on mandatory parole, but he has since been rearrested for another offense, and the State has petitioned to revoke this parole. Brief for Petitioners 7, n. 3.

Meanwhile, Osborne had also been active in federal court, suing state officials under 42 U.S.C. § 1983. He claimed that the Due Process Clause and other constitutional provisions gave him a constitutional right to access the DNA evidence for what is known as short-tandem-repeat (STR) testing (at his own expense).  App. 24. This form of testing is more discriminating than the DQ Alpha or RFLP methods available at the time of Osborne's trial. STR testing is extremely discriminating, can be used on small samples, and is “rapidly becoming the standard.”  Future of Forensic DNA Testing 18, n. 9. Osborne also sought to subject the pubic hairs to mitochondrial DNA testing, a secondary testing method often used when a sample cannot be subjected to other tests. See Postconviction DNA Testing 28. He argues that “[a]ll of the same arguments that support access to the condom for STR testing support access to the hairs for mitochondrial testing as well,” Brief for Respondent 11, n. 4, and we treat the claim accordingly.

FN3.
On cross-motions for summary judgment after remand, the District Court concluded that “there does exist, under the unique and specific facts presented, a very limited constitutional right to the testing sought.” 445 F.Supp.2d 1079, 1081 (2006). The court relied on several factors: that the testing Osborne sought had been unavailable at trial, that the testing could be accomplished at almost no cost to the State, and that the results were likely to be material. Id., at 1081-1082. It therefore granted summary judgment in favor of Osborne.

The Court of Appeals affirmed, relying on the prosecutorial duty to disclose exculpatory evidence recognized in Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). While acknowledging that our precedents “involved only the right to pre-trial disclosure,” the court concluded that the Due Process Clause also “extends the government’s duty to disclose (or the defendant's right of access) to post-conviction proceedings.” 521 F.3d, at 1128. Although Osborne's trial and appeals were over, the court noted that he had a “potentially viable” state constitutional claim of “actual innocence,” id., at 1130, and relied on the “well-established assumption” that a similar claim arose under the Federal Constitution, id., at 1131; cf. Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). The court held that these potential claims extended some of the State's Brady obligations to the postconviction context.

The court declined to decide the details of what showing must be made to access the evidence because it found “Osborne's case for disclosure ... so strong on the facts” that “[w]herever the bar is, he *2316 crosses it.” 521 F.3d, at 1134. While acknowledging that Osborne's prior confessions were “certainly relevant,” the court concluded that they did not “necessarily trum[p] ... the right to obtain post-conviction access to evidence” in light of the “emerging reality of wrongful convictions based on false confessions.” Id., at 1140.

We granted certiorari to decide whether Osborne's claims could be pursued using § 1983, and whether he has a right under the Due Process Clause to obtain postconviction access to the State's evidence for DNA testing. 555 U.S. ----, 129 S.Ct. 488, 172 L.Ed.2d 355 (2008); Pet. for Cert. i. We now reverse on the latter ground.

II

Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue. Postconviction DNA Testing 1-2; Future of Forensic DNA Testing 13-14. DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others.

At the same time, DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent. See House v. Bell, 547 U.S. 518, 540-548, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006). The availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt. The dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice.

specified conditions. That Act also grants money to States that enact comparable statutes, § 413, 118 Stat. 2285, note following 42 U.S.C. § 14136, and as a consequence has served as a model for some state legislation. At oral argument, Osborne agreed that the federal statute is a model for how *2317 States ought to handle the issue. Tr. of Oral Arg. 33, 38-39; see also Brief for United States as Amicus Curiae 19-26 (defending constitutionality of Innocence Protection Act).

These laws recognize the value of DNA evidence but also the need for certain conditions on access to the State's evidence. A requirement of demonstrating materiality is common, e.g., 18 U.S.C. § 3600(a)(8), but it is not the only one. The federal statute, for example, requires a sworn statement that the applicant is innocent. § 3600(a)(1). This requirement is replicated in several state statutes. E.g., Cal.Penal Code Ann. §§ 1405(b)(1), (c)(1) (West Supp.2009), Fla. Stat. § 925.11(2)(a)(3) (2006); N.H.Rev.Stat. Ann. 651 D:2(1)(b) (2007); S.C.Code Ann. 17-28-40 (Supp.2008). States also impose a range of diligence requirements. Several require the requested testing to “have been technologically impossible at trial.” Garrett, supra, at 1681, and n. 242. Others deny testing to those who declined testing at trial for tactical reasons. E.g., Utah Code. Ann. § 78B-9-301(4) (2008).

Alaska is one of a handful of States yet to enact legislation specifically addressing the issue of evidence requested for DNA testing. But that does not mean that such evidence is unavailable for those seeking to prove their innocence. Instead, Alaska courts are addressing how to apply existing laws for discovery and postconviction relief to this novel technology. See Osborne I, 110 P.3d, at 992-993; Patterson v. State, No. A-8814, 2006 WL 573797, *4 (Alaska App., Mar 8, 2006). The same is true with respect to other States that do not have DNA-specific statutes. E.g., Fagan v. State, 957 So.2d 1159 (Ala.Crim.App.2007). Cf. Mass. Rule Crim. Proc. 30(c)(4) (2009).

First, access to evidence is available under Alaska law for those who seek to subject it to newly available DNA testing that will prove them to be actually innocent. Under the State’s general postconviction relief statute, a prisoner may challenge his conviction when “there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice.” Alaska Stat. § 12.72.010(4) (2008). Such a claim is exempt from otherwise applicable time limits if “newly discovered evidence,” pursued with due diligence, “establishes by clear and convincing evidence that the applicant is innocent.” § 12.72.020(b)(2).

Both parties agree that under these provisions of § 12.72, “a defendant is entitled to post-conviction relief if the defendant presents newly discovered evidence that establishes by clear and convincing evidence that the defendant is innocent.” Osborne I, supra, at 992 (internal quotation marks omitted). If such a claim is brought, state law permits general discovery. See Alaska Rule Crim. Proc. 35.1(g). Alaska courts have explained that these procedures are available to request DNA evidence for newly available testing to establish actual innocence. See Patterson, supra, at *4 (“If Patterson had brought the DNA analysis request as part of his previous application for [postconviction] relief ... he would have been able to request production of evidence”).

In addition to this statutory procedure, the Alaska Court of Appeals has invoked a widely accepted three-part test to govern additional rights to DNA access under the State Constitution. Osborne II, 163 P.3d, at 974-975. Drawing on the experience with DNA evidence of State Supreme Courts around the country, the Court of Appeals explained that it was “reluctant to hold that Alaska law offers no remedy to defendants who could prove their factual innocence.” Osborne I, 110 P.3d, at 995; *2318 see id., at 995, n. 27 (citing decisions from other state courts). It was “prepared to hold, however, that a defendant who seeks post-conviction DNA testing ... must show (1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning the defendant's identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue.” Id., at 995. Thus, the Alaska courts have suggested that even those who do not get discovery under the State's criminal rules have available to them a safety valve under the State Constitution.

This is the background against which the Federal Court of Appeals ordered the State to turn over the DNA evidence in its possession, and it is our starting point in analyzing Osborne's constitutional claims.
The parties dispute whether Osborne has invoked the proper federal statute in bringing his claim. He sued under the federal civil rights statute, 42 U.S.C. § 1983, which gives a cause of action to those who challenge a State's "deprivation of any rights ... secured by the Constitution." The State insists that Osborne's claim must be brought under 28 U.S.C. § 2254, which allows a prisoner to seek "a writ of habeas corpus ... on the ground that he is in custody in violation of the Constitution."

While Osborne's claim falls within the literal terms of § 1983, we have also recognized that § 1983 must be read in harmony with the habeas statute, See Preiser v. Rodriguez, 411 U.S. 273, 93 S.Ct. 1355, 36 L.Ed.2d 206 (1972); Heck, 512 U.S., at 487, 114 S.Ct. 2364. "Stripped to its essence," the State says, "Osborne's § 1983 action is nothing more than a request for evidence to support a hypothetical claim that he is actually innocent .... [T]his hypothetical claim sounds at the core of habeas corpus." Brief for Petitioners 19.

Osborne responds that his claim does not sound in habeas at all. Although invalidating his conviction is of course his ultimate goal, giving him the evidence he seeks "would not necessarily imply the invalidity of [his] confinement." Brief for Respondent 21. If he prevails, he would receive only access to the DNA, and even if DNA testing exonerates him, his conviction is not automatically invalidated. He must bring an entirely separate suit or a petition for clemency to invalidate his conviction. If he were proved innocent, the State might also release him on its own initiative, avoiding any need to pursue habeas at all.

Osborne also invokes our recent decision in Wilkinson v. Dotson, 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 263 (2005). There, we held that prisoners who sought new hearings for parole eligibility and suitability need not proceed in habeas. We acknowledged that the two plaintiffs' "hope[d]" their suits would "help bring about earlier release," id., at 78, 125 S.Ct. 1242, but concluded that the § 1983 suit would not accomplish that without further proceedings. "Because neither plaintiff's claim would necessarily spell speedier release, neither [lay] at the core of habeas corpus." Id., at 82, 125 S.Ct. 1242 (internal quotation marks omitted). Every Court of Appeals to consider the question since Dotson has decided that because access to DNA evidence similarly does not "necessarily spell speedier release," ibid., it can be sought under § 1983. See 423 F.3d, at 1055-1056; Savory v. Lyons, 469 F.3d 667, 672 (C.A.2 2006); McKithen v. Brown, 481 F.3d 89, 103, and n. 15 (C.A.2 2007). On the other hand, the State argues that Dotson is distinguishable because the challenged procedures in that *2319 case did not affect the ultimate “exercise of discretion by the parole board.” Brief for Petitioners 32. It also maintains that Dotson does not set forth “the exclusive test for whether a prisoner may proceed under § 1983.” Brief for Petitioners 32.

While we granted certiorari on this question, our resolution of Osborne's claims does not require us to resolve this difficult issue. Accordingly, we will assume without deciding that the Court of Appeals was correct that Heck does not bar Osborne's § 1983 claim. Even under this assumption, it was wrong to find a due process violation.

IV

A

[1] “No State shall ... deprive any person of life, liberty, or property, without due process of law.” U.S. Const., Amdt. 14, § 1; accord Amdt. 5. This Clause imposes procedural limitations on a State's power to take away protected entitlements. See, e.g., Jones v. Flowers, 547 U.S. 220, 226-239, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006). Osborne argues that access to the State's evidence is a “process” needed to vindicate his right to prove himself innocent and get out of jail. Process is not an end in itself, so a necessary premise of this argument is that he has an entitlement (what our precedents call a “liberty interest”) to prove his innocence even after a fair trial has proved otherwise. We must first examine this asserted liberty interest to determine what process (if any) is due. See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570-571, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Olim v. Wakinekona, 461 U.S. 238, 250-251, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983).

[2] In identifying his potential liberty interest, Osborne first attempts to rely on the Governor's constitutional authority to “grant pardons, commutations, and reprieves,” Alaska Const., Art. III, § 21. That claim can be readily disposed of. We have held that noncapital defendants do not have a liberty interest in traditional state executive clemency, to which no particular claimant is entitled as a matter of state law. Connecticut Bd of
Osborne does, however, have a liberty interest in demonstrating his innocence with new evidence under state law. As explained, Alaska law provides that those who use “newly discovered evidence” to “establish[ ] by clear and convincing evidence that [they are] innocent” may obtain “vacation of [their] conviction or sentence in the interest of justice.” Alaska Stat. §§ 12.72.020(b)(2), 12.72.010(4). This “state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right.”

The Court of Appeals went too far, however, in concluding that the Due Process Clause requires that certain familiar preconviction trial rights be extended to protect Osborne's postconviction liberty interest. After identifying Osborne's possible liberty interests, the court concluded that the State had an obligation to comply with the principles of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. In that case, we held that due process requires a prosecutor to disclose material exculpatory evidence to the defendant before trial. The Court of Appeals acknowledged that nothing in our precedents suggested that this disclosure obligation continued after the defendant was convicted and the case was closed. 521 F.3d, at 1128, but it relied on prior Ninth Circuit precedent applying “Brady as a post-conviction right.” id., at 1128-1129 (citing Thomas v. Goldsmith, 979 F.2d 746, 749-750 (C.A.9 1992)). Osborne does not claim that Brady controls this case, Brief for Respondent 39-40, and with good reason.

A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man. At trial, the defendant is presumed innocent and may demand that the government prove its case beyond reasonable doubt. But “[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears.” Herrera v. Collins, 506 U.S. 390, 399, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). “Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.” Dumschat, supra, at 464, 101 S.Ct. 2460 (internal quotation marks and alterations omitted).

The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief. “[W]hen a State chooses to offer help to those seeking relief from convictions,” due process does not “dictat[e] the exact form such assistance must assume.” Pennsylvania v. Finley, 481 U.S. 551, 559, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). Osborne's right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. Brady is the wrong framework.

Instead, the question is whether consideration of Osborne's claim within the framework of the State's procedures for postconviction relief “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,” or “transgresses any recognized principle of fundamental fairness in operation.” Medina v. California, 505 U.S. 437, 446, 448, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) (internal quotation marks omitted); see Herrera, supra, at 407-408, 113 S.Ct. 853 (applying Medina to postconviction relief for actual innocence); Finley, supra, at 556, 107 S.Ct. 1990 (postconviction relief procedures are constitutional if they “compor[t] with fundamental fairness”). Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.

We see nothing inadequate about the procedures Alaska has provided to vindicate its state right to postconviction relief in general, and nothing inadequate about how those procedures apply to those who seek access to DNA evidence. Alaska provides a substantive right to be released on a sufficiently compelling showing of new evidence that establishes innocence. It exempts such claims from otherwise applicable time limits. The State provides for discovery in postconviction proceedings, and has through judicial decision-specified that this
discovery procedure is available to those seeking access to DNA evidence. \textit{Patterson}, 2006 WL 573797, at *4. These procedures are not without limits. The evidence must indeed be newly available to qualify under Alaska's statute, must have been diligently pursued, and must also be sufficiently material. These procedures are similar to those provided for DNA evidence by federal law and the law of other States, see, e.g., 18 U.S.C. \textsection 3600(a), and they are not inconsistent with the "traditions and conscience of our *2321 people" or with "any recognized principle of fundamental fairness." \textit{Medina, supra}, at 446, 448, 112 S.Ct. 2572 (internal quotation marks omitted).

And there is more. While the Alaska courts have not had occasion to conclusively decide the question, the Alaska Court of Appeals has suggested that the State Constitution provides an additional right of access to DNA. In expressing its "reluctan[ce] to hold that Alaska law offers no remedy" to those who belatedly seek DNA testing, and in invoking the three-part test used by other state courts, the court indicated that in an appropriate case the State Constitution may provide a failsafe even for those who cannot satisfy the statutory requirements under general postconviction procedures. \textit{Osborne I}, 110 P.3d, at 995-996.

To the degree there is some uncertainty in the details of Alaska's newly developing procedures for obtaining postconviction access to DNA, we can hardly fault the State for that. Osborne has brought this \textsection 1983 action without ever using these procedures in filing a state or federal habeas claim relying on actual innocence. In other words, he has not tried to use the process provided to him by the State or attempted to vindicate the liberty interest that is now the centerpiece of his claim. When Osborne \textit{did} request DNA testing in state court, he sought RFLP testing that had been available at trial, not the STR testing he now seeks, and the state court relied on that fact in denying him testing under Alaska law. \textit{Osborne I, supra}, at 992 ("[T]he DNA testing that Osborne proposes to perform on this evidence existed at the time of Osborne's trial"); \textit{Osborne II}, 163 P.3d, at 984 (Mannheimer, J., concurring) ("[T]he DNA testing [Osborne] proposes would not yield "new evidence" for purposes of ... [Alaska Stat. \textsection 12.72.010]") because it was "available at the time of Osborne's trial").

His attempt to sidestep state process through a new federal lawsuit puts Osborne in a very awkward position. If he simply seeks the DNA through the State's discovery procedures, he might well get it. If he does not, it may be for a perfectly adequate reason, just as the federal statute and all state statutes impose conditions and limits on access to DNA evidence. It is difficult to criticize the State's procedures when Osborne has not invoked them. This is not to say that Osborne must exhaust state-law remedies. See \textit{Patsy v. Board of Regents of Fla.}, 457 U.S. 496, 500-501, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). But it is Osborne's burden to demonstrate the inadequacy of the state-law procedures available to him in state postconviction relief. Cf. \textit{Medina, supra}, at 453, 112 S.Ct. 2572. These procedures are adequate on their face, and without trying them, Osborne can hardly complain that they do not work in practice.

\[9\] As a fallback, Osborne also obliquely relies on an asserted federal constitutional right to be released upon proof of "actual innocence." Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming, arguendo, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet. \textit{House}, 547 U.S., at 554-555, 126 S.Ct. 2064; \textit{Herrera}, 506 U.S., at 398-417, 113 S.Ct. 853; see also \textit{id.}, at 419-421, 113 S.Ct. 853 (O'Connor, J., concurring); \textit{id.}, at 427-428, 113 S.Ct. 853 (SCALIA, J., concurring); \textit{Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments}, 38 U. Chi. L.Rev. 142, 159, n. 87 (1970). In this case too we can assume without deciding that such a claim exists, because even if so there is no due process *2322 problem. Osborne does not dispute that a federal actual innocence claim (as opposed to a DNA access claim) would be brought in habeas. Brief for Respondent 22-24. If such a habeas claim is viable, federal procedural rules permit discovery "for good cause." 28 U.S.C. \textsection 2254 Rule 6; \textit{Bracy v. Gramley}, 520 U.S. 899, 908-909, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). Just as with state law, Osborne cannot show that available discovery is facially inadequate, and cannot show that it would be arbitrarily denied to him.

\[10\] The Court of Appeals below relied only on procedural due process, but Osborne seeks to defend the judgment on the basis of substantive due process as well. He asks that we recognize a freestanding right to DNA evidence untethered from the liberty interests he hopes to vindicate with it. We reject the invitation and conclude,
in the circumstances of this case, that there is no such substantive due process right. “As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.” Collins v. Harker Heights, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). Osborne seeks access to state evidence so that he can apply new DNA-testing technology that might prove him innocent. There is no long history of such a right, and “[t]he mere novelty of such a claim is reason enough to doubt that ‘substantive due process' sustains it.” Reno v. Flores, 507 U.S. 292, 303, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

And there are further reasons to doubt. The elected governments of the States are actively confronting the challenges DNA technology poses to our criminal justice systems and our traditional notions of finality, as well as the opportunities it affords. To suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative response. The first DNA testing statutes were passed in 1994 and 1997. Act of Aug. 2, 1994, ch. 737, 1994 N.Y. Laws 3709 (codified at N.Y.Crim. Proc. Law Ann. § 440.30(1-a) (West)); Act of May 9, 1997, Pub. Act No. 90-141, 1997 Ill. Laws 2461 (codified at 725 Ill. Comp. Stat., ch. 725, § 5/116-3(a) (West)). In the past decade, 44 States and the Federal Government have followed suit, reflecting the increased availability of DNA testing. As noted, Alaska itself is considering such legislation. See supra, at 2316 - 2317. “By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field.” Glucksberg, 521 U.S., at 720, 117 S.Ct. 2258 (internal quotation marks omitted). “[J]udicial imposition of a categorical remedy ... might pretermit other responsible solutions being considered in Congress and state legislatures.” Murray v. Giarratano, 492 U.S. 1, 14, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) (KENNEDY, J., concurring in judgment). If we extended substantive due process to this area, we would cast these statutes into constitutional doubt and be forced to take over the issue of DNA access ourselves. We are reluctant to enlist the Federal Judiciary in creating a new constitutional code of rules for handling DNA.

FN4. The dissent asserts that our position “resembles” Justice Harlan’s dissent in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Post, at 2339, n. 10 (opinion of STEVENS, J.). Miranda devised rules to safeguard a constitutional right the Court had already recognized. Indeed, the underlying requirement at issue in that case that confessions be voluntary had “roots” going back centuries. Dickerson v. United States, 530 U.S. 428, 432-433, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). In contrast, the asserted right to access DNA evidence is unrooted in history or tradition, and would thrust the Federal Judiciary into an area previously left to state courts and legislatures.

*2323 Establishing a freestanding right to access DNA evidence for testing would force us to act as policymakers, and our substantive-due-process rulemaking authority would not only have to cover the right of access but a myriad of other issues. We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. Cf. Arizona v. Youngblood, 488 U.S. 51, 56-58, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when? No doubt there would be a miscellany of other minor directives. See, e.g., Harvey v. Horan, 285 F.3d 298, 300-301 (C.A.4 2002) (Wilkinson, C. J., concurring in denial of rehearing).

In this case, the evidence has already been gathered and preserved, but if we extend substantive due process to this area, these questions would be before us in short order, and it is hard to imagine what tools federal courts would use to answer them. At the end of the day, there is no reason to suppose that their answers to these questions would be any better than those of state courts and legislatures, and good reason to suspect the opposite. See Collins, supra, at 125, 113 S.Ct. 853; Glucksberg, supra, at 720, 117 S.Ct. 2258.

* * *

DNA evidence will undoubtedly lead to changes in the criminal justice system. It has done so already. The question is whether further change will primarily be made by legislative revision and judicial interpretation of the existing system, or whether the Federal Judiciary must leap ahead-revising (or even discarding) the system by creating a new constitutional right and taking over responsibility for refining it.
Federal courts should not presume that state criminal procedures will be inadequate to deal with technological change. The criminal justice system has historically accommodated new types of evidence, and is a time-tested means of carrying out society's interest in convicting the guilty while respecting individual rights. That system, like any human endeavor, cannot be perfect. DNA evidence shows that it has not been. But there is no basis for Osborne's approach of assuming that because DNA has shown that these procedures are not flawless, DNA evidence must be treated as categorically outside the process, rather than within it. That is precisely what his § 1983 suit seeks to do, and that is the contention we reject.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice ALITO, with whom Justice KENNEDY joins, and with whom Justice THOMAS joins as to Part II, concurring.

Respondent was convicted for a brutal sexual assault. At trial, the defense declined to have DNA testing done on a semen sample found at the scene of the crime. Defense counsel explained that this decision was made based on fear that the testing would provide further evidence of respondent's guilt. After conviction, in an unsuccessful attempt to obtain parole, respondent confessed in detail to the crime. Now, respondent claims that he has a federal constitutional right to test the sample and that he can go directly to federal court to obtain this relief without giving the Alaska courts a full opportunity to consider his claim.

I agree with the Court's resolution of respondent's constitutional claim. In my view, that claim also fails for two independent reasons beyond those given by the majority. First, a state prisoner asserting a federal constitutional right to perform such testing must file a petition for a writ of habeas corpus, not an action under 42 U.S.C. § 1983, as respondent did here, and thus must exhaust state remedies, see 28 U.S.C. § 2254(b)(1)(A). Second, even though respondent did not exhaust his state remedies, his claim may be rejected on the merits, see § 2254(b)(2), because a defendant who declines the opportunity to perform DNA testing at trial for tactical reasons has no constitutional right to perform such testing after conviction.

As our prior opinions illustrate, it is sometimes difficult to draw the line between claims that are properly brought in habeas and those that may be brought under 42 U.S.C. § 1983. See Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973); Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994); Wilkinson v. Dotson, 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005). But I think that this case falls on the habeas side of the line.

We have long recognized the principles of federalism and comity at stake when state prisoners attempt to use the federal courts to attack their final convictions. See, e.g., Darr v. Burford, 339 U.S. 200, 204, 70 S.Ct. 587, 94 L.Ed. 761 (1950); Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 490-491, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973); Preiser, supra, at 491-492, 93 S.Ct. 1827; Rose v. Lundy, 455 U.S. 509, 518-519, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982); Rhines v. Weber, 544 U.S. 269, 273-274, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). We accordingly held that ‘‘it would be unseemly in our dual system of government for a federal district court to upset an opportunity to the state courts to correct a constitutional violation.’’ Lundy, supra, at 518, 102 S.Ct. 1198 (quoting Darr, supra, at 204, 70 S.Ct. 587). Congress subsequently codified Lundy's exhaustion requirement in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(b)(1)(A).

We also have long recognized the need to impose sharp limits on state prisoners' efforts to bypass state courts with their discovery requests. See, e.g., Wainwright v. Sykes, 433 U.S. 72, 87-90, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); Keene v. Tamayo-Reyes, 504 U.S. 1, 8-10, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992); Williams v. Taylor, 529 U.S. 420, 436, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). For example, we have held that “concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum” require a state

The rules set forth in our cases and codified in AEDPA would mean very little if state prisoners could simply evade them through artful pleading. For example, I take it as common ground that a state prisoner’s claim under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), must be brought in habeas because that claim, if proved, would invalidate the judgment of conviction or sentence (and thus the lawfulness of the inmate’s confinement). See Heck, supra, at 481, 114 S.Ct. 2364. But under respondent’s view, I see no reason why a Brady claimant could not bypass the state courts and file a § 1983 claim in federal court, contending that he has a due process right to search the State’s files for exculpatory evidence. Allowing such a maneuver would violate the principles embodied in Lundy, Keeney, and AEDPA.

Although respondent has now recharacterized his claim in an effort to escape the requirement of proceeding in habeas, in his complaint he squarely alleged that the State “deprived [him] of access to exculpatory evidence in violation of Brady [, supra], and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.” App. 37. That allegedly “exculpatory” evidence—which Brady defines as “evidence favorable to [the] accused” and “material either to guilt or to punishment,” 373 U.S., at 87, 83 S.Ct. 1194—would, by definition, undermine respondent’s “guilt” or “punishment” if his allegations are true. Such claims should be brought in habeas, see Heck, supra, at 481, 114 S.Ct. 2364, and respondent cannot avoid that result by attempting to bring his claim under § 1983, see Dotson, supra, at 92, 125 S.Ct. 1242 (KENNEDY, J., dissenting).FN1

FN1. This case is quite different from Dotson. In that case, two state prisoners filed § 1983 actions challenging the constitutionality of Ohio’s parole procedures and seeking “a new parole hearing that may or may not result in release, prescription of the composition of the hearing panel, and specification of the procedures to be followed.” 544 U.S., at 86, 125 S.Ct. 1242 (SCALIA, J., concurring). Regardless of whether such remedies fall outside the authority of federal habeas judges, compare id., at 86-87, 125 S.Ct. 1242, with id., at 88-92, 125 S.Ct. 1242 (KENNEDY, J., dissenting), there is no question that the relief respondent seeks in this case—“exculpatory” evidence that tends to prove his innocence—lies “within the core of habeas corpus,” Preiser v. Rodriguez, 411 U.S. 475, 487, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973).

It is no answer to say, as respondent does, that he simply wants to use § 1983 as a discovery tool to lay the foundation for a future state postconviction application, a state clemency petition, or a request for relief by means of “prosecutorial consent.” See Brief for Respondent 23. Such tactics implicate precisely the same federalism and comity concerns that motivated our decisions (and Congress’) to impose exhaustion requirements and discovery limits in federal habeas proceedings. If a petitioner can evade the habeas statute’s exhaustion requirements in this way, I see no reason why a state prisoner asserting an ordinary Brady claim—i.e., a state prisoner who claims that the prosecution failed to turn over exculpatory evidence prior to trial—could not follow the same course.

What respondent seeks was accurately described in his complaint—the discovery of evidence that has a material bearing on his conviction. Such a claim falls within “the core” of habeas. Preiser, supra, at 489, 93 S.Ct. 1827. Recognition of a constitutional right to postconviction scientific testing of evidence in the possession of the prosecution would represent an expansion *2326 of Brady and a broadening of the discovery rights now available to habeas petitioners. See 28 U.S.C. § 2254 Rule 6. We have never previously held that a state prisoner may seek discovery by means of a § 1983 action, and we should not take that step here. I would hold that respondent’s claim (like all other Brady claims) should be brought in habeas.

II

The principles of federalism, comity, and finality are not the only ones at stake for the State in cases like this one. To the contrary, DNA evidence creates special opportunities, risks, and burdens that implicate important state interests. Given those interests—and especially in light of the rapidly evolving nature of DNA testing technology—this is an area that should be (and is being) explored “through the workings of normal democratic processes in the


The pace of the legislative response has been so fast that two States have enacted statutes while this case was pending. The Governor of South Dakota signed a DNA access law on March 11, 2009, see H. R. 1166, and the Governor of Mississippi signed a DNA access law on March 16, 2009, see S. 2709. The only States that do not have DNA-testing statutes are Alabama, Alaska, Massachusetts, and Oklahoma; and at least three of those States have addressed the issue through judicial decisions. See *Fagan v. State*, 957 So.2d 1159 (Ala.Crim.App.2007); *Osborne v. State*, 110 P.3d 986, 995 (Alaska App.2005) (*Osborne I*); *Commonwealth v. Donald*, 66 Mass.App.Ct. 1110, 848 N.E.2d 447 (2006). Because the Court relies on such evidence, Justice STEVENS accuses it of “resembl[ing]” Justice Harlan's position in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). See *post*, at 2339, n. 10 (quoting 384 U.S., at 523-524, 86 S.Ct. 1602 (dissenting opinion)). I can think of worse things than sharing Justice Harlan's judgment that “this Court's too rapid departure from existing constitutional standards” may “frustrat[e]” the States “long-range and lasting” legislative efforts. *Id.*, at 524, 86 S.Ct. 1602.

A

As the Court notes, DNA testing often produces highly reliable results. See *2327 ante*, at 2316. Indeed, short tandem repeat (STR) “DNA tests can, in certain circumstances, establish to a virtual certainty whether a given individual did or did not commit a particular crime.” *Harvey v. Horan*, 285 F.3d 298, 305 (C.A.4 2002) (Luttig, J., respecting denial of rehearing en banc). Because of that potential for “virtual certainty,” Justice STEVENS argues that the State should welcome respondent's offer to perform modern DNA testing (at his own expense) on the State's DNA evidence; the test will either confirm respondent's guilt (in which case the State has lost nothing) or exonerate him (in which case the State has no valid interest in detaining him). See *post*, at 2336 - 2337.

Alas, it is far from that simple. First, DNA testing—even when performed with modern STR technology, and even when performed in perfect accordance with protocols—often fails to provide “absolute proof” of anything. *Post*, at 2337 (STEVENS, J., dissenting). As one scholar has observed:

“[F]orensic DNA testing rarely occurs [under] idyllic conditions. Crime scene DNA samples do not come from a single source obtained in immaculate conditions; they are messy assortments of multiple unknown persons, often collected in the most difficult conditions. The samples can be of poor quality due to exposure to heat, light, moisture, or other degrading elements. They can be of minimal or insufficient quantity, especially as investigators push DNA testing to its limits and seek profiles from a few cells retrieved from cigarette butts, envelopes, or soda cans. And most importantly, forensic samples often constitute a mixture of multiple persons, such that it is not clear whose profile is whose, or even how many profiles are in the sample at all. All of these factors make DNA testing in the forensic context far more subjective than simply reporting test results ....” * Murphy, The Art in the
See also R. Michaelis, R. Flanders, & P. Wulff, A Litigator's Guide to DNA 341 (2008) (hereinafter Michaelis) (noting that even “STR analyses are plagued by issues of suboptimal samples, equipment malfunctions and human error, just as any other type of forensic DNA test”); Harvey v. Horan, 278 F.3d 370, 383, n. 4 (C.A.4 2002) (King, J., concurring in part and concurring in judgment) (noting that the first STR DNA test performed under Virginia's postconviction DNA access statute was inconclusive). Such concerns apply with particular force where, as here, the sample is minuscule, it may contain three or more persons’ DNA, and it may have degraded significantly during the 24 or more hours it took police to recover it.

Second, the State has important interests in maintaining the integrity of its evidence, and the risks associated with evidence contamination increase every time someone attempts to extract new DNA from a sample. According to Professor John Butler-who is said to have written “the canonical text on forensic DNA typing,” Murphy, supra, at 493, n. 16—“[t]he extraction process is probably where the DNA sample is more susceptible to contamination in the laboratory than at any other time in the forensic DNA analysis process,” J. Butler, Forensic DNA Typing 42 (2d ed.2005).

Indeed, modern DNA testing technology is so powerful that it actually increases the risks associated with mishandling evidence. STR tests, for example, are so sensitive that they can detect DNA transferred from person X to a towel (with *2328 which he wipes his face), from the towel to Y (who subsequently wipes his face), and from Y's face to a murder weapon later wielded by Z (who can use STR technology to blame X for the murder). See Michaelis 62-64; Thompson, Ford, Doom, Raymer, & Krane, Evaluating Forensic DNA Evidence: Essential Elements of a Competent Defense Review (Part 2), The Champion, May 2003, pp. 25-26. Any test that is sensitive enough to pick up such trace amounts of DNA will be able to detect even the slightest, unintentional mishandling of evidence. See Michaelis 63 (cautioning against mishandling evidence because “two research groups have already demonstrated the ability to obtain STR profiles from fingerprints on paper or evidence objects”). And that is to say nothing of the intentional DNA-evidence-tampering scandals that have surfaced in recent years. See, e.g., Murphy, The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence, 95 Calif. L.Rev. 721, 772-773 (2007) (collecting examples). It gives short shrift to such risks to suggest that anyone—including respondent, who has twice confessed to his crime, has never recanted, and passed up the opportunity for DNA testing at trial-should be given a never-before-recognized constitutional right to rummage through the State's genetic-evidence locker.

Third, even if every test was guaranteed to provide a conclusive answer, and even if no one ever contaminated a DNA sample, that still would not justify disregarding the other costs associated with the DNA-access regime proposed by respondent. As the Court notes, recognizing a prisoner's freestanding right to access the State's DNA evidence would raise numerous policy questions, not the least of which is whether and to what extent the State is constitutionally obligated to collect and preserve such evidence. See ante, at 2322 - 2323. But the policy problems do not end there.

Even without our creation and imposition of a mandatory-DNA-access regime, state crime labs are already responsible for maintaining and controlling hundreds of thousands of new DNA samples every year. For example, in the year 2005, the State of North Carolina processed DNA samples in approximately 1,900 cases, while the State of Virginia processed twice as many. See Office of State Budget and Management, Cost Study of DNA Testing and Analysis As Directed by Session Law 2005-267, Section 15.8, pp. 5, 8 (Mar. 1, 2006) (hereinafter North Carolina Study), http://www.osbm.state.nc.us/files/pdf_files/3-1-2006FinalDNAReport.pdf (all Internet materials as visited June 16, 2009, and available in Clerk of Court's case file); see also id., at 8 (noting that the State of Iowa processed DNA samples in 1,500 cases in that year). Each case often entails many separate DNA samples. See Wisconsin Criminal Justice Study Commission, Position Paper: “Decreasing the Turnaround Time for DNA Testing,” p. 2 (hereinafter Wisconsin Study), http://www.wcjsc.org/WCJSC_Report_on_DNA_Backlog.pdf (“An average case consists of 8 samples”). And these data-which are now four years out of date-dramatically underestimate the States' current DNA-related caseloads, which expand at an average annual rate of around 24%. See Wisconsin Dept. of Justice, Review of State Crime Lab Resources for DNA Analysis 6 (Feb. 12, 2007), http://www.doj.state.wi.us/news/files/dnaanalysisplan.pdf.
The resources required to process and analyze these hundreds of thousands of samples have created severe backlogs in state crime labs across the country. For example, the State of Wisconsin reports that it receives roughly 17,600 DNA samples per year, but its labs can process only 9,600. Wisconsin Study 2. Similarly, the State of North Carolina reports that “[i]t is not unusual for the [State] Crime Lab to have several thousand samples waiting to be outsourced due to the federal procedures for [the State's] grant. This is not unique to North Carolina but a national issue.” North Carolina Study 9.

The procedures that the state labs use to handle these hundreds of thousands of DNA samples provide fertile ground for litigation. For example, in Commonwealth v. Duarte, 56 Mass.App. 714, 723, 780 N.E.2d 99, 106 (2002), the defendant argued that “the use of a thermometer that may have been overdue for a standardization check rendered the DNA analysis unreliable and inadmissible” in his trial for raping a 13-year-old girl. The court rejected that argument and held “that the status of the thermometer went to the weight of the evidence, and not to its admissibility,” id., at 724, 780 N.E.2d, at 106, and the court ultimately upheld Duarte's conviction after reviewing the testimony of the deputy director of the laboratory that the Commonwealth used for the DNA tests, see ibid. But the case nevertheless illustrates “that no detail of laboratory operation, no matter how minute, is exempt as a potential point on which a defense attorney will question the DNA evidence.” Michaelis 68; see also id., at 68-69 (discussing the policy implications of Duarte).

My point in recounting the burdens that postconviction DNA testing imposes on the Federal Government and the States is not to denigrate the importance of such testing. Instead, my point is that requests for postconviction DNA testing are not cost free. The Federal Government and the States have a substantial interest in the implementation of rules that regulate such testing in a way that harnesses the unique power of DNA testing while also respecting the important governmental interests noted above. The Federal Government and the States have moved expeditiously to enact rules that attempt to perform this role. And as the Court holds, it would be most unwise for this Court, wielding the blunt instrument of due process, to interfere prematurely with these efforts.

B

I see no reason for such intervention in the present case. When a criminal defendant, for tactical purposes, passes up the opportunity for DNA testing at trial, that defendant, in my judgment, has no constitutional right to demand to perform DNA testing after conviction. Recognition of such a right would allow defendants to play games with the criminal justice system. A guilty defendant could forgo DNA testing at trial for fear that the results would confirm his guilt, and in the hope that the other evidence would be insufficient to persuade the jury to find him guilty. Then, after conviction, with nothing to lose, the defendant could demand DNA testing in the hope that some happy accident—for example, degradation or contamination of the evidence—would provide the basis for seeking postconviction relief. Denying the opportunity for such an attempt to game the criminal justice system should not shock the conscience of the Court.

There is ample evidence in this case that respondent attempted to game the system. At trial, respondent's lawyer made an explicit, tactical decision to forgo restriction-fragment-length-polymorphism (RFLP) testing in favor of less-reliable DQ Alpha testing. Having forgone more accurate DNA testing once before, respondent's reasons for seeking it now are suspect. It is true that the STR testing respondent now seeks is even more advanced than the *2330 RFLP testing he declined—but his counsel did not decline RFLP testing because she thought it was not good enough; she declined because she thought it was too good. Osborne I, 110 P.3d 986, 990 (Alaska App.2005). “[A] defendant should not be allowed to take a gambler's risk and complain only if the cards [fall] the wrong way.” Osborne v. State, 163 P.3d 973, 984 (Alaska App.2007) (Osborne II) (Mannheimer, J., concurring) (internal quotation marks omitted).

Justice STEVENS contends that respondent should not be bound by his attorney's tactical decision and notes that respondent testified in the state postconviction proceeding that he strongly objected to his attorney's strategy. See post, at 2336 - 2337, n. 8. His attorney, however, had no memory of that objection, and the state court did not find that respondent's testimony was truthful. Nor do we have reason to assume that respondent was telling the truth, particularly since he now claims that he lied at his parole hearing when he twice confessed to the crimes for which he was convicted.
entitlement to that evidence, I would affirm the decision of the postconviction court. Osborne bears the burden of proving that the State has unreasonably withheld evidence. The State bears the burden of proving that it has been unable or unwilling to articulate reasons for withholding the evidence. Osborne's right to test the evidence is of course grounded in the Due Process Clause, and Osborne has made the requisite showing of necessity.

If the Court believes that Osborne, in fact, has a right to test the evidence, the Court need not address his ineffective assistance claim. If the Court believes that Osborne does not have a right to test the evidence, it should then address Osborne's ineffective assistance claim.

In any event, even assuming for the sake of argument that respondent did object at trial to his attorney's strategy, it is a well-accepted principle that, except in a few carefully defined circumstances, a criminal defendant is bound by his attorney's tactical decisions unless the attorney provided constitutionally ineffective assistance. See Vermont v. Brillon, 556 U.S. ----, ----, 129 S.Ct. 1283, 1290-1291, 173 L.Ed.2d 231 (2009). Here, the state postconviction court rejected respondent's ineffective-assistance claim. Osborne I, supra, at 991-992; respondent does not challenge that holding; and we must therefore proceed on the assumption that his attorney's decision was reasonable and binding.

In adopting rules regarding postconviction DNA testing, the Federal and State Governments may choose to alter the traditional authority of defense counsel with respect to DNA testing. For example, the federal statute provides that a prisoner's declination of DNA testing at trial bars a request for postconviction testing only if the prisoner knowingly and voluntarily waived that right in a proceeding occurring after the enactment of the federal statute. 18 U.S.C. § 3600(a)(3)(A)(i). But Alaska has specifically decided to retain the general rule regarding the authority of defense counsel. See Osborne I supra, at 991-992 (citing Simeon v. State, 90 P.3d 181, 184 (Alaska App.2004)).

Justice STEVENS is quite wrong to suggest that the application of this familiar principle in the present context somehow lessens the prosecution's burden to prove a defendant's guilt. Post, at 2336 - 2337, n. 8 (citing Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). Respondent is not challenging the sufficiency of the State's evidence at trial. Rather, he claims that he has a right to obtain evidence that may be useful to him in a variety of postconviction proceedings. The principle that the prosecution must prove its case beyond a reasonable doubt and the principle that a defendant has no obligation to prove his innocence are not implicated in any way by the issues in this case.

* * *

If a state prisoner wants to challenge the State's refusal to permit postconviction DNA testing, the prisoner should proceed under the habeas statute, which duly accounts for the interests of federalism, comity, and finality. And in considering the merits of such a claim, the State's weighty interests cannot be summarily dismissed as "arbitrary, or conscience shocking." Post, at 2336 (STEVENS, J., dissenting). With these observations, I join the opinion of the Court.

Justice STEVENS, with whom Justice GINSBURG and Justice BREYER join, and with whom Justice SOUTER joins as to Part I, dissenting.

The State of Alaska possesses physical evidence that, if tested, will conclusively establish whether respondent William Osborne committed rape and attempted murder. If he did, justice has been served by his conviction and sentence. If not, Osborne has needlessly spent decades behind bars while the true culprit has not been brought to justice. The DNA test Osborne seeks is a simple one, its cost modest, and its results uniquely precise. Yet for reasons the State has been unable or unwilling to articulate, it refuses to allow Osborne to test the evidence at his own expense and to thereby ascertain the truth once and for all.

On two equally problematic grounds, the Court today blesses the State's arbitrary denial of the evidence Osborne seeks. First, while acknowledging that Osborne may have a due process right to access the evidence under Alaska's postconviction procedures, the Court concludes that Osborne has not yet availed himself of all possible avenues for relief in state court. As both a legal and factual matter, that conclusion is highly suspect. More troubling still, based on a fundamental mischaracterization of the right to liberty that Osborne seeks to vindicate, the Court refuses to acknowledge "in the circumstances of this case" any right to access the evidence that is grounded in the Due Process Clause itself. Because I am convinced that Osborne has a constitutional right of access to the evidence he wishes to test and that, on the facts of this case, he has made a sufficient showing of entitlement to that evidence, I would affirm the decision of the Court of Appeals.

FN3. The state court noted that respondent's trial counsel "disbelieved Osborne's statement that he did not commit the crime" and therefore "elected to avoid the possibility of obtaining DNA test results that might have confirmed Osborne's culpability." Osborne I, 110 P.3d, at 990. Given the reasonableness of trial counsel's judgment, the state court held that respondent's protestations (whether or not he made them) were irrelevant. Id., at 991-992.

In any event, even assuming for the sake of argument that respondent did object at trial to his attorney's strategy, it is a well-accepted principle that, except in a few carefully defined circumstances, a criminal defendant is bound by his attorney's tactical decisions unless the attorney provided constitutionally ineffective assistance. See Vermont v. Brillon, 556 U.S. ----, ----, 129 S.Ct. 1283, 1290-1291, 173 L.Ed.2d 231 (2009). Here, the state postconviction court rejected respondent's ineffective-assistance claim. Osborne I, supra, at 991-992; respondent does not challenge that holding; and we must therefore proceed on the assumption that his attorney's decision was reasonable and binding.

FN4. In adopting rules regarding postconviction DNA testing, the Federal and State Governments may choose to alter the traditional authority of defense counsel with respect to DNA testing. For example, the federal statute provides that a prisoner's declination of DNA testing at trial bars a request for postconviction testing only if the prisoner knowingly and voluntarily waived that right in a proceeding occurring after the enactment of the federal statute. 18 U.S.C. § 3600(a)(3)(A)(i). But Alaska has specifically decided to retain the general rule regarding the authority of defense counsel. See Osborne I supra, at 991-992 (citing Simeon v. State, 90 P.3d 181, 184 (Alaska App.2004)).

FN5. Justice STEVENS is quite wrong to suggest that the application of this familiar principle in the present context somehow lessens the prosecution's burden to prove a defendant's guilt. Post, at 2336 - 2337, n. 8 (citing Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). Respondent is not challenging the sufficiency of the State's evidence at trial. Rather, he claims that he has a right to obtain evidence that may be useful to him in a variety of postconviction proceedings. The principle that the prosecution must prove its case beyond a reasonable doubt and the principle that a defendant has no obligation to prove his innocence are not implicated in any way by the issues in this case.

* * *

If a state prisoner wants to challenge the State's refusal to permit postconviction DNA testing, the prisoner should proceed under the habeas statute, which duly accounts for the interests of federalism, comity, and finality. And in considering the merits of such a claim, the State's weighty interests cannot be summarily dismissed as "arbitrary, or conscience shocking." Post, at 2336 (STEVENS, J., dissenting). With these observations, I join the opinion of the Court.

I

The Fourteenth Amendment provides that “[n]o State shall ... deprive any person of life, liberty, or property, without due process of law.” § 1. Our cases have frequently recognized that protected liberty interests may arise “from the Constitution itself, by reason of guarantees implicit in the word ‘liberty,’ ... or it may arise from an expectation or interest created by state laws or policies.” *Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005). Osborne contends that he possesses a right to access DNA evidence arising from both these sources.

Osborne first anchors his due process right in *Alaska Stat. § 12.72.010*(4) (2008). Under that provision, a person who has been “convicted of, or sentenced for, a crime may institute a proceeding for post-conviction relief if the person claims ... that there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction*2332 or sentence in the interest of justice.” *Ibid.* Osborne asserts that exculpatory DNA test results obtained using state-of-the-art Short Tandem Repeat (STR) and Mitochondrial (mtDNA) analysis would qualify as newly discovered evidence entitled him to relief under the state statute. The problem is that the newly discovered evidence he wishes to present cannot be generated unless he is first able to access the State's evidence—something he cannot do without the State's consent or a court order.

Ordinarily, claims under § 12.72.010(4) must be brought within one year after the conviction becomes final. § 12.72.020(a)(3)(A). However, the court may hear an otherwise untimely claim based on newly discovered evidence “if the applicant establishes due diligence in presenting the claim and sets out facts supported by evidence that is admissible and (A) was not known within ... two years after entry of the judgment of conviction if the claim relates to a conviction; ... (B) is not cumulative to the evidence presented at trial; (C) is not impeachment evidence; and (D) establishes by clear and convincing evidence that the applicant is innocent.” § 12.72.020(b)(2) (2002).

Although States are under no obligation to provide mechanisms for postconviction relief, when they choose to do so, the procedures they employ must comport with the demands of the Due Process Clause, see *Evitts v. Lucey*, 469 U.S. 37, 393, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), by providing litigants with fair opportunity to assert their state-created rights. Osborne contends that by denying him an opportunity to access the physical evidence, the State has denied him meaningful access to state postconviction relief, thereby violating his right to due process.

Although the majority readily agrees that Osborne has a protected liberty interest in demonstrating his innocence with new evidence under *Alaska Stat. § 12.72.010*(4), see ante, at 2319, it rejects the Ninth Circuit's conclusion that Osborne is constitutionally entitled to access the State's evidence. The Court concludes that the adequacy of the process afforded to Osborne must be assessed under the standard set forth in *Medina v. California*, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992). Under that standard, Alaska's procedures for bringing a claim under § 12.72.010(4) will not be found to violate due process unless they “‘offend[d] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,’ or ‘transgres[s] any recognized principle of fundamental fairness in operation.’” *Ante*, at 2320 (quoting *Medina*, 505 U.S., at 444, 448, 112 S.Ct. 2572). (2002) After conducting a cursory review of the relevant statutory text, the Court concludes that Alaska's procedures are constitutional on their face.

Osborne contends that the Court should assess the validity of the State's procedures under the test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), rather than the more exacting test adopted by *Medina v. California*, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992). In my view, we need not decide which standard governs because the state court's denial of access to the evidence Osborne seeks violates due process under either standard. See *Harvey*, 285 F.3d, at 315 (Luttig, J).
While I agree that the statute is not facially deficient, the state courts' application of § 12.72.010(4) raises serious questions whether the State's procedures are fundamentally unfair in their operation. As an initial matter, it is not clear that Alaskan courts ordinarily permit litigants to utilize the state postconviction statute to obtain new evidence in the form of DNA tests. The majority assumes that such discovery is possible based on a single, unpublished, nonprecedential decision from the Alaska Court of Appeals, see ante, at 2320 (citing Patterson v. State, No. A-8814 *2333 (Mar. 8, 2006)), but the State concedes that no litigant yet has obtained evidence for such testing under the statute.\footnote{4}

\footnote{4.} The State explained at oral argument that such testing was ordered in the Patterson case, but by the time access was granted, the relevant evidence had been destroyed. See Tr. of Oral Arg. 12.

Of even greater concern is the manner in which the state courts applied § 12.72.010(4) to the facts of this case. In determining that Osborne was not entitled to relief under the postconviction statute, the Alaska Court of Appeals concluded that the DNA testing Osborne wished to obtain could not qualify as “newly discovered” because it was available at the time of trial. See Osborne v. State, 110 P.3d 986, 992 (2005) (Osborne I). In his arguments before the state trial court and his briefs to the Alaska Court of Appeals, however, Osborne had plainly requested STR DNA testing, a form of DNA testing not yet in use at the time of his trial. See App. 171, 175; see also 521 F.3d 1118, 1123, n. 2 (C.A.9 2008). The state appellate court's conclusion that the requested testing had been available at the time of trial was therefore clearly erroneous.\footnote{5} Given these facts, the majority's assertion that Osborne “attempt[ed] to sidestep state process” by failing “to use the process provided to him by the State” is unwarranted. Ante, at 2321.

\footnote{5.} The majority avoids confronting this serious flaw in the state court's decision by treating its mistaken characterization of the nature of Osborne's request as if it were binding. See ante, at 2321. But see ante, at 2314, n. 2 (conceding “[i]t is not clear” whether the state court erred in reaching that conclusion).

The same holds true with respect to the majority's suggestion that the Alaska Constitution might provide additional protections to Osborne above and beyond those afforded under § 12.72.010(4). In Osborne's state postconviction proceedings, the Alaska Court of Appeals held out the possibility that even when evidence does not meet the requirements of § 12.72.010(4), the State Constitution might offer relief to a defendant who is able to make certain threshold showings. See Osborne I, 110 P.3d, at 995-996. On remand from that decision, however, the state trial court denied Osborne relief on the ground that he failed to show that (1) his conviction rested primarily on eyewitness identification; (2) there was a demonstrable doubt concerning his identity as the perpetrator; and (3) scientific testing would like be conclusive on this issue. Osborne v. State, 163 P.3d 973, 979-981 (Alaska App.2007) (Osborne II). The first two reasons reduce to an evaluation of the strength of the prosecution's original case-a consideration that carries little weight when balanced against evidence as powerfully dispositive as an exculpatory DNA test. The final reason offered by the state court-that further testing would not be conclusive on the issue of Osborne's guilt or innocence-is surely a relevant factor in deciding whether to release evidence for DNA testing. Nevertheless, the state court's conclusion that such testing would not be conclusive in this case is indefensible, as evidenced by the State's recent concession on that point. See also 521 F.3d 1118, 1136, 1139 (C.A.9 2008) (detailing why the facts of this case do not permit an inference that any exonerating test result would be less than conclusive).

Osborne made full use of available state procedures in his efforts to secure access to evidence for DNA testing so that he might avail himself of the postconviction relief afforded by the State of Alaska. He was rebuffed at every turn. The manner in which the Alaska courts applied state *2334 law in this case leaves me in grave doubt about the adequacy of the procedural protections afforded to litigants under Alaska Stat. § 12.72.010(4), and provides strong reason to doubt the majority's flippant assertion that if Osborne were “simply [to] see[k] the DNA through the State's discovery procedures, he might well get it.” Ante, at 2321. However, even if the Court were correct in its assumption that Osborne might be given the evidence he seeks were he to present his claim in state court a second time, there should be no need for him to do so.

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II

Wholly apart from his state-created interest in obtaining postconviction relief under Alaska Stat. § 12.72.010(4), Osborne asserts a right to access the State's evidence that derives from the Due Process Clause itself. Whether framed as a “substantive liberty interest ... protected through a procedural due process right” to have evidence made available for testing, or as a substantive due process right to be free of arbitrary government
action, see Harvey v. Horan, 285 F.3d 298, 315, 319 (C.A.4 2002) (Luttig, J., respecting denial of rehearing en banc). The result is the same: On the record now before us, Osborne has established his entitlement to test the State's evidence.

FN6. See Harvey, 285 F.3d, at 318. (Luttig, J.) (“[T]he claimed right of access to evidence partakes of both procedural and substantive due process. And with a claim such as this, the line of demarcation is faint”).

The liberty protected by the Due Process Clause is not a creation of the Bill of Rights. Indeed, our Nation has long recognized that the liberty safeguarded by the Constitution has far deeper roots. See Declaration of Independence ¶ 2 (holding it self-evident that “all men are ... endowed by their Creator with certain unalienable Rights,” among which are “Life, Liberty, and the pursuit of Happiness”); see also Meachum v. Fano, 427 U.S. 215, 230, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976) (STEVENS, J., dissenting). The “most elemental” of the liberties protected by the Due Process Clause is “the interest in being free from physical detention by one's own government.” Hamdi v. Rumsfeld, 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion); see Foucha v. Louisiana, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause”).

Although a valid criminal conviction justifies punitive detention, it does not entirely eliminate the liberty interests of convicted persons. For while a prisoner's “rights may be diminished by the needs and exigencies of the institutional environment[,] ... [t]here is no iron curtain drawn between the Constitution and the prisons of this country.” Wolff v. McDonnell, 418 U.S. 539, 555-556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Shaw v. Murphy, 532 U.S. 223, 228-229, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001) (“[I]ncarceration does not divest prisoners of all constitutional protections”). Our cases have recognized protected interests in a variety of postconviction contexts, extending substantive constitutional protections to state prisoners on the premise that the Due Process Clause of the Fourteenth Amendment requires States to respect certain fundamental liberties in the postconviction context. See, e.g., Thornburgh v. Abbott, 490 U.S. 401, 407, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (right to free speech); Turner v. Safley, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) (right to marry); Cruz v. Beto, 405 U.S. 319, 322, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972) (per curiam) (right to free exercise of religion); Lee v. Washington, 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968) (per curiam) (right to be free of racial discrimination); Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969) (right to petition government for redress of grievances). It is therefore far too late in the day to question the basic proposition that convicted persons such as Osborne retain a constitutionally protected measure of interest in liberty, including the fundamental liberty of freedom from physical restraint.

Recognition of this right draws strength from the fact that 46 States and the Federal Government have passed statutes providing access to evidence for DNA testing, and 3 additional states (including Alaska) provide similar access through court-made rules alone, see Brief for State of California et al. as Amici Curiae 3-4, n. 1, and 2; ante, at 2316 - 2317. These legislative developments are consistent with recent trends in legal ethics recognizing that prosecutors are obliged to disclose all forms of exculpatory evidence that come into their possession following conviction. See, e.g., ABA Model Rules of Professional Conduct 3.8(g)-(h) (2008); see also Imbler v. Pachtman, 424 U.S. 409, 427, n. 25, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (“[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction”). The fact that nearly all the States have now recognized some postconviction right to DNA evidence makes it more, not less, appropriate to recognize a limited federal right to such evidence in cases where litigants are unfairly barred from obtaining relief in state court.

Insofar as it is process Osborne seeks, he is surely entitled to less than “the full panoply of rights,” that would be due a criminal defendant prior to conviction, see Morrissey v. Brewer, 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). That does not mean, however, that our pretrial due process cases have no relevance in the postconviction context. In Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), we held that the State violates due process when it suppresses “evidence favorable to an accused” that is “material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Although Brady does not directly provide for a postconviction right to such evidence, the concerns with fundamental fairness that motivated our decision in that case are equally present when convicted persons such as Osborne seek access to dispositive DNA evidence following conviction.
Recent scientific advances in DNA analysis have made “it literally possible to confirm guilt or innocence beyond any question whatsoever, at least in some categories of cases.” Harvey, 285 F.3d, at 305 (Luttig, J.). As the Court recognizes today, the powerful new evidence that modern DNA testing can provide is “unlike anything known before.” Ante, at 2316. Discussing these important forensic developments in his oft-cited opinion in Harvey, Judge Luttig explained that although “no one would contend that fairness, in the constitutional sense, requires a post-conviction right of access or a right to disclosure anything approaching in scope that which is required pre-trial,” in cases “where the government holds previously-produced forensic evidence, the testing of which concededly could prove beyond any doubt that the defendant did not commit the crime for which he was convicted, the very same principle of elemental fairness that dictates pre-trial production of all potentially exculpatory evidence dictates post-trial production of this infinitely narrower category of evidence.” *2336 285 F.3d, at 317. It does so “out of recognition of the same systemic interests in fairness and ultimate truth.” Ibid.

Observing that the DNA evidence in this case would be so probative of Osborne's guilt or innocence that it exceeds the materiality standard that governs the disclosure of evidence under Brady, the Ninth Circuit granted Osborne's request for access to the State's evidence. See 521 F.3d, at 1134. In doing so, the Court of Appeals recognized that Osborne possesses a narrow right of postconviction access to biological evidence for DNA testing “where [such] evidence was used to secure his conviction, the DNA testing is to be conducted using methods that were unavailable at the time of trial and are far more precise than the methods that were then available, such methods are capable of conclusively determining whether Osborne is the source of the genetic material, the testing can be conducted without cost or prejudice to the State, and the evidence is material to available forms of post-conviction relief.” Id., at 1142. That conclusion does not merit reversal.

If the right Osborne seeks to vindicate is framed as purely substantive, the proper result is no less clear. “The touchstone of due process is protection of the individual against arbitrary action of government,” Meachum, 427 U.S., at 226, 96 S.Ct. 2532 (internal quotation marks omitted); Wolff, 418 U.S., at 558, 94 S.Ct. 2963; County of Sacramento v. Lewis, 523 U.S. 833, 845-846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). When government action is so lacking in justification that it “can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense,” Collins v. Harker Heights, 503 U.S. 115, 128, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), it violates the Due Process Clause. In my view, the State's refusal to provide Osborne with access to evidence for DNA testing qualifies as arbitrary.

Throughout the course of state and federal litigation, the State has failed to provide any concrete reason for denying Osborne the DNA testing he seeks, and none is apparent. Because Osborne has offered to pay for the tests, cost is not a factor. And as the State now concedes, there is no reason to doubt that such testing would provide conclusive confirmation of Osborne's guilt or revelation of his innocence. FN7 In the courts below, the State refused to provide an explanation for its refusal to permit testing of the evidence, see Brief for Respondent 33, and in this Court, its explanation has been, at best, unclear. Insofar as the State has articulated any reason at all, it appears to be a generalized interest in protecting the finality of the judgment of conviction from any possible future attacks. See Brief for Petitioners 18, 50. FN8

FN7 Justice ALITO provides a detailed discussion of dangers such as laboratory contamination and evidence tampering that may reduce the reliability not only of DNA evidence, but of any type of physical forensic evidence. Ante, at 2324 - 2329 (concurring opinion). While no form of testing is error proof in every case, the degree to which DNA evidence has become a foundational tool of law enforcement and prosecution is indicative of the general reliability and probative power of such testing. The fact that errors may occur in the testing process is not a ground for refusing such testing altogether—were it so, such evidence should be banned at trial no less than in postconviction proceedings. More important still is the fact that the State now concedes there is no reason to doubt that if STR and mtDNA testing yielded exculpatory results in this case, Osborne's innocence would be established.

FN8 In his concurring opinion, Justice ALITO suggests other reasons that might motivate States to resist access to such evidence, including concerns over DNA testing backlogs and manipulation by defendants. See ante, at 2316 - 2317. Not only were these reasons not offered by the State of Alaska as grounds for its decision in this case, but they are not in themselves compelling. While state resource constraints might justify delays in the testing of postconviction DNA evidence, they would not justify an outright ban on access to such evidence. And Justice ALITO's concern that guilty defendants will “play games with the criminal justice system” with regard to the timing of their requests for DNA evidence is not only speculative, but gravely concerning. Ante, at 2317. It bears
remembering that criminal defendants are under no obligation to prove their innocence at trial; rather, the State bears the burden of proving their guilt. See *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Having no obligation to conduct pretrial DNA testing, a defendant should not be bound by a decision to forgo such testing at trial, particularly when, as in this case, the choice was made by counsel over the defendant's strong objection. See *Osborne I*, 110 P.3d, at 990-991. (Justice ALITO suggests there is reason to doubt whether Osborne asked his counsel to perform DNA testing prior to trial, *ante*, at 2318. That fact was not disputed in the state courts, however. Although Osborne's trial counsel averred that she "did not have a present memory of Osborne's desire to have [a more specific discriminatory] test of his DNA done,” she also averred that she was “willing to accept that he does” and that she “would have disagreed with him.” *Id.* at 990.)

*2337* While we have long recognized that States have an interest in ensuring the finality of their judgments, see, e.g., *Duncan v. Walker*, 533 U.S. 167, 179, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001); *Teague v. Lane*, 489 U.S. 288, 309, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion); *McCleskey v. Zant*, 499 U.S. 467, 491-492, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), finality is not a stand-alone value that trumps a State's overriding interest in ensuring that justice is done in its courts and secured to its citizens. Indeed, when absolute proof of innocence is readily at hand, a State should not shrink from the possibility that error may have occurred. Rather, our system of justice is strengthened by "recog[niz]ing the need for, and imperative of, a safety valve in those rare instances where objective proof that the convicted actually did not commit the offense later becomes available through the progress of science." *Harvey*, 285 F.3d, at 306 (Luttig, J.). DNA evidence has led to an extraordinary series of exonerations, not only in cases where the trial evidence was weak, but also in cases where the convicted parties confessed their guilt and where the trial evidence against them appeared overwhelming.*FN9* The examples provided by *amici* of the power of DNA testing serve to convince me that the fact of conviction is not sufficient to justify a State's refusal to perform a test that will conclusively establish innocence or guilt.

*FN9* See generally Brief for Current and Former Prosecutors as *Amici Curiae* ; Brief for Jeanette Popp et al. as *Amici Curiae* ; see also Brief for Individuals Exonerated by Postconviction DNA Testing as *Amici Curiae* 1-20. See also Garrett, *Judging Innocence*, 108 Colum. L.Rev. 55, 109 (2008) (documenting that in 50% of cases in which DNA evidence exonerated a convicted person, reviewing courts had commented on the exoneree's likely guilt and in 10% of the cases had described the evidence supporting conviction as "overwhelming").

This conclusion draws strength from the powerful state interests that offset the State's purported interest in finality *per se*. When a person is convicted for a crime he did not commit, the true culprit escapes punishment. DNA testing may lead to his identification. See Brief for Current and Former Prosecutors as *Amici Curiae* 16 (noting that in more than one-third of all exonerations DNA testing identified the actual offender). Crime victims, the law enforcement profession, and society at large share a strong interest in identifying and apprehending the actual perpetrators of vicious crimes, such as the rape and *2338* attempted murder that gave rise to this case.

The arbitrariness of the State's conduct is highlighted by comparison to the private interests it denies. It seems to me obvious that if a wrongly convicted person were to produce proof of his actual innocence, no state interest would be sufficient to justify his continued punitive detention. If such proof can be readily obtained without imposing a significant burden on the State, a refusal to provide access to such evidence is wholly unjustified.

In sum, an individual's interest in his physical liberty is one of constitutional significance. That interest would be vindicated by providing postconviction access to DNA evidence, as would the State's interest in ensuring that it punishes the true perpetrator of a crime. In this case, the State has suggested no countervailing interest that justifies its refusal to allow Osborne to test the evidence in its possession and has not provided any other nonarbitrary explanation for its conduct. Consequently, I am left to conclude that the State's failure to provide Osborne access to the evidence constitutes arbitrary action that offends basic principles of due process. On that basis, I would affirm the judgment of the Ninth Circuit.

**III**

The majority denies that Osborne possesses a cognizable substantive due process right "under the circumstances of this case," and offers two meager reasons for its decision. First, citing a general reluctance to "expand the concept of substantive due process," *ante*, at 2322 (quoting *Collins*, 503 U.S., at 125, 112 S.Ct. 1061), the Court observes that there is no long history of postconviction access to DNA evidence. "The mere novelty of such a claim," the Court asserts, "is reason enough to doubt that "substantive due process" sustains
it,’ ” ante, at 2322 (quoting Reno v. Flores, 507 U.S. 292, 303, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)). The flaw is in the framing. Of course courts have not historically granted convicted persons access to physical evidence for STR and mtDNA testing. But, as discussed above, courts have recognized a residual substantive interest in both physical liberty and in freedom from arbitrary government action. It is Osborne's interest in those well-established liberties that justifies the Court of Appeals' decision to grant him access to the State's evidence for purposes of previously unavailable DNA testing.

The majority also asserts that this Court's recognition of a limited federal right of access to DNA evidence would be ill advised because it would “short circuit what looks to be a prompt and considered legislative response” by the States and Federal Government to the issue of access to DNA evidence. Such a decision, the majority warns, would embroil the Court in myriad policy questions best left to other branches of government. Ante, at 2322 - 2323. The majority's arguments in this respect bear close resemblance to the manner in which the Court once approached the now-venerable right to counsel for indigent defendants. Before our decision in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), state law alone governed the manner in which counsel was appointed for indigent defendants. “Efforts to impose a minimum federal standard for the right to counsel in state courts routinely met the same refrain: ‘in the face of these widely varying state procedures,’ this Court refused to impose the dictates of ‘due process’ onto the states and ‘hold invalid all procedure not reaching that standard.’” Brief for Current and Former Prosecutors as Amici Curiae 28, n. 8 (quoting Bute v. Illinois, 333 U.S. 640, 668, 68 S.Ct. 763, 92 L.Ed. 986 (1948)). *2339 When at last this Court recognized the Sixth Amendment right to counsel for all indigent criminal defendants in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), our decision did not impede the ability of States to tailor their appointment processes to local needs, nor did it unnecessarily interfere with their sovereignty. It did, however, ensure that criminal defendants were provided with the counsel to which they were constitutionally entitled. FN10 In the same way, a decision to recognize a limited right of postconviction access to DNA testing would not prevent the States from creating procedures by which litigants request and obtain such access; it would merely ensure that States do so in a manner that is nonarbitrary.

FN10. The majority's position also resembles that taken by Justice Harlan in his dissent in Miranda v. Arizona, 384 U.S. 436, 88 S.Ct. 1952, 9 L.Ed.2d 1016 (1968), in which he faulted the Court for its “ironic untimeliness.” He noted that the Court's decision came at time when scholars, politicians, and law enforcement officials were beginning to engage in a “massive reexamination of criminal law enforcement procedures on a scale never before witnessed,” and predicted that the practical effect of the Court's decision would be to “handicap seriously” those sound efforts. Id., at 523-524, 86 S.Ct. 1602. Yet time has vindicated the decision in Miranda. The Court's refusal to grant Osborne access to critical DNA evidence rests on a practical judgment remarkably similar to Justice Harlan's, and I find the majority's judgment today as profoundly incorrect as the Miranda minority's was yesterday.

While it is true that recent advances in DNA technology have led to a nationwide reexamination of state and federal postconviction procedures authorizing the use of DNA testing, it is highly unlikely that affirming the judgment of the Court of Appeals would significantly affect the use of DNA testing in any of the States that have already developed statutes and procedures for dealing with DNA evidence or would require the few States that have not yet done so to postpone the enactment of appropriate legislation. FN11 Indeed, a holding by this Court that the policy judgments underlying that legislation rest on a sound constitutional foundation could only be constructive.

FN11. The United States and several States have voiced concern that the recognition of a limited federal right of access to DNA evidence might call into question reasonable limits placed on such access by federal and state statutes. See Brief for United States as Amicus Curiae 17-26; Brief for State of California et al. as Amici Curiae 1-16. For example, federal law and several state statutes impose the requirement that an applicant seeking postconviction DNA testing execute an affidavit attesting to his innocence before any request will be performed. See, e.g., 18 U.S.C. § 3600(a)(1); Fla. Stat. § 925.11(2)(a)(3) (2009 Supp.). Affirming the judgment of the Ninth Circuit would not cast doubt on the constitutionality of such a requirement, however, since Osborne was never asked to execute such an affidavit as a precondition to obtaining access to the State's evidence. Similarly, affirmance would not call into question the legitimacy of other reasonable conditions States may place on access to DNA testing, such as Alaska's requirement that test results be capable of yielding a clear answer with respect to guilt or innocence. “[D]ue process is flexible,” Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and the manner in which it is provided may reasonably vary from State to State and case to case. So
long as the limitations placed on a litigant's access to such evidence remain procedurally fair and nonarbitrary, they will comport with the demands of due process.

IV

Osborne has demonstrated a constitutionally protected right to due process which the State of Alaska thus far has not vindicated and which this Court is both empowered and obliged to safeguard. On the record before us, there is no reason to deny access to the evidence and there are *2340 many reasons to provide it, not least of which is a fundamental concern in ensuring that justice has been done in this case. I would affirm the judgment of the Court of Appeals, and respectfully dissent from the Court's refusal to do so.

Justice SOUTER, dissenting.

I respectfully dissent on the ground that Alaska has failed to provide the effective procedure required by the Fourteenth Amendment for vindicating the liberty interest in demonstrating innocence that the state law recognizes. I therefore join Part I of Justice STEVENS's dissenting opinion.

I would not decide Osborne's broad claim that the Fourteenth Amendment's guarantee of due process requires our recognition at this time of a substantive right of access to biological evidence for DNA analysis and comparison. I would reserve judgment on the issue simply because there is no need to reach it; at a general level Alaska does not deny a right to postconviction testing to prove innocence, and in any event, Osborne's claim can be resolved by resort to the procedural due process requirement of an effective way to vindicate a liberty interest already recognized in state law, see Evitts v. Lucey, 469 U.S. 387, 393, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). My choice to decide this case on that procedural ground should not, therefore, be taken either as expressing skepticism that a new substantive right to test should be cognizable in some circumstances, or as implying agreement with the Court that it would necessarily be premature for the Judicial Branch to decide whether such a general right should be recognized.

There is no denying that the Court is correct when it notes that a claim of right to DNA testing, post-trial at that, is a novel one, but that only reflects the relative novelty of testing DNA, and in any event is not a sufficient reason alone to reject the right asserted, see Reno v. Flores, 507 U.S. 292, 318-319, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) (O'Connor, J., concurring). Tradition is of course one serious consideration in judging whether a challenged rule or practice, or the failure to provide a new one, should be seen as violating the guarantee of substantive due process as being arbitrary, or as falling wholly outside the realm of reasonable governmental action. See Poe v. Ullman, 367 U.S. 497, 542, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). We recognize the value and lessons of continuity with the past, but as Justice Harlan pointed out, society finds reasons to modify some of its traditional practices, ibid., and the accumulation of new empirical knowledge can turn yesterday's reasonable range of the government's options into a due process anomaly over time.

As for determining the right moment for a court to decide whether substantive due process requires recognition of an individual right unsanctioned by tradition (or the invalidation of traditional law), I certainly agree with the Court that the beginning of wisdom is to go slow. Substantive due process expresses the conception that the liberty it protects is a freedom from arbitrary government action, from restraints lacking any reasonable justification id., at 541, 81 S.Ct. 1752, and a substantive due process claim requires attention to two closely related elements that call for great care on the part of a court. It is crucial, first, to be clear about whose understanding it is that is being taken as the touchstone of what is arbitrary and outside the sphere of reasonable judgment. And it is just as essential to recognize how much time society needs in order to work through a given issue before it makes sense to ask whether a law or practice on the subject is beyond the pale of reasonable choice, and subject to being struck down as violating due process.

FN1. Mutatis mutandis, the same is true of our notions of life and property, subject to the same due process guarantee.

It goes without saying that the conception of the reasonable looks to the prevailing understanding of the broad society, not to individual notions that a judge may entertain for himself alone, id., at 542, 544, 81 S.Ct. 1752, and in applying a national constitution the society of reference is the nation. On specific issues, widely shared understandings within the national society can change as interests claimed under the rubric of liberty evolve into recognition, see Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (personal privacy);
Changes in societal understanding of the fundamental reasonableness of government actions work out in much the same way that individuals reconsider issues of fundamental belief. We can change our own inherited views just so fast, and a person is not labeled a stick-in-the-mud for refusing to endorse a new moral claim without having some time to work through it intellectually and emotionally. Just as attachment to the familiar and the limits of experience affect the capacity of an individual to see the potential legitimacy of a moral position, the broader society needs the chance to take part in the dialectic of public and political back and forth about a new liberty claim before it makes sense to declare unsympathetic state or national laws arbitrary to the point of being unconstitutional. The time required is a matter for judgment depending on the issue involved, but the need for some time to pass before a court entertains a substantive due process claim on the subject is not merely the requirement of judicial restraint as a general approach, but a doctrinal demand to be satisfied before an allegedly lagging legal regime can be held to lie beyond the discretion of reasonable political judgment.

Despite my agreement with the Court on this importance of timing, though, I do not think that the doctrinal requirement necessarily stands in the way of any substantive due process consideration of a postconviction right to DNA testing, even as a right that is freestanding. Given the pace at which DNA testing has come to be recognized as potentially dispositive in many cases with biological evidence, there is no obvious argument that considering DNA testing at a general level would subject wholly intransigent legal systems to substantive due process review prematurely. But, as I said, there is no such issue before us, for Alaska does not flatly deny access to evidence for DNA testing in postconviction cases.

In another case, a judgment about appropriate timing might also be necessary on issues of substantive due process at the more specific level of the State's conditions for exercising the right to test. Several such limitations are potentially implicated, including the need of a claimant to show that the test results would be material as *2342 potentially showing innocence, and the requirement that the testing sought be capable of producing new evidence not available at trial. But although I assume that avoiding prematurity is as much a doctrinal consideration in assessing the conditions affecting a substantive right as it is when the substantive right itself is the subject of a general claim, FN2 there is no need here to resolve any timing issue that might be raised by challenges to these details.

FN2. It makes sense to approach these questions as governed by the same requirement to allow time for adequate societal and legislative consideration that substantive liberty interests should receive at a general level. As Judge Luttig has pointed out, there is no hermetic line between the substantive and the procedural in due process analysis, *Harvey v. Horan, 285 F.3d 298, 318-319 (C.A.4 2002), and in this case one could argue back and forth about the better characterization of various state conditions as being one or the other.

Osborne's objection here is not only to the content of the State's terms and conditions, but also to the adequacy of Alaska's official machinery in applying them, and there is no reason to defer consideration of this due process claim: given the conditions Alaska has placed on the right it recognizes, the due process guarantee requires the State to provide an effective procedure for proving entitlement to relief under that scheme, *Evitts, 469 U.S., at 393, 105 S.Ct. 830, and the State has failed. On this issue, Osborne is entitled to relief. Alaska has presented no good reasons even on its own terms for denying Osborne the access to the evidence he seeks, and the inexplicable failure of the State to provide an effective procedure is enough to show a need for a §1983 remedy, and relief in this case. Justice STEVENS deals with this failure in Part I of his dissent, which I join, and I emphasize only two points here.

In effect, Alaska argues against finding any right to relief in a federal §1983 action because the procedure the State provides is reasonable and adequate to vindicate the post-trial liberty interest in testing evidence that the State has chosen to recognize. FN3 When I first considered the State's position I thought Alaska's two strongest points were these: (1) that in Osborne's state litigation he failed to request access for the purpose of a variety of postconviction testing that could not have been done at time of trial (and thus sought no new evidence by his state-court petition); and (2) that he failed to aver actual innocence (and thus failed to place his oath behind the
assertion that the evidence sought would be material to his postconviction claim). Denying him any relief under these circumstances, the argument ran, did not indicate any inadequacy in the state procedure that would justify resort to § 1983 for providing due process.

FN3. Alaska does not argue that the State's process for vindicating the right to test, however inadequate, defines the limit of the right it recognizes, with a consequence that, by definition, the liberty interest recognized by the State calls for no process for its vindication beyond what the State provides.

Yet the record shows that Osborne has been denied access to the evidence even though he satisfied each of these conditions. As for the requirement to claim testing by a method not available at trial, Osborne's state-court appellate brief specifically mentioned his intent to conduct short tandem repeat (STR) analysis, App. at 171, 175, and the State points to no pleading, brief, or evidence that Osborne ever changed this request.

The State's reliance on Osborne's alleged failure to claim factual innocence is equally untenable. While there is no question that after conviction and imprisonment he admitted guilt under oath as a *2343 condition for becoming eligible for parole, the record before us makes it equally apparent that he claims innocence on oath now. His affidavit filed in support of his request for evidence under § 1983 contained the statement, “I have always maintained my innocence,” id., at 226, ¶ 2, followed by an explanation that his admission of guilt was a necessary gimmick to obtain parole, id., at 227, ¶ 7. Since the State persists in maintaining that Osborne is not entitled to test its evidence, it is apparently mere makeweight for the State to claim that he is not entitled to §1983 relief because he failed to claim innocence seriously and unequivocally.

This is not the first time the State has produced reasons for opposing Osborne's request that collapse upon inspection. Arguing before the Ninth Circuit, the State maintained that the DNA evidence Osborne sought was not material; that is, it argued that a test excluding Osborne as the source of semen in the blue condom, found near the bloody snow and spent shell casing in the secluded area where the victim was raped by one man, would not “establish that he was factually innocent” or even “undermine confidence ... in the verdict.” Reply of Appellant, in No. 06-35875 (CA9 2008), p. 18; see also 521 F.3d 1118, 1136 (C.A.9 2008). Such an argument is patently untenable, and the State now concedes that a favorable test could “conclusively establish Osborne's innocence.” Reply to Brief in Opposition 8.

Standing alone, the inadequacy of each of the State's reasons for denying Osborne access to the DNA evidence he seeks would not make out a due process violation. But taken as a whole the record convinces me that, while Alaska has created an entitlement of access to DNA evidence under conditions that are facially reasonable, the State has demonstrated a combination of inattentiveness and intransigence in applying those conditions that add up to procedural unfairness that violates the Due Process Clause.

FN4. This Court is not in a position to correct individual errors of the Alaska Court of Appeals or Alaska officials, as § 1983 does not serve as a mechanism to review specific, unfavorable state-law determinations.

F. Mississippi DNA Preservation and Testing Statute

MISSISSIPPI’S POST-CONVICTION RELIEF STATUTE

This article shall be known and may be cited as the “Mississippi Uniform Post-Conviction Collateral Relief Act.”

§ 99-39-3. Purpose

(1) The purpose of this article is to revise, streamline and clarify the rules and statutes pertaining to post-conviction collateral relief law and procedures, to resolve any conflicts therein and to provide the courts of this state with an exclusive and uniform procedure for the collateral review of convictions and sentences. Specifically, this article repeals the statutory writ of error coram nobis, supersedes Rule 8.07 of the Mississippi Uniform Criminal Rules of Circuit Court Practice and abolishes the common law writs relating to post-conviction collateral relief, including by way of illustration but not limitation, error coram nobis, error coram vobis, and post-conviction habeas corpus, as well as statutory post-conviction habeas corpus. The relief formerly accorded by such writs may be obtained by an appropriate motion under this article. The enactment of this article does not affect any pre-conviction remedies.

(2) Direct appeal shall be the principal means of reviewing all criminal convictions and sentences, and the purpose of this article is to provide prisoners with a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal.

§ 99-39-5. Motion for relief; grounds; limitations; definitions

(1) Any person sentenced by a court of record of the State of Mississippi, including a person currently incarcerated, civilly committed, on parole or probation or subject to sex offender registration for the period of the registration or for the first five (5) years of the registration, whichever is the shorter period, may file a motion to vacate, set aside or correct the judgment or sentence, a motion to request forensic DNA testing of biological evidence, or a motion for an out-of-time appeal if the person claims:

(a) That the conviction or the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of Mississippi;

(b) That the trial court was without jurisdiction to impose sentence;

(c) That the statute under which the conviction and/or sentence was obtained is unconstitutional;

(d) That the sentence exceeds the maximum authorized by law;
(e) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(f) That there exists biological evidence secured in relation to the investigation or prosecution attendant to the petitioner's conviction not tested, or, if previously tested, that can be subjected to additional DNA testing, that would provide a reasonable likelihood of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.

(g) That his plea was made involuntarily;

(h) That his sentence has expired; his probation, parole or conditional release unlawfully revoked; or he is otherwise unlawfully held in custody;

(i) That he is entitled to an out-of-time appeal; or

(j) That the conviction or sentence is otherwise subject to collateral attack upon any grounds of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.

(2) A motion for relief under this article shall be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction. Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate either:

(a)(i) That there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence; or

(ii) That, even if the petitioner pled guilty or nolo contendere, or confessed or admitted to a crime, there exists biological evidence not tested, or, if previously tested, that can be subjected to additional DNA testing that would provide a reasonable likelihood of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.

(b) Likewise excepted are those cases in which the petitioner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction.
(3) This motion is not a substitute for, nor does it affect, any remedy incident to the proceeding in the trial court, or direct review of the conviction or sentence.

(4) Proceedings under this article shall be subject to the provisions of Section 99-19-42.

(5) For the purposes of this article:

(a) “Biological evidence” means the contents of a sexual assault examination kit and any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or other identifiable biological material that was collected as part of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense. This definition applies whether that material is catalogued separately, such as on a slide, swab or in a test tube, or is present on other evidence, including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups, cigarettes or other items;

(b) “DNA” means deoxyribonucleic acid.

§ 99-39-7. Filing of motions

The motion under this article shall be filed as an original civil action in the trial court, except in cases in which the petitioner's conviction and sentence have been appealed to the Supreme Court of Mississippi and there affirmed or the appeal dismissed. Where the conviction and sentence have been affirmed on appeal or the appeal has been dismissed, the motion under this article shall not be filed in the trial court until the motion shall have first been presented to a quorum of the Justices of the Supreme Court of Mississippi, convened for said purpose either in termtime or in vacation, and an order granted allowing the filing of such motion in the trial court. The procedure governing applications to the Supreme Court for leave to file a motion under this article shall be as provided in Section 99-39-27.


(1) A motion under this article shall name the State of Mississippi as respondent and shall contain all of the following:

(a) The identity of the proceedings in which the petitioner was convicted.

(b) The date of the entry of the judgment of conviction and sentence of which complaint is made.

(c) A concise statement of the claims or grounds upon which the motion is based.

(d) A separate statement of the specific facts which are within the personal knowledge of the petitioner and which shall be sworn to by the petitioner, including, when application is made pursuant to Section 99-39-5, a statement that there exists a reasonable probability that the
petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through DNA testing at the time of the original prosecution; that the evidence to be tested was secured in relation to the offense underlying the challenged conviction and (i) was not previously subjected to DNA testing, or (ii) although previously subjected to DNA testing, can be subjected to additional DNA testing that provides a reasonable likelihood of more probative results; and that the chain of custody of the evidence to be tested established that the evidence has not been tampered with, replaced or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, that the testing itself has the potential to establish the integrity of the evidence. For purposes of this paragraph, evidence that has been in the custody of law enforcement, other government officials, or a public or private hospital shall be presumed to satisfy the chain-of-custody requirement, absent specific evidence of material tampering, replacement or alteration, and that the application for testing is made to demonstrate innocence or the appropriateness of a lesser sentence and not solely to unreasonably delay the execution of sentence or the administration of justice.

(e) A specific statement of the facts which are not within the petitioner's personal knowledge. The motion shall state how or by whom said facts will be proven. Affidavits of the witnesses who will testify and copies of documents or records that will be offered shall be attached to the motion. The affidavits of other persons and the copies of documents and records may be excused upon a showing, which shall be specifically detailed in the motion, of good cause why they cannot be obtained. This showing shall state what the petitioner has done to attempt to obtain the affidavits, records and documents, the production of which he requests the court to excuse.

(f) The identity of any previous proceedings in federal or state courts that the petitioner may have taken to secure relief from his conviction and sentence.

(2) A motion shall be limited to the assertion of a claim for relief against one (1) judgment only. If a petitioner desires to attack the validity of other judgments under which he is in custody, he shall do so by separate motions.

(3) The motion shall be verified by the oath of the petitioner.

(4) If the motion received by the clerk does not substantially comply with the requirements of this section, it shall be returned to the petitioner if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion so returned.

(5) The petitioner shall deliver or serve a copy of the motion, together with a notice of its filing, on the state. The filing of the motion shall not require an answer or other motion unless so ordered by the court under Section 99-39-11(3).

(1) The original motion, together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.

(2) If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the petitioner to be notified.

(3) If the motion is not dismissed under subsection (2) of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate and, in cases in which the petitioner's claim rests on the results of DNA testing of biological evidence, order the testing of the biological evidence.

(4) To facilitate DNA testing of biological evidence, if granted under subsection (3) and if the interests of justice require, the judge may order:

(a) The state to locate and provide the petitioner with any document, note, log or report relating to items of physical evidence collected in connection with the case, or to otherwise assist the petitioner in locating items of biological evidence that the state contends have been lost or destroyed;

(b) The state to take reasonable measures to locate biological evidence that may be in its custody and to prepare an itemized inventory of such evidence;

(c) The state to assist the petitioner in locating evidence that may be in the custody of a public or private hospital, public or private laboratory or other facility;

(d) Both parties to reveal whether any DNA or other biological evidence testing was previously conducted without knowledge of the other party; and

(e) Both parties to produce laboratory reports prepared in connection with DNA testing, as well as the underlying data and the laboratory notes, if evidence had previously been subjected to DNA testing.

(5) If the court orders DNA testing of biological evidence under subsection (3) and evidence for such testing is located in accordance with subsection (4), such testing shall be conducted by a facility mutually agreed upon by the petitioner and the state and approved by the court, or, if the parties cannot agree, the court shall designate the testing facility and provide parties with a reasonable opportunity to be heard on the choice of laboratory issue. The court shall impose reasonable conditions on the testing to protect the parties' interests in the integrity of the evidence and the testing process.

(6) If a state or county crime laboratory performs DNA testing of biological evidence under this article, the state shall bear the costs of such testing upon a finding of the petitioner's indigence.
(7) If testing is performed at a private laboratory, the court may require either the petitioner or the state to pay for the testing, as the interests of justice require.

(8) If the state or county crime laboratory does not have the ability or resources to conduct the type of DNA testing to be performed, the state shall bear the costs of testing at a private laboratory that has such capabilities.

(9) The court, in its discretion, may make such other orders as may be appropriate in connection with a granting of testing under subsection (3). These include, but are not limited to, designating:

(a) The type of DNA analysis to be used;

(b) The testing procedures to be followed;

(c) The preservation of some portion of the sample for testing replication;

(d) Additional DNA testing, if the results of the initial testing are inconclusive or otherwise merit additional scientific analysis;

(e) The collection and DNA testing of elimination samples from third parties; or

(f) Any combination of these.

(10) The court may order additional testing, paid for in accordance with subsections (6) through (8), upon a showing by the petitioner that the comparison of a DNA profile derived from the biological evidence at the scene of the crime for which he was convicted could, when compared to the DNA profiles in the SDIS or CODIS database systems, provide evidence that raises a reasonable probability that the trier of fact would have come to a different outcome by virtue of that comparison demonstrating the possible guilt of a third party or parties.

(11) This section shall not be applicable where an application for leave to proceed is granted by the Supreme Court under Section 99-39-27.

(12) Proceedings under this section shall be subject to the provisions of Section 99-19-42.


The answer shall respond to all of the allegations of the motion and shall assert such affirmative defenses as the state may deem appropriate.

§ 99-39-15. Discovery
(1) A party may invoke the processes of discovery available under the Mississippi Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

(2) Requests for discovery shall be accomplished by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

§ 99-39-17. Expansion of record

(1) If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(2) The expanded record may include, without limitation, letters predating the filing of the motion in the court, documents, exhibits and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(3) In any case in which an expanded record is directed, copies of the letters, documents, exhibits and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(4) The court may require the authentication of any material under subsection (1) or (2) of this section.


(1) If the motion is not dismissed at a previous stage of the proceeding, the judge, after the answer is filed and discovery, if any, is completed, shall, upon a review of the record, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice shall require.

(2) The court may grant a motion by either party for summary judgment when it appears from the record that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.

§ 99-39-21. Waiver; defenses; res judicata; burden of proof

(1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the
United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.

(2) The litigation of a factual issue at trial and on direct appeal of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal legal theories which could have been raised under said factual issue; and any relief sought under this article upon said facts but upon different state or federal legal theories shall be procedurally barred absent a showing of cause and actual prejudice.

(3) The doctrine of res judicata shall apply to all issues, both factual and legal, decided at trial and on direct appeal.

(4) The term “cause” as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.

(5) The term “actual prejudice” as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence.

(6) The burden is upon the prisoner to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section.

§ 99-39-23. Evidentiary hearings; counsel; burden of proof

(1) If an evidentiary hearing is required, the judge may appoint counsel for a petitioner who qualifies for the appointment of counsel under Section 99-15-15.

(2) The hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation.

(3) The parties shall be entitled to subpoena witnesses and compel their attendance, including, but not being limited to, subpoenas duces tecum.

(4) The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the petitioner brought before it for the hearing.

(5) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the conviction or sentence under attack, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence or other matters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.

(6) The order as provided in subsection (5) of this section or any order dismissing the petitioner's motion or otherwise denying relief under this article is a final judgment and shall
be conclusive until reversed. It shall be a bar to a second or successive motion under this article. Excepted from this prohibition is a motion filed under Section 99-19-57(2), raising the issue of the convict's supervening mental illness before the execution of a sentence of death. A dismissal or denial of a motion relating to mental illness under Section 99-19-57(2) shall be res judicata on the issue and shall likewise bar any second or successive motions on the issue. Likewise excepted from this prohibition are those cases in which the petitioner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the petitioner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are those cases in which the petitioner has filed a prior petition and has requested DNA testing under this article, provided the petitioner asserts new or different grounds for relief related to DNA testing not previously presented or the availability of more advanced DNA technology.

(7) No relief shall be granted under this article unless the petitioner proves by a preponderance of the evidence that he is entitled to the relief.

(8) Proceedings under this section shall be subject to the provisions of Section 99-19-42.

(9) In cases resulting in a sentence of death and upon a determination of indigence, appointment of post-conviction counsel shall be made by the Office of Capital Post-Conviction Counsel upon order entered by the Supreme Court promptly upon announcement of the decision on direct appeal affirming the sentence of death. The order shall direct the trial court to immediately determine indigence and whether the inmate will accept counsel.

§ 99-39-25. Appeals; stay of judgment; bail

(1) A final judgment entered under this article may be reviewed by the supreme court of Mississippi on appeal brought either by the prisoner or the state on such terms and conditions as are provided for in criminal cases.

(2) A perfection of appeal by the state shall act as a supersedeas and shall stay the judgment until there is a final adjudication by the supreme court.

(3) When the appeal is brought by the state, the prisoner may be released on bail pending appeal under the terms and conditions provided for in Rule 7.02, Mississippi Uniform Criminal Rules of Circuit Court Practice.

(4) When the appeal is brought by the prisoner, bail shall not be allowed.

(5) The attorney general shall represent the state in all appeals under this article, whether the appeal is brought by the prisoner or by the state.
§ 99-39-27. Leave to proceed in trial court

(1) The application for leave to proceed in the trial court filed with the Supreme Court under Section 99-39-7 shall name the State of Mississippi as the respondent.

(2) The application shall contain the original and two (2) executed copies of the motion proposed to be filed in the trial court together with such other supporting pleadings and documentation as the Supreme Court by rule may require.

(3) The prisoner shall serve an executed copy of the application upon the Attorney General simultaneously with the filing of the application with the court.

(4) The original motion, together with all files, records, transcripts and correspondence relating to the judgment under attack, shall promptly be examined by the court.

(5) Unless it appears from the face of the application, motion, exhibits and the prior record that the claims presented by those documents are not procedurally barred under Section 99-39-21 and that they further present a substantial showing of the denial of a state or federal right, the court shall by appropriate order deny the application. The court may, in its discretion, require the Attorney General upon sufficient notice to respond to the application.

(6) The court, upon satisfaction of the standards set forth in this article, is empowered to grant the application.

(7) In granting the application the court, in its discretion, may:

(a) Where sufficient facts exist from the face of the application, motion, exhibits, the prior record and the state's response, together with any exhibits submitted with those documents, or upon stipulation of the parties, grant or deny any or all relief requested in the attached motion.

(b) Allow the filing of the motion in the trial court for further proceedings under Sections 99-39-13 through 99-39-23.

(8) No application or relief shall be granted without the Attorney General being given at least five (5) days to respond.

(9) The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this article. Excepted from this prohibition is an application filed under Section 99-19-57(2), raising the issue of the offender's supervening mental illness before the execution of a sentence of death. A dismissal or denial of an application relating to mental illness under Section 99-19-57(2) shall be res judicata on the issue and shall likewise bar any second or successive applications on the issue. Likewise excepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi.
or the United States that would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, that is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence. Likewise exempted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

(10) Proceedings under this section shall be subject to the provisions of Section 99-19-42.

(11) Post-conviction proceedings in which the defendant is under sentence of death shall be governed by rules established by the Supreme Court as well as the provisions of this section.


If application to proceed in the trial court is granted, post-conviction proceedings on cases where the death penalty has been imposed in the trial court and appeals from the trial court shall be conducted in accordance with rules established by the Supreme Court.

§ 99-39-29. Stay of execution

If the prisoner or prisoners shall be under sentence of death and the date fixed for the execution of the sentence shall arrive at a time when proceedings for post-conviction collateral relief are pending, either in the state or the federal courts, the Supreme Court of Mississippi shall have the authority to stay the execution upon a substantial showing of merit pending the determination of said proceeding. If, however, a stay has been entered either by a state or federal court and post-conviction collateral relief is denied, the Supreme Court of Mississippi shall forthwith fix a day, not more than thirty (30) days distant from the date of said denial or the vacating of any stay entered by any federal court, for the execution of the sentence, and a warrant shall forthwith issue accordingly.
Chapter 49. Preservation and Accessibility of Biological Evidence
§ 99-49-1. Biological evidence; legislative intent; definitions; preservation procedures; remedies

(1) **Legislative intent.** The Legislature finds that:

(a) The value of properly preserved biological evidence has been enhanced by the discovery of modern DNA testing methods, which, coupled with a comprehensive system of DNA databases that store crime scene and offender profiles, allow law enforcement to improve its crime-solving potential;

(b) Tapping the potential of preserved biological evidence requires the proper identification, collection, preservation, storage, cataloguing and organization of such evidence;

(c) Law enforcement agencies indicate that “cold” case investigations are hindered by an inability to access biological evidence that was collected in connection with criminal investigations;

(d) Innocent people mistakenly convicted of the serious crimes for which biological evidence is probative cannot prove their innocence if such evidence is not accessible for testing in appropriate circumstances;

(e) It is well established that the failure to update policies regarding the preservation of evidence squanders valuable law enforcement resources, manpower hours and storage space; and

(f) Simple but crucial enhancements to protocols for properly preserving biological evidence can solve old crimes, enhance public safety and settle claims of innocence.

(2) **Definitions.** For the purposes of this section:

(a) “Biological evidence” means the contents of a sexual assault examination kit or any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or other identifiable biological material that was collected as part of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense. This definition applies whether that material is catalogued separately, such as on a slide, swab or in a test tube, or is present on other evidence, including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups, cigarettes or other items.

(b) “DNA” means deoxyribonucleic acid.
(c) “Custody” means persons currently incarcerated; civilly committed; on parole or probation; or subject to sex offender registration for the period of the registration or for the first five (5) years of the registration, whichever is the shorter period.

(d) “Profile” means a unique identifier of an individual, derived from DNA.

(e) “State” refers to any governmental or public entity within Mississippi, including all private entities that perform such functions, and its officials or employees, including, but not limited to, law enforcement agencies, prosecutors' offices, courts, public hospitals, crime laboratories, and any other entity or individual charged with the collection, storage or retrieval of biological evidence.

(3) **Preservation of evidence procedures.** (a) The state shall preserve all biological evidence:

(i) That is secured in relation to an investigation or prosecution of a crime for the period of time that the crime remains unsolved; or

(ii) That is secured in relation to an investigation or prosecution of a crime for the period of time that the person convicted of that crime remains in custody.

(b) This section applies to evidence that:

(i) Was in the possession of the state during the investigation and prosecution of the case; and

(ii) At the time of conviction was likely to contain biological material.

(c) The state shall not destroy biological evidence should one or more additional co-defendants, convicted of the same crime, remain in custody, and shall preserve the evidence for the period of time in which all co-defendants remain in custody.

(d) The state shall retain evidence in the amount and manner sufficient to develop a DNA profile from the biological material contained in or included on the evidence.

(e) Upon written request by the defendant, the state shall prepare an inventory of biological evidence that has been preserved in connection with the defendant's criminal case.

(f) The state may destroy evidence that includes biological material before the expiration of the time period specified in paragraph (a) of this subsection if all of the following apply:

(i) No other provision of federal or state law requires the state to preserve the evidence.

(ii) The state sends certified delivery of notice of intent to destroy the evidence to:

1. All persons who remain in custody as a result of the criminal conviction, delinquency adjudication, or commitment related to evidence in question;
2. The attorney of record for each person in custody;

3. The Mississippi Office of Indigent Appeals;

4. The district attorney in the county of conviction; and

5. The Mississippi Attorney General.

(iii) No person who is notified under paragraph (f)(ii) of this subsection does either of the following within sixty (60) days after the date on which the person received the notice:

1. Files a motion for testing of evidence under Title 99, Chapter 39, Mississippi Code of 1972; or

2. Submits a written request for retention of evidence to the state entity which provided notice of its intent to destroy evidence under paragraph (f)(ii) of this subsection.

(g) If, after providing notice under paragraph (f)(ii) of this subsection of its intent to destroy evidence, the state receives a written request for retention of the evidence, the state shall retain the evidence while the person remains in custody.

(h) The state shall not be required to preserve physical evidence that is of such a size, bulk or physical character as to render retention impracticable. When such retention is impracticable, the state shall remove and preserve portions of the material evidence likely to contain biological evidence related to the offense, in a quantity sufficient to permit future DNA testing, before returning or disposing of the physical evidence.

(i) Should the state be called upon to produce biological evidence that could not be located and whose preservation was required under the provisions of this statute, the chief evidence custodian assigned to the entity charged with the preservation of said evidence shall provide an affidavit in which the custodian stipulates, under penalty of perjury, an accurate description of the efforts taken to locate that evidence and that the evidence could not be located.

(4) Any evidence in a murder, manslaughter or felony sexual assault case in the possession of the state on July 1, 2009, whether biological or not, shall be preserved by the state consistent with the legislative intent expressed in subsection (1) and subject to compliance with subsection (3)(f).

(5) **Remedies for noncompliance.** If the court finds that biological evidence was destroyed in violation of the provisions of this section, it may impose appropriate sanctions and order appropriate remedies.

CREDIT(S)

Added by [Laws 2009, Ch. 339, § 1](http://laws.ms.gov), eff. from and after passage (approved March 16, 2009).
G. Howard v. State

SAMPLE POST-CONVICTION DNA PLEADING

IN THE SUPREME COURT OF MISSISSIPPI

No. 2010--DR--1043

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EDDIE LEE HOWARD, JR., Petitioner,

v.

STATE OF MISSISSIPPI, Respondent

____________________________

REQUEST FOR POST-CONVICTION DNA TESTING AND
MOTION FOR POST-CONVICTION RELIEF

COMES NOW Petitioner, Eddie Lee Howard, by and through counsel and respectfully moves this Honorable Court to grant Petitioner’s request to pursue testing of biological evidence in this case, pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-1, et seq., as amended by S.B. No. 2709 (effective March 16, 2009). Petitioner seeks DNA testing to prove that he is actually innocent of the crime for which he was convicted. The DNA testing requested by Petitioner has the scientific potential to exclude Petitioner as the perpetrator of the rape and murder for which he has been incarcerated for nearly 20 years.1 The State, through trial prosecutor Forrest Allgood, has consented to

1 The perpetrator stabbed the victim twice in the chest (Tr. 497, 501), and sexually assaulted her (Tr. 501). At the time of trial, neither the state nor the defense sought to test the DNA evidence. Petitioner’s post--conviction counsel was granted permission to
Petitioner’s request for DNA testing. However, there is disagreement among the parties as to what laboratory should conduct the tests.

Related to Petitioner request for post-conviction DNA testing is his request for post-conviction relief based on newly discovered evidence pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-1, et seq., and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article III, §§ 13, 14, 21, 26, 28, 31 and 32 of the Mississippi Constitution, as well as other law and authority set forth below.

Related to his request for post-conviction relief is the grounds for this motion are set out below.

I. PROCEDURAL HISTORY

Petitioner was charged by indictment returned by a Lowndes County grand jury on August 13, 1992, with capital murder in the death of Georgia Kemp. The indictment also charged that the murder occurred during the course of the crime of rape in violation of Miss. Code (1972) § 97-3-19(2)(e). Petitioner entered a plea of not guilty. The trial commenced on May 9, 1994; Petitioner proceeded pro se. On May 12, 1994, Petitioner was found guilty of capital murder and sentenced to death. After denial of his motion for a new trial, Petitioner appealed to the Mississippi Supreme Court.

On June 26, 1997, the Mississippi Supreme Court reversed Petitioner’s conviction, holding that the Petitioner’s waiver of his right to counsel was not voluntary and that the

engage DNA testing but failed to do so. Those circumstances are discussed in detail in Part IV, Section A, below. Due to advances in technology, petitioner now seeks to test these items for, among other things, the presence of seminal fluid.
trial court had erred in failing to order a competency hearing before allowing pro se representation. *Howard v. State*, 701 So.2d 274 (Miss. 1997) (hereinafter “Howard I”). Petitioner was re--indicted as a habitual offender and re--tried. Petitioner was again convicted and sentenced to death.


Petitioner filed a petition for post--conviction relief which was denied on September 28, 2006. *Howard v. State*, 945 So.2d 326 (Miss. 2006).

Petitioner filed a petition for a writ of *habeas corpus* in the federal district court for the Northern District of Mississippi on February 4, 2009. That petition is pending.

II. STANDARD OF REVIEW

Requests for post--conviction DNA testing pursuant to Miss. Code Ann. § 99--39--5(f) requires an inmate to show that: (1) that biological evidence secured in relation to the investigation is still available, and (2) if favorable results had been obtained through DNA testing at the time of Petitioner's trial, such results “would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence.”

Presentation of a claim of newly discovered evidence for post-conviction review pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Mississippi Code § 99-39-5(2)(a)(i), requires that:
A motion for relief under this article . . . be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi . . . Excepted from this three---year statute of limitations are those cases in which the petitioner can demonstrate either:

(a)(i) . . . that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence;


In interpreting this statute, the Court of Appeals has held that a petitioner is entitled to a new trial based on newly discovered evidence when he can demonstrate:

(1) that the new evidence was discovered since the trial, (2) that when using due diligence the evidence could not be discovered prior to trial, (3) that the evidence is material to the issue and that it is not merely cumulative or impeaching, and (4) that the evidence will probably produce a different result or verdict in the new trial.

Sonnenburg v. State, 830 So.2d 678, 681 (Miss. Ct. App. 2002).

Additionally, where a petition for post-conviction review is based on newly discovered evidence, post-conviction relief should be granted when a petitioner shows by a preponderance of the evidence that material facts existed which had not been previously heard and which required the vacation of his conviction or sentence. Turner v. Mississippi, 673 So.2d 382, 384 (Miss. 1996); see also Hardiman v. State, 789 So.2d 814, 817 (Miss. App. 2001) ("Pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act a petitioner is entitled to an in-court opportunity to prove his claims if the claims are procedurally alive, substantially showing a denial of a state or federal right."); Bell v. State, 759 So.2d 111 (Miss. 1999) (granting an evidentiary hearing based on newly discovered evidence).
III. STATEMENT OF FACTS

In 1992, Ms. Georgia Kemp, the 84-year-old victim in this case, lived in a white frame house at 402 Nineteenth Street South in Columbus. On the evening of February 2, 1992, a fourteen-year-old passerby noticed smoke coming from Ms. Kemp’s residence. The young girl notified several adults who then called 911. The Columbus Fire Department responded to the call at 8:30 pm.

When firefighters arrived they discovered two smoldering fires in Ms. Kemp’s living room. Soon thereafter, they found Ms. Kemp lying face down on the floor of an adjoining bedroom. Believing the victim to still be alive, the firemen grabbed and lifted her by the arms and shoulders, only to determine by the stiffness of her body and the lack of vital signs that she was deceased.

When law enforcement found Ms. Kemp, she was clothed in an unbuttoned white nightgown with nylon stockings pulled down to her ankles. Nearby were a butcher knife and a telephone with its line severed. A pair of women’s underwear was also found close to Ms. Kemp’s body. There was no sign of forced entry, and nothing of value was taken from the home. An arson investigator determined that the fires were set intentionally and had probably smoldered for four to six hours before being reported.

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2 The information in the Statement of Facts is primarily taken from the second trial transcript (“Howard II”), dated May 22 - May 24, 2000. Unless specifically noted, all citations to transcript pages refer to the second trial transcript.

3 Tr. 407-08
4 Tr. 413.
5 Tr. 417.
6 Tr. 418-19.
7 Tr. 455, 458.
8 Tr. 459-61.
9 Tr. 457.
10 Tr. 465-66.
11 Tr. 434, 437.
Of the items collected as evidence from the home and tested for fingerprints, only a single fingerprint was lifted. It was subsequently determined to be the victim’s. Though collected as part of the investigation, no DNA or blood evidence was presented at trial.

Dr. Steven Hayne performed an autopsy on February 3, 1992, the day after the discovery of Ms. Kemp’s body. (See Dr. Hayne’s Autopsy Report, attached as Appendix A). His examination found signs of forced sexual intercourse. A sexual assault kit was completed, but subsequent testing at the time found no seminal fluid or other DNA evidence. Dr. Hayne did not then find injuries to Ms. Kemp’s right forearm, right side of neck, or to her right breast. The body was then buried.

On February 6th, three days after Kemp’s burial, Dr. Hayne requested additional study of the body, because “[there] was some question that—uh—there could be injuries inflicted by teeth.” Because Dr. Hayne “[was] not a forensic odontologist or forensic dentist...”, he asked that this second examination of Ms. Kemp's body “be performed by a forensic odontologist or forensic dentist so as to ascertain the presence or absence of injuries that could be—uh—construed as injuries produced by the teeth on the remains of Georgia Kemp.”

That same day (February 6th), Detective David Turner of the Columbus Police Department contacted Dr. Michael West, and asked Dr. West if “[West] could...examine

12 Tr. 467.
13 Howard, 945 So.2d at 337.
14 Tr. 492; See Appendix A (Dr. Hayne’s Autopsy Report).
15 Tr. 501.
16 Tr. 505, 507.
17 Howard, 945 So.2d at 333 n.1 (Miss. 2006).
18 Id.
19 Tr. 502.
20 Id.
the body of...Georgia Kemp...for any possible wound pattern injuries.” Also on the 6th, police took Mr. Howard, who had been developed as a suspect, to a local dentist’s office, where Howard consented to having his dental impressions taken.

On February 7th, Ms. Kemp’s body was exhumed (See Letter from State Medical Examiner ordering exhumation of Kemp’s body, attached as Appendix B). Dr. West examined the body, assisted by Dr. Hayne. Shortly thereafter Dr. West examined and photographed the Ms. Kemp’s body. He also “mapped” the body, using ultraviolet light to determine if any wounds were present that were not visible in normal light. This was a “technique that [West himself had] pioneered.” Through his observations, he discovered three wounds on Ms. Kemp’s body that he said resembled human bite marks - on her neck, arm, and breast.

According to Dr. West, the injury on Ms. Kemp’s arm exhibited only the markings of upper teeth. After his examination, he claimed that the arm bite was consistent with Mr. Howard’s upper teeth. He claimed further that the mark on the victim’s neck was imprinted by both lower and upper teeth. According to Dr. West, that mark was consistent with Howard’s upper and lower teeth.

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21 Tr. 552
22 Howard, 945 So.2d at 333; Tr. 400, 469.
23 See Appendix B (Letter from state medical examiner ordering exhumation of Ms. Kemp’s body).
24 Howard, 945 So.2d at 333 n.1
25 Tr. 553
26 Id.
27 Id.
28 Tr. 558-59.
29 Tr. 559.
30 Tr. 468, 560.
31 Id.
32 Id.
The third mark – the mark on Ms. Kemp’s right breast – was also determined by Dr. West to be a bite mark.\textsuperscript{33} To further examine this particular mark, he performed a “replication test,” whereby, according to his description, the models of Petitioner’s teeth were “dipped down in an ink blotter . . . [t]hen place[d] . . . on Mrs. Kemp’s body and gently press[ed] . . . down like you would a rubber stamp trying to mimic the biting forces or actions of the teeth, pressing it and then lifting it off.”\textsuperscript{34}

Based on this “replication test,” Dr. West was able to give his “highest opinion as far as comparison” in determining that within a reasonable medical certainty that Mr. Howard’s teeth inflicted the wound on Ms. Kemp’s right breast.\textsuperscript{35} Dr. West testified that despite multiple challenging factors, such as Ms. Kemp’s advanced age, Howard’s partial dental prosthetic, the inherent distortion of skin due to decomposition, and the positioning of the body during his examination, he was confident that Mr. Howard had bitten Ms. Kemp.\textsuperscript{36} Dr. West stated: “Do I have any doubt [Mr. Howard’s] teeth made that bite on [Ms. Kemp’s] breast? I don’t have any.”\textsuperscript{37}

Mr. Howard was arrested for Ms. Kemp’s murder on February 8, 1992.\textsuperscript{38} Detective Turner testified that on February 13, 1992, Mr. Howard wrote a note asking to meet with law enforcement and thereafter met with Turner.\textsuperscript{39} According to Detective Turner, Mr. Howard requested to be taken “back to where the murder of [Ms. Kemp] had occurred, that [doing so] may bring back some memories to [Howard].”\textsuperscript{40} Howard also told the

\begin{footnotesize}
\textsuperscript{33} Tr. 560-61.
\textsuperscript{34} Tr. 561.
\textsuperscript{35} Id.
\textsuperscript{36} Tr. 578, 584.
\textsuperscript{37} Tr. 584
\textsuperscript{38} Tr. 469
\textsuperscript{39} Tr. 469-70
\textsuperscript{40} Tr. 470.
\end{footnotesize}
detective that "the case was solved," without further elaboration.\(^{41}\) Other than Detective Turner, there were no other witnesses to Mr. Howard’s statement, and the statement was not recorded in any way.\(^{42}\)

Several law enforcement officers, along with Howard, then rode in an unmarked car to Ms. Kemp’s residence.\(^{43}\) Passing the crime scene, Detective Turner “pointed to [Howard] that this is the residence here where the murder occurred.”\(^{44}\) Mr. Howard “acknowledged the residence but continued to look and basically told [Turner] that it did not bring back any memories to [Howard].”\(^{45}\) While in the neighborhood, Mr. Howard pointed out the house in which he and his mother had formerly lived and his aunt’s residence; both homes were within a few blocks of Ms. Kemp’s house.\(^{46}\) The group drove back by Ms. Kemp’s home and Mr. Howard repeated that no memories came back to him.\(^{47}\)

After returning to the police department, Mr. Howard sat in Detective Turner’s office.\(^{48}\) At this second meeting, Howard again said the case was solved.\(^{49}\) Further, Mr. Howard said that five or six other individuals were involved and Detective Turner should keep investigating.\(^{50}\) Howard asked Turner if Turner thought Howard was crazy.\(^{51}\) Detective Turner replied in the negative.\(^{52}\) Mr. Howard then said “I’m not crazy…I had a temper and

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41 Id.
42 Howard, 945 So.2d at 334, n. 3; Tr. 483.
43 Tr. 471-72.
44 Tr. 472
45 Id.
46 Id.
47 Tr. 473.
48 Id.
49 Id.
50 Id.
51 Id.
52 Id.
that’s why this happened.” 53 Detective Turner considered this to be an incriminating statement suggesting Mr. Howard’s guilt. 54 Again, Mr. Howard’s statement was not recorded, and no person witnessed it other than Detective Turner. 55

Though the State relied on this portion of Mr. Howard’s statement as evidence of his involvement, Howard also made other claims of dubious credibility, among them that he needed Detective Turner to “remember…February 12th, 1992 at 4:30 pm.”; Mr. Howard told Turner that this date was “important,” but did not explain why. 56 Mr. Howard also asked Detective Turner if Turner could “get [Howard] out of…jail” because “[Howard needed] to make a phone call to a guy in Chicago.” 57 Mr. Howard promised that after speaking with this individual in Chicago he would provide “the details of the crime.” 58 Mr. Howard was allowed to make the phone call – evidently to a potential employer – and never spoke again of the crime or any role he may have played in it. 59 60

Kayfen Fulgham, a former girlfriend of Petitioner’s, testified that during sexual intercourse with Mr. Howard, Howard sometimes “would bite [Ms. Fulgham]…on her breasts

53 Id.
54 Id.
55 Howard, 945 So.2d at 334, n. 3; Tr. 483.
56 Tr. 471-72.
57 Id.
58 Id.
59 Id.

Petitioner’s attorney later moved the trial court for a psychiatric examination, stating that Petitioner “is unable to intelligently communicate with his attorney or anyone else, and it is the attorney’s impression that the defendant’s present mental condition is such that he is unable to cooperate and aid in the preparation of his defense and further, that the defendant has spent time in a mental hospital in the past.” Howard I at 423. Another of his attorneys noted that “I do not feel that this defendant is in touch with reality… this defendant is more out of touch with reality than any defendant that I have ever defended or seen in this county.” Id. This Court reversed Petitioner’s conviction in Howard I by finding that “it should have been readily apparent to the trial judge that Howard was not competent even to assist in his defense, much less conduct his own defense.” Id. at 415, 421.
and neck.”61 Ms. Fulgham also testified that when she saw Mr. Howard on the day of the murder, Howard smelled “…like burnt clothes or something, you know, wood, like smoke.”62

IV. ARGUMENT

A. PETITIONER IS ENTITLED TO DNA TESTING UNDER THE RECENT AMENDMENTS TO THE POST-CONVICTON RELIEF ACT.

Petitioner has consistently maintained his innocence, and now seeks leave to complete DNA testing at his expense on items collected during the victim's autopsy and from the crime scene to prove it. As this Court noted in denying Petitioner post-conviction relief, "[t]he only evidence linking … [Mr. Howard] to the crime was his alleged statement to Detective Turner that the case was 'solved' and the bite mark identification."63 In spite of the abundance of biological evidence, the Court explained that "no DNA testing has ever been performed in this case."64 Mr. Howard's prior post-conviction counsel had been offered the opportunity to have such testing conducted but did not take advantage of it.65

Both prior and subsequent to the passage of post-conviction DNA testing legislation as codified in Miss. Code Ann. § 99-39-1, et seq., undersigned counsel has been in conversation with the District Attorney who prosecuted Petitioner's case, Forrest

61 Tr. 516.
62 Tr. 517.
63 Howard, 945 So.2d at 352 n.16.
64 Id. at 337-38.
65 The Court explained in its opinion that it issued an earlier order on June 10, 2005 allowing Mr. Ryan's office "a reasonable time" to inspect a newly-produced box of physical evidence that included a rape kit, blood samples, and pubic hairs, and to request funding for expert testing, after which a post-conviction supplement could be filed. As the docket sheet for the case shows, the post-conviction supplement was filed approximately four months later, on October 7, 2005. But no DNA testing was requested prior to that filing. The docket shows that on March 30, 2006, nearly six months after filing the supplement and nearly ten months after the Court order allowing "a reasonable time" to seek it, Mr. Ryan's office finally requested DNA testing. The Court denied that request in a subsequent order, apparently believing that the office had missed its opportunity and was too late.
Allgood, who has consents to DNA testing in Mr. Howard’s case. Mr. Allgood, however, does not agree to the laboratory where the Defendant seeks to perform the testing. Petitioner seeks to conduct the DNA testing, at the Innocence Project’s expense, at Forensic Science Associates (“FSA”), a private DNA laboratory in Richmond, California, whose testing led to the recent exoneration of Kennedy Brewer and Levon Brooks, as well as the apprehension of the true perpetrator in those cases. FSA also performed the DNA testing in the first case in which this Court ordered testing pursuant to Miss. Code Ann. § 99-39-1, et seq. (See State v. Edward Ward (No. 2000-104-CR2).

Petitioner requests that this Court grant his application for post-conviction DNA testing and order that the testing be performed at FSA. In the alternative, Petitioner requests that this Court formally grant his unopposed request to test the biological evidence and remand to the Circuit Court of Lowndes County for further action consistent therewith.

1. **Petitioner Satisfies the Requirements of the State’s Recent DNA Access Law and His Request for DNA Testing is Unopposed by the State.**

This Court has recognized the exculpatory power of DNA evidence and has guaranteed access to DNA testing capable of proving a defendant’s innocence at all stages of criminal proceedings. *Richardson v. State*, 767 So.2d 195, 199 (Miss. 2000). The Mississippi Legislature recently expressed the state’s commitment to providing DNA testing in criminal

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66 The evidence that Petitioner seeks to test includes, but is not necessarily limited to: (a) sealed Victim Sexual Assault Kit (RSUKIII); (b) fingernail scrapings from victim; (c) clothing of victim; (d) newspaper from floor around victim; (e) blue bedspread from victim’s bed; (f) knife found at victim’s house; (g) box of kitchen matches recovered from bedroom; (h) two blankets from victim’s bed; (i) bottom sheet from victim’s bed; (j) bloodstained top sheet; (k) manila envelope containing samples from original evidence sent to the Mississippi Crime Lab.
cases by amending the Mississippi Uniform Post-Conviction Collateral Relief Act to ensure that post-conviction petitioners have access to DNA testing. Senate Bill Number 2709 was signed by Governor Barbour on March 16, 2009, and became effective immediately. The bill added a new ground for relief to the Post-Conviction Relief Act:

(1) Any person sentenced by a court of record of the State of Mississippi . . . may file . . . a motion to request forensic DNA testing of biological evidence . . . if the person claims:

[f] That there exists biological evidence secured in relation to the investigation or prosecution attendant to the petitioner’s conviction not tested, or, if previously tested, that can be subjected to additional DNA testing, that would provide a reasonable likelihood of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.


To grant testing under the statute, the Court must determine that Petitioner satisfies three criteria:

1. That “there exists a reasonable probability that the petitioner would not have been convicted . . . if favorable results had been obtained through DNA testing at the time of the original prosecution’’;

2. “That the evidence to be tested was secured in relation to the offense underlying the challenged conviction and (i) was not previously subjected to DNA testing, or (ii) although previously subjected to DNA testing, can be subjected to additional DNA testing that provides a reasonable likelihood of more probative results”; and

3. “That the chain of custody of the evidence to be tested established that the evidence has not been tampered with, replaced or altered in any material respect.”


Petitioner satisfies each of the statute’s criteria.
Dr. Hayne conducted the autopsy in this case and testified that the victim’s vaginal injuries were consistent with forced sexual intercourse. Dr. Hayne also testified that he collected bodily fluids, as well as samples from the victim’s vaginal vault, vaginal swabs, and used an RSVK1111 Sexual Assault Kit. Dr. Hayne collected all of these so that, if found, semen or other biological evidence samples could be forwarded to the Mississippi State Crime Lab for testing.

An initial test at the Mississippi Crime Lab failed to detect semen in the victim’s rape kit items. At Mr. Howard’s trial, no forensic scientist from the Mississippi Crime Lab testified to the analysis of the samples. Rather, a member of Columbus law enforcement and Dr. Hayne testified about finding the samples and sending them to the Mississippi Crime Lab, as well as the Lab’s limited findings. Because testing for DNA was never conducted in this case, Petitioner respectfully requests that the above listed items be subjected to DNA testing to detect semen that may have been overlooked in the original examination (as happened in State v. Ward, see infra) and/or the presence of skin or sweat cells, or other biological material deposited by the perpetrator.

Re-examination of the rape kit specimens with contemporary technologies may reveal semen and/or spermatozoa that were not detected in the original examination, as has frequently occurred in the post-conviction context where evidence is re-examined. Moreover, new forms of technology could be used to generate the assailant’s profile from skin cells and other fluids deposited during the sex acts even if the assailant did not leave

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67 Tr. 501.
68 Tr. 504-505.
69 Tr. 505.
70 Tr. 488-89.
sperm behind. In addition, Petitioner seeks to examine other items of evidence believed to have been handled by the perpetrator for “touch DNA”. This type of DNA analysis has become routine in the past few years.

The importance of re-examining evidence in sexual assault cases has been confirmed in both the scientific literature and individual DNA exoneration cases. The lab – FSA – that Petitioner requests perform the testing has significant experience in identifying biological evidence where none was thought to have existed before, and in developing conclusive profiles. In fact, this same lab performed the work in the Brooks and Brewer cases, as well as an additional Mississippi case where testing was ordered as a result of a request made pursuant to Miss. Code Ann. § 99-39-5(f).

2. FSA

FSA is a private DNA laboratory where testing is overseen by Dr. Edward Blake and performed by Criminalist Alan Keel. Mr. Keel is certified by the American Board of Criminalistics and is a DNA technical leader pursuant to the 1995 DNA Identification Act. FSA has performed testing on behalf of prosecutors in Louisiana, Tennessee, Texas, Arizona, California, Florida, Indiana, Iowa, Kansas, Michigan, Nebraska, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, South Dakota, Virginia, Washington, and Wisconsin.

In this State, FSA was approved by the U.S. District Court for the U.S. District Court for the Southern District of Mississippi, Hattiesburg Division, and performed testing in State v. Andrew L. Harris, Case No. 10,051, a case which was handled by the Innocence

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71 For example, Y-STR DNA technology is a specialized form of the conventional STR test that targets male DNA. See, e.g., Shabazz v. State, 592 S.E. 2d 876 (Ga. 2004) (discussing Y-STR testing in a case where such results were used to link defendant to male DNA in rape kit evidence after STR analysis failed to generate the male donor’s profile). Y-STR is capable of identifying the genetic profile of male DNA in rape kit samples through testing of skin cells and/or pre-ejaculate left behind during intercourse (even where there is no ejaculation/spermatozoa).
Project and the Forrest County District Attorney’s Office. FSA was able to yield conclusive results from the limited available evidence in this post-conviction DNA testing case; the results confirmed the defendant’s guilt.

FSA is sought out by prosecutors and the defense alike, especially in old or more complicated cases, because of their demonstrated success in obtaining results from old, degraded, or otherwise complicated samples. In numerous cases, FSA has been able to obtain results from samples where other laboratories (both public and private) have failed, obtained less complete results, or completely overlooked biological material to subject to DNA analysis.72 (See Affirmation of Vanessa Potkin, attached as Appendix C).

FSA’s ability to generate conclusive results in old complicated cases is illustrated by its extraordinary work in two other recent Mississippi cases – one in which the lab confirmed the defendant’s guilt through testing, and another where the lab’s testing led to the identification of a serial assailant, Justin Albert Johnson, who committed crimes for which Kennedy Brewer and Levon Brooks were wrongfully convicted.

More specifically, the first case in which testing was ordered under the state’s new DNA access law was State v. Edward Ward (No. 2000-104-CR2), a rape case from Bolivar County. After this Court ordered testing in that case, in September 2009, the Circuit Court of Bolivar County entered an Order for DNA testing. (See Ward Order, attached as Appendix D). The evidence was sent to FSA.

During the original examination of the evidence from Ward’s case at the Mississippi Crime Lab in 2000 prior to trial, no spermatozoa were found in the victim’s rape kit and crime scene evidence. When the evidence was sent to FSA in 2009, FSA re--

72 See Affirmation of Vanessa Potkin, attached as Appendix C.
examined the evidence and was able to identify spermatozoa on the plastic rape kit comb that had been used to comb the victim’s pubic area for loose pubic hairs as well as in some foreign material debris. (Again, none of this spermatozoa had been detected in the crime laboratory’s original 2000 examination). FSA was also able to generate the DNA profile from the spermatozoa it identified. FSA’s results provided scientific corroboration for the defendant’s guilt.

FSA was also instrumental in the exonerations of Levon Brooks and Kennedy Brewer. Levon Brooks was convicted in 1992 of the abduction, sexual assault and murder of his ex-girlfriend’s three-year-old daughter, Courtney Smith. Kennedy Brewer was similarly convicted in 1995 of the abduction, rape and murder of his girlfriend’s daughter, Christine Jackson. Both men’s conviction’s for these identical crimes – committed less than five miles from each other, about a year and a half apart, were based significantly on erroneous bite mark comparison testimony supplied by Dr. Michael West.

Though Brewer had been excluded in 2002 as the source of semen in Jackson’s rape kit through testing by a regional lab, that lab claimed that there were two individuals who were the source of the material. Brewer’s conviction was vacated, but the State planned to re-try him for the crime. Subsequent tests by FSA in 2007, as Brewer was awaiting re-trial, determined that, in fact, there had been only a single male source of the sperm in Jackson’s rape kit. These results were confirmed by the initial testing lab. FSA confirmed Brewer’s exclusion as the sperm source. More importantly, FSA identified the sperm source through also DNA testing a sample from Justin Albert Johnson, who had been an original suspect in both the Jackson and Smith murders. Johnson subsequently confessed to committing both murders. In this fashion, FSA’s testing aided in the
exoneration of both Brewer and Brooks and identified the true perpetrator of the Jackson and Smith murders, who is now standing trial for these crimes.

The DNA testing that Petitioner requests at FSA will be performed at no cost to the State. The Innocence Project will pay the costs of the testing.

Petitioner requests that this Court grant post-conviction DNA testing, which District Attorney Allgood does not oppose. Petitioner also requests that this Court grant his request to perform testing at FSA due to FSA’s demonstrated ability to gain results in difficult cases such as the instant one. In the alternative Petitioner request that the Court remand on this issue to the Circuit Court for determinations consistent herewith.

B. THE NAS REPORT CONSTITUTES NEWLY DISCOVERED EVIDENCE THAT WOULD HAVE ALTERED THE OUTCOME OF PETITIONER’S TRIAL.

Petitioner also seeks relief based on evidence discovered and developed subsequent to his trial and conviction that would have altered the outcome the proceeding. The newly discovered evidence consists of the February 17, 2009 National Academies of Sciences (NAS) published report, *Strengthening Forensic Science in the United States: A Path Forward* (hereinafter “NAS Report,” attached as Appendix E), as well as additional newly discovered evidence of serial acts of forensic fraud perpetrated by Dr. Michael West, the prosecution’s primary witness, in Mr. Howard’s case. This evidence provides objectively verifiable proof that, had it been known to Petitioner at the time of his trial, would have precluded Dr. West’s testimony under any cognizable theory of admissibility.
In the event that this Court grants Petitioner’s request for post-conviction DNA testing, Petitioner would request that the Court hold in abeyance its ruling on this claim for post-conviction relief, until Petitioner can supplement this claim with the results of the DNA testing.

The central purpose of a criminal trial is “to discover the truth.” *Portuondo v. Agard*, 529 U.S. 61, 73 (2000) (noting that “the central function of the trial... is to discover the truth.”). Discovering the truth is necessary so that the “twofold” purpose of justice—i.e., convicting the guilty and exonerating the innocent—can be attained. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (noting that the “twofold aim” of justice “is that guilt shall not escape or innocence suffer.”). In order to expose the truth, however, criminal trials must be premised not only on fair procedures that adequately ensure the truth can and will be uncovered, *see e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004) (right to cross-examine adverse witnesses); *Banks v. Dretke*, 540 U.S. 668 (2004) (right to impeachment or potentially exculpatory evidence), but, more importantly, on accurate and truthful evidence. Indeed, it is axiomatic that the truth cannot be revealed, that Due Process cannot be honored, and that the innocent cannot be fairly identified when the fact finder is inundated with false, misleading, and unreliable evidence—particularly unreliable scientific evidence. *See Miller v. Pate*, 386 U.S. 1, 5 (1967) (“the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence”); *accord Napue v. Illinois*, 360 U.S. 264 (1959); *see also Ake v. Oklahoma*, 470

74 *See United States v. Leon*, 468 U.S. 897, 900-01 (1984) (recognizing the general goal of establishing “procedures under which criminal defendants are ‘acquitted or convicted on the basis of all the evidence which exposes the truth’” (quoting *Alderman v. United States*, 394 U.S. 165, 175 (1969)). These procedural safeguards protect “the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.” *California v. Trombetta*, 467 U.S. 479, 485 (1984).
U.S. 68, 82 n.7 (1985) (citation omitted) ("Testimony emanating from the depth and scope of specialized knowledge is very impressive to a jury.").

The NAS Report found serious deficiencies in the nation's forensic science system, deficiencies which in their most egregious form resulted in the admission of inaccurate and false or fraudulent evidence. The result in some cases, the report noted, was that such evidence played a substantial role in an alarming number of wrongful convictions, particularly in cases where bite mark testimony was admitted.

While the NAS Report criticized many forensic techniques and forms of evidence, it issued its harshest criticism at bite mark identification. Indeed, the NAS Report concluded that: (1) there is no evidence of an existing scientific basis for identifying an individual to the exclusion of all others; (2) the scientific basis is insufficient to conclude that bite mark comparisons can result in a conclusive match; (3) no thorough study has been conducted of large populations to establish the uniqueness of bite marks; (4) if a bite mark is compared to a dental cast, and the suspect providing the dental cast cannot be eliminated as a person who could have made the bite mark, there is no established science indicating what percentage of the population or subgroup of the population could also have produced the bite mark; (5) bite mark examiners rarely must undergo proficiency testing; (6) the limited proficiency testing results indicate a substantial error rate; and (7) the elasticity of the skin, the unevenness of the surface bite, and swelling and healing severely limit the validity of bite mark identification.

While the NAS Report focused on the present state of affairs in forensic science and the bite mark community, the report plainly indicates that most of these problems are not recent, but have plagued the forensic science and bite mark communities for
decades. Although defendants and defense attorneys have routinely argued that the forensic science community is scientifically bankrupt, neither defendants nor their counsel have had “independent” and “objective” evidence from a “governmental body” to prove this point.\textsuperscript{75} Now, however, after years of claiming that the forensic science community is scientifically bankrupt and bite marks are unreliable, the most prestigious scientific organization in the United States has finally concluded that this is in fact true. As a result, the NAS Report, which was released on February 17, 2009, constitutes “newly discovered” evidence pursuant to Mississippi Uniform Post--Conviction Collateral Relief Act, Miss. Code Ann. § 99--39--1, \textit{et seq.}, that could not have been raised or litigated earlier by the exercise of due diligence.

Recognizing the “rising nationwide criticism of forensic evidence,” \textit{Ramirez v. State}, 810 So.2d 836, 853 (Fla. 2001),\textsuperscript{76} and “that significant improvements are needed in

\textsuperscript{75} For the most part, when defense counsel attacked a forensic expert’s testimony as scientifically bankrupt, counsel generally introduced his or her own forensic expert thus leading to the battle of the experts. In such situations, at least in Mississippi, both experts were typically permitted to testify, with the jury being the “ultimate referee” as to which expert was more credible. See \textit{Brooks v. State}, 748 So.2d 736 (Miss. 1999); \textit{Brewer v. State}, 25 So.2d 106 (Miss. 1998).

\textsuperscript{76} Indeed, several courts had questioned forensic science’s proclaimed accuracy and reliability prior to Congress’s directive to the NAS to study the forensic science system. For instance, this Court in a dissent noted that Dr. Michael West’s forensic work and testimony “may be expedient to prosecutors . . . it is harmful to the criminal justice system.” Continuing, the dissent urged “a careful analysis of bite mark testimony – especially that coming from Dr. West – now rather than later or we risk having West become the Ralph Erdmann [Texas pathologist, convicted of seven felony charges in 1992 stemming from his falsifying autopsy reports] of Mississippi with the attendant consequence of having to examine every case in which West has ever testified.” \textit{Brooks v. State}, 748 So.2d 736, 750 (Miss. 1999) (McRae, J., dissenting).

forensic science,” NAS Report, at P--1. Congress directed the NAS “to conduct a study on forensic science.” Id. at S--1; P.L. No. 109--108, 119 Stat. 2290 (2005); H.R. Rep. No. 109--272, at 121 (2005). In the fall of 2006, the NAS established a committee to implement Congress’s charge. The committee included members of the forensic science community, legal, and science communities. The committee met on eight occasions between January 2007 and November 2008. During these meetings, the “committee heard expert testimony” on several issues relating to the forensic science community. Between meetings, committee members reviewed “numerous published materials, studies, and reports related to the forensic science disciplines, engaged in independent research on the subject, and worked on drafts of the final report.” Id. at S--2. The committee, as mentioned, issued its final report on February 17, 2009.

A. FINDINGS REGARDING FORENSIC SCIENCE

At the outset, the NAS Report acknowledged what had become painfully obvious in the years preceding the report: invalid forensic evidence and exaggerated forensic

scientific methodology exists to support a finding of a match to an absolute certainty, but permitting testimony “to a reasonable degree of ballistic certainty”); United States v. Monteiro, 407 F.Supp.2d 351, 355 (D. Mass. 2006) (finding that while the underlying principles behind firearm identification may be scientifically valid, “there is no reliable ... scientific methodology which will currently permit the expert to testify that [a casing and a particular firearm are] a ‘match’ to an absolute certainty, or to an arbitrary degree of statistical certainty.”); Ramirez v. State, 810 So. 2d 836, 853 (Fla. 2001) (“In order to preserve the integrity of the criminal justice system... particularly in the face of rising nationwide criticism of forensic evidence in general... state courts... must... cull scientific fiction and junk science from fact.”); People v. Saxon, 871 N.E.2d 244, 256 (Ill. App. 2007) (McDade, J., dissenting) (noting that “1/3 of the wrongful convictions” have been “linked to the misapplication of forensic disciplines” which is defined as where “forensic scientists and prosecutors presented fraudulent, exaggerated, or otherwise tainted evidence to the judge or jury which led to the wrongful conviction”) (citing www.innocenceproject.org); State v. Clifford, 121 P.3d 489, 503 (Mont. 2005) (Nelson, J., concurring) (noting how “long-accepted forensic science evidence has recently received greater public scrutiny not only because the ‘experts’ proffering the evidence were either astonishingly inept or downright corrupt, but also because of recent scientific developments such as DNA tests which have revealed the limitations of forensic techniques such as hair identification analysis”) (citation omitted); State v. Quintana, 103 P.3d 168, 170 (Utah App. 2004) (Thorne, J., concurring) (“[M]ost evidence points to a lack of consistent training of [fingerprint] examiners and an absence of any nationally recognized standard to ensure that examiners are equipped to perform the tasks expected of them.”).
testimony easily mislead fact finders and had contributed to an alarming number of wrongful convictions. The NAS Report stated:

[Advances in DNA testing] revealed that, in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.

NAS Report, at S-3. The NAS Report also commented:

The number of exonerations resulting from the analysis of DNA has grown across the country in recent years, uncovering a disturbing number of wrongful convictions—some for capital crimes—and exposing serious limitations in some of the forensic science approaches commonly used in the United States.

Id. at 1–6.

The NAS Report then identified and discussed several issues in forensic science that call into question—if not entirely undermine—the proclaimed reliability (and infallibility) of several non-DNA forensic identification techniques—particularly bite mark identification. The issues pertained to: (1) inadequate or no research regarding base rates, examiner error rates, measurement error rates, and minimizing the risk of contextual biases; (2) inadequate or no standards regarding forensic terminology, report writing, forensic science education, and for determining a match; (3) the lack of mandatory certification for forensic examiners—including forensic dentists; and (4) inadequate funding. The following passage captures the essence of the NAS Report’s overall findings:

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Too often [forensic science facilities] have inadequate educational programs, and they typically lack mandatory and enforceable standards, founded on rigorous research and testing, certification requirements, and accreditation programs. Additionally, forensic science and forensic pathology research, education, and training lack strong ties to our research universities and national science assets.

NAS Report, at S-10.

In the end, the NAS Report stressed that "substantial improvement is necessary in the forensic science disciplines to enhance law enforcement's ability to identify those who have or have not committed a crime and to prevent the criminal justice system from erroneously convicting or exonerating the persons who come before it." Id. at 1–2.

1. **No Research**

The NAS Report repeatedly mentioned that there is no research regarding: (1) base rates for certain evidentiary characteristics and features (e.g., teeth and bite pattern characteristics); (2) error rates for forensic examiners (i.e., proficiency testing); (3) errors rates for different forensic technologies (i.e., measurement error); and (4) ways in which conscious or unconscious contextual biases can be minimized. The NAS Report stated:

> The fact is that many forensic tests—such as those used to infer the source of toolmarks and bite marks—have never been exposed to stringent scientific scrutiny. Most of these techniques were developed in crime laboratories to aid in the investigation of evidence from a particular crime scene, and researching their limitations and foundations was never a top priority.

NAS Report, at 1-6 (emphasis added). The NAS Report added:

> [S]ome forensic science disciplines are supported by little rigorous systematic research to validate the discipline's basic premises and techniques. There is no evident reason why such research cannot be conducted.
"Id. at S--16, 6--4 ("the forensic science disciplines suffer from an inadequate research base").

The NAS Report also stated:

The simple reality is that the interpretation of forensic evidence is not always based on scientific studies to determine its validity. This is a serious problem. Although research has been done in some disciplines, there is a notable dearth of peer-reviewed, published studies establishing the scientific bases and validity of many forensic methods.

"Id. at S-5 and S-6. The NAS Report also stated:

Much forensic evidence—including, for example, bite marks... is introduced in criminal trials without any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline.

"Id. at 3-18 (emphasis added). The lack of research dates back to the late 1980s:

Before the first offering of the use of DNA in forensic science in 1986, no concerted effort had been made to determine the reliability of these tests, and some in the forensic science and law enforcement communities believed that scientists' ability to withstand cross-examination in court when giving testimony related to these tests was sufficient to demonstrate the tests' reliability. However, although the precise error rates of these forensic tests are still unknown, comparison of their results with DNA testing in the same cases has revealed that some of these analyses, as currently performed, produce erroneous results.

"Id. at 1--6.

The lack of research raises significant concerns because "[m]any of the processes used in... forensic science... are largely empirical applications of science—that is, they are not based on a body of knowledge that recognizes the underlying limitations of the scientific principles and methodologies used for problem solving and discovery." "Id. at 1--3. The NAS Report reinforced this point by noting that "many [forensic identification] techniques have been developed heuristically. That is, they are based on observation, experience, and reasoning without an underlying scientific theory, experiments designed
to test the uncertainties and reliability of the method, or sufficient data that are collected and analyzed scientifically.” *Id.* at 5--1.

a. **No Base Rate Data**

Forensic science is concerned with individuality, but true individuality is not a legitimate scientific expectation, even for DNA testing. At best, then, all forensic examiners can present to the fact finder is the likelihood of a coincidental match—i.e., what is the conditional probability that a randomly--selected individual or object shares the same characteristic(s) as the crime scene print or mark. Determining the likelihood of a coincidental match, however, requires base rate data regarding the characteristic(s) or feature(s) under investigation—e.g., teeth and bite mark characteristic. As the NAS Report repeatedly noted, however, base rate data is non--existent for many of the forensic sciences, including bite mark identification:

With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source. In terms of scientific basis, the analytically based disciplines generally hold a notable edge over disciplines based on expert interpretation.

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78 *See Commonwealth v. Crews,* 640 A.2d 395, 401 (Pa. 1994) (“For proving identity... as opposed to disproving identity, DNA can never provide absolute, conclusive proof, even thought extremely low probabilities of a coincidental match provide a basis for very strong inferences of identity.”); JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS 27 (2d 2005) (noting that “absolute certainty in DNA identification is not possible in practice” and explaining that “the next best thing is to claim virtual certainty due to the extreme small probabilities of a coincidental (random) match.”).

79 The “social science literature defines a base rate as a proportion - the relative frequency with which an event occurs or an attribute is present in some reference population.” Jonathan J. Koehler, *When do Courts Think Base Rate Statistics are Relevant?*, 42 JURIMETRICS J. 373, 374 (2002). For a straightforward conversation of base rates in the polygraph context, see *State v. Porter,* 698 A.2d 739, 767 n.53 (Conn. 1997). For example, base rate data may provide data regarding how many Mississipians are over sixty--five or how many National Football League players were arrested in a given year. In the forensic science context, base rate data can provide information on how often a particular friction ridge fingerprint pattern appears in the human population. Likewise, it can provide data as to how often a hair characteristic or a combination of different hair characteristics appears in the Caucasian race, the African-American race, or the Latino race.
As mentioned supra, the NAS Report concluded that there is no base rate data regarding teeth and bite pattern characteristics.

With no base rate, many forensic examiners and dentists like Dr. West routinely make (unjustifiable) probabilistic claims based on their experience. The NAS Report criticized such testimony and urged the forensic science community to undertake base rate research:

In most forensic science disciplines, no studies have been conducted of large populations to establish the uniqueness of marks or features. Yet, despite the lack of a statistical foundation, examiners make probabilistic claims based on their experience. A statistical framework that allows quantification of these claims is greatly needed.

Id. at 6-5. The NAS criticized such testimony due to the inherent limitations of human intuition:

[H]uman intuition is not a good substitute for careful reasoning when probabilities are concerned. As an example, consider a problem commonly posed in beginning statistics classes: How many people must be in a room before there is a 50 percent probability that at least two will share a common birthday? Intuition might suggest a large number, perhaps over 100, but the actual answer is 23. This is not difficult to prove through careful logic, but intuition is likely to be misleading.

Id. at 4-10. The NAS Report also commented on the correlation between experienced-based bite mark testimony and wrongful convictions:

Testimony of experts generally is based on their experience and their particular method of analysis of the bite mark. Some convictions based mainly on testimony by experts indicating the identification of an individual based on a bite mark have been overturned as a result of the provision of compelling evidence to the contrary (usually DNA evidence).

Id. at 5-36.
An offshoot of the base rate research is research focused on “intraindividual” variability and “interindividual” variability. This type of research is also nonexistent in forensic science:

For the identification sciences (e.g., friction ridge analysis, toolmark analysis, handwriting analysis), such studies would accumulate data about the intraindividual variability (e.g., how much one finger’s impressions vary from impression to impression, or how much one toolmark or signature varies from instance to instance) and the interindividual variability (e.g., how much the impressions of many fingerprints vary across a population and in what ways). With that information, one could begin to attach confidence limits to individualization determinations and also begin to develop an understanding of how much similarity is needed in order to attain a given level of confidence that a match exists.

Id. at 6-1 and 6-2.

b. NO RESEARCH AIMED AT MINIMIZING CONTEXTUAL BIASES

According to the NAS Report, “scientific investigations... must be as free from bias as possible” and “practices [must be] put in place to detect biases (such as those from measurements, human interpretation) and to minimize their effects on conclusions.” NAS Report, at 4--2. Consequently, a “body of research is required to establish the limits and measures of performance and to address the impact of sources of variability and potential bias.” Id. at 4--9. This research is especially critical for subjective forensic assessments such as bite mark identification because the likelihood of falling prey to unconscious contextual biases increases when (1) examiners confront an ambiguous stimulus capable of producing varying interpretations and (2) the examiner is affiliated with a law enforcement or prosecutorial agency.80

80 The context bias (or observer effect) phenomenon is governed by the basic tenet of cognitive psychology, which states that an individual’s desires and expectations influence how they perceive an object or situation. See Ulric Neisser, Cognition and Reality: Principles and Implications of Cognitive Psychology 43-45 (1976).
The NAS Report acknowledged that bite mark identification is very subjective: “In numerous instances, experts diverge widely in their evaluations of the same bite mark evidence, which has led to questioning of the value and scientific objectivity of such evidence.” NAS Report, at 5-37. More importantly, forensic examiners and dentists encounter many situations where they are exposed to information that can easily cultivate conscious or unconscious expectations, with the most common expectation being that the suspect or defendant is guilty. As the NAS Report stressed, the “traps created by such biases can be very subtle, typically one is not aware that his or her judgment is being affected.” Id. Consequently, the NAS Report urged the forensic science community to conduct research aimed at identifying and minimizing contextual biases:

[Subjective forensic] disciplines need to develop rigorous protocols to guide these subjective interpretations and pursue equally rigorous research and evaluation programs. The development of such research programs can benefit significantly from other areas, notably from the large body of research on the evaluation of observer performance in diagnostic medicine and from the findings of cognitive psychology on the potential for bias and error in human observers.

Id. at S-6.

C. NO ERROR RATE RESEARCH

Forensic examiners and dentists are bound to make errors. See NAS Report, at 4-5 (“Scientific data and processes are subject to a variety of sources of error. For example, laboratory results and data from questionnaires are subject to measurement error, and interpretations of evidence by human observers are subject to potential biases.”). Consequently, a “key task for the scientific investigator designing and conducting a
scientific study, as well as for the analyst applying a scientific method to conduct a particular analysis, is to identify as many sources of error as possible, to control or to eliminate as many as possible, and to estimate the magnitude of remaining errors so that the conclusions drawn from the study are valid.” *Id.* at 4-5. The NAS Report also stated:

The existence of several types of potential error rates makes it absolutely critical for all involved in the analysis to be explicit and precise in the particular rate or rates referenced in a specific setting. The estimation of such error rates requires rigorously developed and conducted scientific studies. Additional factors may play a role in analyses involving human interpretation, such as the experience, training, and inherent ability of the interpreter, the protocol for conducting the interpretation, and biases from a variety of sources, as discussed in the next section. The assessment of the accuracy of the conclusions from forensic analyses and the estimation of relevant error rates are key components of the mission of forensic science.

*Id.* at 4-9.

In the courtroom setting, the need for error rate data is critical because, without such data, the fact finder cannot accurately identify the evidence’s reliability and thus its probative value. As the NAS Report noted: “[T]he accuracy of forensic methods resulting in classification or individualization conclusions needs to be evaluated in well-designed and rigorously conducted studies. The level of accuracy of an analysis is likely to be a key determinant of its ultimate probative value.” *Id.* at 6-2

For instance, forensic scientists and dentists are fully capable of conducting proficiency tests in order to accurately identify how often their associative conclusions (or identifications) are correct (i.e., examiner error). Such data would be extremely relevant and probative to the fact finder. For instance, had Dr. West testified that he misidentified bite marks in 3 out of every 10 cases (a 30% error rate), the jury could have

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81 “Error rates’ are defined as proportions of cases in which the analysis led to a false conclusion.” NAS Report, at 4-7 and 4-8.
used his information to determine how much weight and credibility it should give their testimony.82

Similarly, forensic scientists and dentists are fully capable of identifying the error rates associated with particular techniques (i.e., method error). See id. at 4–5 (“As with all other scientific investigations, laboratory analyses conducted by forensic scientists are subject to measurement error.”). For instance, had Dr. West informed the jury that the technique he used to individualize the bite mark to Petitioner’s bite pattern had a particular error rate, the jury could have used his information to once again determine how much weight and credibility it should give their testimony.

Despite the importance of error rate data, “in most areas of forensic science, there is no well-defined system that exists for determining error rates, and proficiency testing shows that some examiners perform poorly.” Id. at 6–5, 6–1 (“Few forensic science methods have developed adequate measures of the accuracy of inferences made by forensic scientists.”). Moreover, when proficiency tests have been conducted, they have not been “sufficiently rigorous” and, thus, offer no real value to the critical question of whether forensic examiners and the techniques they rely on are accurate. Id. at 7–11 (“Although many forensic science disciplines have engaged in proficiency testing for the past several decades, several courts have noted that proficiency testing in some disciplines is not sufficiently rigorous.”).83

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82 According to the NAS Report: “Proficiency testing is an integral part of an effective quality assurance program. It is one of many measures used by laboratories to monitor performance and to identify areas where improvement may be needed. A proficiency testing program is a reliable method of verifying that the laboratory’s technical procedures are valid and that the quality of work is being maintained.” NAS Report, at 7-11 (citation omitted).

83 For example, a federal district judge noted that “the FBI [fingerprint] examiners got very high proficiency grades, but the tests they took did not ... [O]n the present record I conclude that the proficiency tests are less demanding than they should be.” United States v. Llera Plaza, 188 F. Supp. 2d 549, 565 (E.D. PA. 2002). Similarly, another federal district judge said this about a document examiner’s remarkable ability to score
As noted infra, the NAS Report concluded that the limited proficiency tests for forensic dentists have revealed “substantial rates of erroneous results[.]” Id. at 1--10.

2. **No Standards**

Developing and enforcing standards is critical in science because science is premised on replication. Standards “provide the foundation against which performance, reliability, and validity can be assessed.” NAS Report, at 6--4. Adherence to standards also “reduces bias, improves consistency, and enhances the validity and reliability of results.” Id. Furthermore, standards “reduce variability resulting from the idiosyncratic tendencies of the individual examiner—for example, setting conditions under which one can declare a ‘match’ in forensic identifications.” Id. Simply put, standards “make it possible to replicate and empirically test procedures and help disentangle method errors from practitioner errors.” Id.

Despite the importance of standards, the forensic science and bite mark communities have yet to develop adequate and rigorous standards for determining a “match” and writing a report. Likewise, both communities have failed to develop a precise vocabulary to ensure that the fact finder is not misled to believe that an item of evidence has been individualized and that it could only have come from the defendant or an instrument in the defendant’s possession. Finally, the forensic science community has failed to develop adequate education, certification, and accreditation standards. As the NAS Report noted:

perfectly on all is proficiency tests: “There were aspects of Mr. Cawley’s testimony that undermined his credibility. Mr. Cawley testified that he achieved a 100% passage rate on the proficiency tests that he took and that all of his peers always passed their proficiency tests. Mr. Cawley said that his peers always agreed with each others’ results and always got it right. Peer review in such a ‘Lake Woebegone’ environment is not meaningful.” United States v. Lewis, 220 F. Supp. 2d 548, 554 (S.D. W. Va. 2002). See also United States v. Crisp, 324 F.3d 261, 274 (4th Cir. 2003) (Michael, J., dissenting) (“Proficiency testing is typically based on a study of prints that are far superior to those usually retrieved from a crime scene.”).
Although there have been notable efforts to achieve standardization and develop best practices in some forensic science disciplines and the medical examiner system, most disciplines still lack best practices or any coherent structure for the enforcement of operating standards, certification, and accreditation. Standards and codes of ethics exist in some fields, and there are some functioning certification and accreditation programs, but none are mandatory. In short, oversight and enforcement of operating standards, certification, accreditation, and ethics are lacking in most local and state jurisdictions.

*Id.* at S-17.

### a. **No Standards for Determining a Match**

The forensic science community has yet to develop empirically sound and “rigorous protocols for performing subjective interpretations” such as bite mark identification. *Id.* at 6–4. As noted *infra*, there are no standards that “indicate the criteria necessary for... determining whether the bite mark can be related to a person’s dentitions and with what degree of probability.” *Id.* at 5–35.

### b. **No Standardized Terminology and Report Writing Requirements**

Science, as mentioned, is premised on replication. Replication leads to increased confidence regarding the validity of a particular technique, test, or instrument. See NAS Report, at 4–3 (“The validation of results over time increases confidence.”). Replication, however, can only occur if scientists precisely define terms, processes, context, results, and limitations of the results and their experiment. *Id.* at 4–2 (noting that the “key elements of good scientific practice” include “precision when defining terms, processes, context, results, and limitations”). Consequently, “laboratory reports generated as the result of a scientific analysis should be complete and thorough. They should contain, at minimum, ‘methods and materials,’ ‘procedures,’ ‘results,’ ‘conclusions,’ and, as
appropriate, sources and magnitudes of uncertainty in the procedures and conclusions (e.g., levels of confidence).” *Id.* at 5--15.84

Despite the critical importance of precisely defining terms, processes, procedures, context, and limitations, the NAS Report noted that while “[s]ome forensic laboratory reports meet this standard of reporting... most do not.” *Id.* at 6–3. The NAS Report added:

[R]eports contain only identifying and agency information, a brief description of the evidence being submitted, a brief description of the types of analysis requested, and a short statement of the results (e.g., “The green, brown plant material in item #1 was identified as marijuana”). The norm is to have no description of the methods or procedures used, and most reports do not discuss measurement uncertainties or confidence limits.

*Id.* As a result, the NAS Report concluded that “[t]here is a critical need in most fields of forensic science to raise the standards for reporting and testifying about the results of investigations.” *Id.* at 6--3. Indeed, injustices have occurred and death sentences vacated because forensic examiners failed to adequately and objectively define and describe terms, processes, procedures, context, and the limitations of their results and techniques.85

84 *See also id.* at 6-1 (“All results for every forensic science method should indicate the uncertainty in the measurements that are made, and studies must be conducted that enable the estimation of those values.”); *id.* at 6–3 (“Forensic science reports, and any courtroom testimony stemming from them, must include clear characterizations of the limitations of the analyses, including associated probabilities where possible.”).

85 The Ninth Circuit Court of Appeals commented that the California Department of Justice serologist, who provided critical testimony at Herman Atkins’ rape trial, disclosed a lab report that “lacked specificity and was arguably misleading,” and that he “was not as forthcoming in explaining information as he should have been.” *Atkins v. County of Riverside*, 151 Fed. Appx. 501, 506 (9th Cir. 2005). The serologist’s testimony and “misleading” lab report played a role in Atkins’ wrongful rape conviction. See Fred Dickey, *Worst--Case Scenario; The Story of Herman Atkins’ Years Imprisoned as an Innocent Man Might Scare the Hell Out of You. It Should*, L.A. TIMES, June 25, 2000, at 16.

Similarly, an “unclear and ambiguous” FBI DNA report allowed Joyce Gilchrist to falsely claim that the FBI’s DNA tests in Alfred Brian Mitchell’s capital murder case were inconclusive and did not rule out the possibility Mitchell deposited the semen and sperm recovered from the victim. *See Mitchell v. Ward*, 150 F. Supp. 2d 1194, 1123, 1126 (W.D. 
The forensic community has also failed to precisely define critical terms that are often used “in reports and in court testimony to describe findings, conclusions, and the degrees of association between evidentiary material (e.g., hairs, fingerprints, fibers) and particular people or objects.” NAS Report, at 6–3. Such terms, as the NAS Report noted, “include but are not limited to ‘match,’ ‘consistent with,’ ‘identical,’ ‘similar in all respects

Okla. 1999). The FBI’s DNA examinations, however, unequivocally excluded Mitchell as a possible donor of the sperm or semen. The FBI even communicated this information to Gilchrist a year before she testified. Id. at 1126 (“Over a year before Petitioner was tried and convicted of rape and anal sodomy, Agent Vick’s DNA testing revealed that Petitioner’s DNA was not present on the samples tested.”) (emphasis in original). The FBI’s DNA analyst admitted, however, “that there [was] no way to tell from his report that: 1) he obtained no DNA profile results from the rectal swabs; 2) he obtained no DNA profile results unlike the victim for the vaginal swabs; and 3) he obtained no DNA profile results unlike the victim or Taylor for the panties.” Id. The DNA analyst also “testified that it is clear from the report provided to the defense that Mitchell’s DNA was not revealed in the FBI testing.” Id. at 1126 n.46. In short, the FBI’s terse DNA report failed to adequately inform Mitchell’s attorneys that all DNA tests excluded Mitchell as a possible donor of the semen and sperm. Id. at 1126 n.45 (“the defense was not aware that the FBI’s DNA testing revealed the critical fact that Mitchell’s DNA was not present on the samples tested.”). Moreover, the report was so “unclear and ambiguous” that another DNA expert failed to realize, like defense counsel, that all the FBI’s DNA tests excluded Mitchell. Id. at 1127. The Tenth Circuit Court of Appeals ultimately vacated Mitchell’s death sentence because of the “unclear and ambiguous” report and Gilchrist’s subsequent misconduct. See Mitchell v. Gibson, 262 F.3d 1036, 1063 (10th Cir. 2001) (“The laboratory performed DNA testing on these items and prepared a report, which was couched in convoluted language that did not clearly recite the test results.”).

The Florida Supreme Court overturned Gerald D. Murray’s first--degree murder conviction and death sentence in part because “there was a general sloppiness in documenting the [forensic] tests which even the analyst admitted was below the standards normally accepted.” Murray v. State, 838 So. 2d 1073, 1081 (Fla. 2002). As the Florida Supreme Court explained: “Because of the clerical errors and the below--standard documentation and paperwork, other experts who were retained by the defense were unable to adequately review the test results since necessary portions of the documentation were missing.” Id.

Finally, Guy Paul Morin’s wrongful murder conviction in Canada can be attributed in part to forensic scientists who “failed to communicate accurately the limitations of their findings to ... the Court.” Kent Roach, Inquiring into the Causes of Wrongful Convictions, 35 CRIM. L. BULL. 152, 162--63 (1999).
tested,’ and ‘cannot be excluded as the source of.’” *Id.* 86 This “imprecision in vocabulary stems in part from the paucity of research in forensic science and the corresponding limitations in interpreting the results of forensic analyses.” *Id.* 87

The NAS Report stressed that many forensic science disciplines, including bite mark identification, “critically need to standardize and clarify the terminology used in reporting and testifying about the results and in providing more information.” *Id.* at 6–5. Precisely defining these terms is critical because, as the NAS Report explained, “such terms can have a profound effect on how the trier of fact in a criminal or civil matter perceives and evaluates evidence.” *Id.*

**c. No Certification Standards**

Professional competence is typically determined by some recognized set of standards. For instance, would—be lawyers must take (and do well on) the LSAT to gain admission into law school and then pass the bar before they can step foot into a courtroom to argue a motion. Similarly, future doctors must take (and do well on) the MCAT to gain admission into medical school and then pass their medical boards before they can practice medicine. Many professions, even those where one’s life or liberty is not at stake, require members to be licensed or certified. 88 This is not the case in forensic science because “most jurisdictions do not require forensic practitioners to be certified, and most forensic science disciplines have no mandatory certification programs.” NAS Report, at §4; accord State v. Quintana, 103 P.3d 168, 170 (Utah Ct. App. 2004) (Thorne,

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86 The NAS Report also noted that “the forensic science disciplines have not reached agreement or consensus on the precise meaning of any of these terms.” *Id.* at 6–3.
87 Dr. West himself was found in violation of his peers’ reporting and nomenclature standards in two ethics investigations of his work. See Section B below.
88 As the NAS Report explained: “In other realms of science and technology, professionals, including nurses, physicians, professional engineers, and some laboratorians, typically must be certified before they can practice.” NAS Report, at 7–12.
J., concurring) ("[M]ost evidence points to a lack of consistent training of [fingerprint] examiners and an absence of any nationally recognized standard to ensure that examiners are equipped to perform the tasks expected of them.").

Consequently, the forensic examiner's competency has routinely been gauged by two non--science individuals: judges and jurors. Judges decide whether an examiner is qualified to testify as an expert, while jurors decide whether the expert's testimony and conclusions are credible. Under this system, then, "courts are required to accept or reject the expert's own claims of expertise, or that of his employer, without the benefit of an impartial and rigorous assessment of his or her capabilities." This "case-by-case adjudicatory approach... is not well suited to address the systematic problems in many of the various forensic science disciplines. Judicial review, by itself, will not cure the infirmities of the forensic science community." NAS Report, at 3--20.

The lack of mandatory certification programs is disconcerting because the "quality and relevance" of undergraduate and graduate forensic science programs is "uncertain." "It appears that there are no formal and systematically applied standards or standardization requirements for forensic science education programs, making the quality and relevance of existing programs uncertain." Indeed, the NAS Report strongly suggested that current and past forensic science programs have not adequately trained students on the fundamental practices of science and the scientific method:

To correct some of the existing deficiencies, it is crucially important to improve undergraduate and graduate forensic science programs. The legitimization of practices in the forensic science disciplines must be based on established scientific knowledge, principles, and practices, which are best learned through formal education.

While Dr. West testified that he had been qualified as bite mark expert in several cases,\textsuperscript{90} he did not testify (nor could he) that he took and passed a national or state certification test establishing that he could accurately distinguish human bite marks from non-bite mark wounds and associate a bite mark to the one and only person who could have inflicted the bite mark to the exclusion of all others.

**B. Specific Finding Regarding Bite Mark Identification**

The NAS Report criticized many forensic techniques and forms of evidence, but it directed its harshest criticism at bite mark identification. Indeed, the NAS Report concluded that: (1) there is no evidence of an existing scientific basis for identifying an individual to the exclusion of all others; (2) the scientific basis is insufficient to conclude that bite mark comparisons can result in a conclusive match; (3) no thorough study has been conducted of large populations to establish the uniqueness of bite marks; (4) if a bite mark is compared to a dental cast, and the suspect providing the dental cast cannot be eliminated as a person who could have made the bite mark, there is no established science indicating what percentage of the population or subgroup of the population could also have produced the bite mark; (5) bite mark examiners rarely must undergo proficiency testing; (6) the limited proficiency testing results indicate a substantial error rate; and (7) the elasticity of the skin, the unevenness of the surface bite, and swelling and healing severely limit the validity of bite mark identification.

**1. The Assumptions Underlying Bite Mark Identification**

\textsuperscript{90}Tr. 541
Bite mark identification is premised on four assumptions; if any of these four assumptions are invalid, then bite mark identification is invalid:

1. The dental features of the biting teeth (six upper and six lower teeth) are unique.

2. This uniqueness remains constant throughout a person’s lifetime.

3. These unique dental features can and are transferred and recorded every time the person bites into an impressionable object, such as human skin.

4. Trained forensic dentists can accurately determine whether a mark or wound on a person’s body is a human bite mark and link the bite mark to the one and only person who could have left the distinct bite pattern.91

The NAS Report invalidated all four assumptions. Indeed, the NAS Report repeatedly singled out bite mark identification for its shoddy scientific foundation and its significant error rate. For instance, the NAS Report stated: “Much forensic evidence—including, for example, bite marks... is introduced in criminal trials without any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline.” NAS Report, at 3–18 (emphasis added). The NAS Report also stated: “The fact is that many forensic tests—such as those used to infer the source of... bite marks—have never been exposed to stringent scientific scrutiny. Id. at 1–6 (emphasis added). Similarly, the NAS Report stated that “there are important variations among the disciplines relying on expert interpretation. For example, there are more established protocols and available research for fingerprint analysis than for the analysis of bite marks.” Id. at 5–5 and 5–6 (emphasis added).

a. The Permanently Unique Assumption

The NAS Report debunked the first three assumptions when it commented:

No thorough study has been conducted of large populations to establish the uniqueness of bite marks; theoretical studies promoting the uniqueness theory include more teeth than are seen in most bite marks submitted for comparison. There is no central repository of bite marks and patterns.

*Id.* at 5-36. The NAS Report also stated:

Although the methods of collection of bite mark evidence are relatively noncontroversial, there is considerable dispute about the value and reliability of the collected data for interpretation. Some of the key areas of dispute include the accuracy of human skin as a reliable registration material for bite marks, the uniqueness of human dentition, the techniques used for analysis, and the role of examiner bias.

*Id.* at 5-37. The NAS Report added:

Unfortunately, bite marks on the skin will change over time and can be distorted by the elasticity of the skin, the unevenness of the surface bite, and swelling and healing. These features may severely limit the validity of forensic odontology. Also, some practical difficulties, such as distortions in photographs and changes over time in the dentition of suspects, may limit the accuracy of the results.

*Id.* at 5-37. Finally, the NAS Report stated:

Although the methods of collection of bite mark evidence are relatively noncontroversial, there is considerable dispute about the value and reliability of the collected data for interpretation. Some of the key areas of dispute include the accuracy of human skin as a reliable registration material for bite marks, the uniqueness of human dentition, the techniques used for analysis, and the role of examiner bias.

*Id.*

**b. Accuracy Assumption**

The NAS Report debunked the accuracy assumption when it commented:

Failure to acknowledge uncertainty in findings is common [in forensic science]: Many examiners claim in testimony that others in their field would come to the exact same conclusions about the evidence they have analyzed. Assertions of a “100 percent match” contradict findings of proficiency tests that find *substantial rates of erroneous results in some disciplines* (i.e., voice identification, *bite mark analysis*).
Id. at 1--9 and 1--10 (emphasis added). The NAS Report also commented on the “high percentage of false positive matches of bite marks using controlled comparison studies.”

Id. at 5--36.

2. OTHER ISSUES REGARDING BITE MARK IDENTIFICATION

a. CANNOT INDIVIDUALIZE BITE MARKS

Dr. West testified that he could individualize the bite mark on Mrs. Kemp’s shoulder to Petitioner’s bite pattern.92 The NAS Report proves that these conclusions are invalid: “Bite mark testimony has been criticized basically on the same grounds as testimony by questioned document examiners and microscopic hair examiners. The committee received no evidence of an existing scientific basis for identifying an individual to the exclusion of all others.” NAS Report, at 5--37 (emphasis added).

Moreover, bite mark examiners cannot even opine as to the likelihood of a coincidental match because there is no base rate data regarding the characteristics of teeth and bite patterns. Indeed, the NAS Report repeatedly acknowledged this fundamental shortcoming of bite mark identification:

Often in criminal prosecutions... forensic evidence is offered to support conclusions about “individualization” (sometimes referred to as “matching” a specimen to a particular individual or other source)... With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.

92 Specifically, Dr. West found to a reasonable degree of certainty that the molds from Petitioner’s teeth matched the bite mark on Kemp’s breast. (Tr. 561--62). He also testified that Petitioner’s dental mold was “consistent” with the bite marks on the arm and neck. (Tr. 559--60). Dr. West explained that “consistent” meant he could not exclude Howard as the biter, and that he could not state with any certainty that Howard was the biter. (Id.).
Id. at 5--5. The NAS Report also stated that while “the majority of odontologists are satisfied that bite marks can demonstrate sufficient detail for positive identification, no scientific studies support this assessment, and no large population studies have been conducted.” Id. at 5--37. The NAS Report added:

More research is needed to confirm the fundamental basis for the science of bite mark identification. Although forensic odontologists understand the anatomy of teeth and the mechanics of biting and can retrieve sufficient information from bite marks on skin to assist in criminal investigations and provide testimony at criminal trials, the scientific basis is insufficient to conclude that bite mark comparisons can result in a conclusive match.

Id. at 5--36.93 Finally, the NAS Report stated:

If a bite mark is compared to a dental cast using the guidelines of the ABFO, and the suspect providing the dental cast cannot be eliminated as a person who could have made the bite, there is no established science indicating what percentage of the population or subgroup of the population could also have produced the bite. This follows from the basic problems inherent in bite mark analysis and interpretation.

Id. at 5--36.

b. No Standards for Determining a Match

Like many other forensic identification techniques, there are no empirically validated standards and procedures that allow forensic dentists to associate an unknown bite mark to a known bite pattern. The NAS Report acknowledged this fundamental shortcoming: “[T]here is still no general agreement among practicing forensic odontologists about national or international standards for comparison.” Id. at 5--37.94

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93 The NAS Report acknowledged that, “[d]espite the inherent weakness in bite mark comparison, it is reasonable to assume that the process can sometimes reliably exclude suspects.” NAS Report, at 5--37.

94 Similarly, the experts who have testified in reported bite mark cases have used a low of eight points of comparison to a high of fifty-two points. E.g., State v. Garrison, 585 P.2d 563, 566 (Ariz. 1978) (10 points); People v. Slone, 143 Cal. Rptr. 61, 62 (Cal. Ct. App. 1978) (10 points); People v. Milone, 356 N.E.2d 1350, 1356 (Ill. App. Ct. 1976) (29 points); State v. Sager, 600 S.W.2d 541, 564 (Mo. Ct. App. 1980) (52 points); State v. Green, 290 S.E.2d 625, 630 (N.C. 1982) (14 points); State v. Temple, 273 S.E.2d 273, 279 (N.C. 1981) (8 points).
Moreover, even when guidelines have been developed, the NAS Report noted that “there is no incentive or requirement that these guidelines be used in the criminal justice system.” *Id.* at 5--36. Consequently, “there is no science on the reproducibility of the different methods of analysis that lead to conclusions about the probability of a match. This includes reproducibility between experts and with the same expert over time. Even when using the guidelines, different experts provide widely differing results and a high percentage of false positive matches of bite mark using controlled comparison studies.” *Id.* at 5--35 and 5--36.

3. **Summary of Bite Mark Identification’s Shortcomings**

The NAS Report summarized “the basic problems inherent” in bite mark identification as follows:

(1) The uniqueness of the human dentition has not been scientifically established.
(2) The ability of the dentition, if unique, to transfer a unique pattern to human skin and the ability of the skin to maintain that uniqueness has not been scientifically established.
   i. The ability to analyze and interpret the scope or extent of distortion of bite mark patterns on human skin has not been demonstrated.
   ii. The effect of distortion on different comparison techniques is not fully understand and therefore has not been quantified.
(3) A standard for the type, quality, a number of individual characteristics required to indicate that a bite mark has reached a threshold of evidentiary value has not been established.

*Id.* at 5-37.

The NAS Report invalidates each conclusion that buttresses the bite mark evidence underlying Mr. Howard’s conviction.

First, there is no scientific research establishing the uniqueness of teeth and human dentitions. Moreover, there is no database that catalogues different teeth characteristics so that bite mark examiners can at least opine as to the likelihood of a coincidental match.

Second, there is no scientific evidence establishing that a person’s teeth remain the same (or unique) throughout his or her life.

Third, there is no scientific evidence establishing that human skin can accurately and consistently capture the minute details of a person’s teeth and bite pattern.

Fourth, there is no scientific evidence establishing that the procedures used by Dr. West are reliable. A procedure is reliable only if other bite mark experts arrive at the same conclusion as he—i.e., consistency of conclusions. As the NAS Report repeatedly mentioned, not one method of bite mark identification has produced consistent results when utilized by different bite mark experts. Moreover, neither the State nor Dr. West introduced any evidence regarding the reliability of the procedures.

Fifth, there is no scientific evidence establishing that the procedures used by Dr. West are valid. A procedure is valid only if it is able to consistently produce correct results—i.e., accuracy of results. Not a shred of evidence was introduced establishing that Dr. West could accurately link—on a consistent basis—an unknown bite mark to a known bite pattern. Moreover, as the NAS Report emphasized, the limited proficiency testing data indicates that bite mark identification has the highest error rate for any forensic identification technique.

Sixth, there are no standards for determining a match or individualizing a bite mark. With no standards, match and individuality determinations are left to the bite
mark expert’s unguided subjective judgment. Moreover, the lack of standards prevents reproducibility and validation of matches and identifications. In neither of Mr. Howard’s trials was Dr. West able to produce any documentation at all of his examination and subsequent findings. The inability to reproduce Dr. West’s identifications renders his identifications invalid.

Seventh, contextual biases likely tainted Dr. West’s identifications. Dr. West conducted single-sample testing: he only compared Howard’s bite pattern with the bite mark. Single-sample forensic testing is equivalent to an eyewitness show-up. A show-up is an identification procedure where an eyewitness is presented with a single suspect for identification.\(^\text{95}\) Eyewitness research has continually recognized an assortment of problems associated with show-ups.\(^\text{96}\) The U.S. Supreme Court has even commented that a show-up raises reliability concerns because it is a highly “suggestive procedure.”


It is clear both that Petitioner’s conviction was premised almost entirely on bite mark evidence and that in light of the NAS Report’s findings and conclusions no “rational trier of fact could have found the essential elements” of the offenses for which Petitioner was convicted “beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. at 319. As such, had the bite mark evidence been properly excluded at Petitioner’s trial, the outcome would have been substantially different.


B. **EVIDENCE OF DR. MICHAEL WEST’S SERIAL ACTS OF FORENSIC FRAUD IS NEWLY DISCOVERED AND OBJECTIVELY VERIFIABLE EVIDENCE THAT WOULD, HAD IT BEEN PRESENTED, CULMINATED IN A DIFFERENT VERDICT IN PETITIONER’S TRIAL.**

For years, including the period of time of Petitioner’s trial, evidence of Dr. Michael West’s controversial work was not litigated consistent with the standards set forth in the NAS Report, but instead was analyzed as though it were simply a novel permutation of expert testimony whose admission required perfunctory passage through the gatekeeping function of Rule 702 and cases like *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or *Howard*, 701 So.2d 274, 288 (Miss. 1997). See e.g., *Brooks v. State*, 748 So.2d 736, 739 (Miss. 1999). Dr. West’s testimony was routinely admitted in trial courts throughout Mississippi.

As the NAS Report makes abundantly clear, the science of bite mark identification, at least as typically practiced, has no place in American courtrooms. Moreover, as practiced by Dr. West in this and in several other cases, it was rife with error and in likely every instance, fraudulent. Representative examples of his work include the recent DNA exonerations of Kennedy Brewer and Levon Brooks, who were convicted of crimes in Noxubee County occurring slightly over a year apart and who spent many years in prison because of Dr. West’s bogus claims that their teeth undoubtedly matched alleged bite marks on the victims’ bodies. It also includes the following cases and reports, some of which occurred prior to proceedings in the present case, but the most important of which have arisen since. The pattern includes exonerations as well as cases that are still being reviewed by the courts in which Dr. West made similar claims of scientific fact and expert
opinion that now, in retrospect, appear not only outlandish but based in the same pseudo-science.

**Larry Maxwell**

In early September of 1990, three people were stabbed to death in Daleville, Mississippi. Law enforcement arrested Larry Maxwell. Mr. Maxwell provided investigators with an alibi. He worked at a nearby naval facility, and work records and surveillance video gave no indication that he was anywhere other than at work during the time the murders took place. Law enforcement recovered a knife that they provided to Dr. West. He compared the wounds on the victims to the knife and determined that the “wounds on the body of [the victim] Floyd Parker were indeed and without doubt produced by the butcher knife in question.”

Dr. West used a special lighting technique to allegedly observe and photograph marks on Mr. Maxwell’s hands that corresponded to characteristics found on the knife handle. Maxwell was charged with three counts of capital murder. When asked to produce the corresponding photographs, Dr. West claimed that he had accidentally overexposed them.

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97 See e.g., Appellant’s Brief, Larry C. Maxwell, Plaintiff and Appellant, v. Lauderdale County; Lauderdale County Sheriff’s Department; Kemper County; Kemper County Sheriff’s Department; Chief Deputy Michael Vick; T.R. Vick; C.M. Vincent; Joel Walters; and Michael West, Defendants and Respondents, No. 96-60525, November 4, 1996, 1996 WL 33474782 at 10, and Court Record (hereinafter “CR”) Vol.7, p. 2655.
99 Dr. West was informed by law enforcement that Maxwell was a suspect in the murders and that the knife had been taken from he victims’ home. Id. at 10--11, CR---Vol.7, p. 2562; Dr. West’s findings that the knife in question “indeed and without doubt” caused the victims’ injuries is speculative and not based on scientific method or established and generally accepted scientific principles. In fact forensic science does not generally accept as scientifically reliable conclusions that a particular knife blade produced a particular knife wound.  Id. at 10, (CR---Vol.7, p. 2656--59); see also NAS Report at 150--55.
The State’s case against Mr. Maxwell was dismissed after the trial court issued an order precluding evidence developed by Dr. West.\textsuperscript{100} (See \textit{Maxwell} Order, attached as Appendix F).

\textbf{Levon Brooks}

In September of 1990, a three year-old girl was abducted from her home and found sexually assaulted and manually strangled in a nearby pond in Noxubee County, Mississippi. Levon Brooks was detained by law enforcement as a suspect. Brooks was later transported to Dr. West’s office to have dental molds cast.\textsuperscript{101} (See Testimony of Dr. West in Brooks’ Trial, attached as Appendix G). Dr. West purported to match Mr. Brooks’ teeth mold to the marks on the victim’s body.\textsuperscript{102} Additionally, Dr. West claimed that by using his analyses he was able to “exclude” upwards of a dozen other suspects because the teeth molds gathered from them did not match the bite wounds on the victim.\textsuperscript{103} At Mr. Brooks’ trial, Dr. West testified “that it could be no one but Levon Brooks that bit this girl’s arm.”\textsuperscript{104} Mr. Brooks was convicted.

Mr. Brooks is innocent. He was exonerated by the Noxubee County Circuit Court on March 13, 2008, and released from a life sentence.\textsuperscript{105} (See \textit{Brooks} Order, attached as Appendix H).

\textbf{Kennedy Brewer}

In May of 1992, another three year-old victim disappeared from her house in Noxubee County. Law enforcement asked Dr. West to gather teeth impressions from four

\textsuperscript{100} See Order, \textit{State v. Maxwell} (attached as Appendix F).
\textsuperscript{101} See Testimony of Dr. West in Levon Brooks’ trial, at 721 (attached as Appendix G).
\textsuperscript{102} Brooks Tr. 722-29, 730.
\textsuperscript{103} Brooks Tr. 753
\textsuperscript{104} \textit{Id} at 730.
\textsuperscript{105} See \textit{Brooks} Order, attached as Appendix H.
individuals, all of whom were initial suspects.\textsuperscript{106} (See Excerpt of Dr. West’s Testimony in Brewer’s Trial, attached as Appendix I). Dr. West determined that Mr. Brewer’s teeth matched nineteen areas on the victim’s body.\textsuperscript{107}

Kennedy Brewer was convicted and sentenced to death. DNA testing excluded him as the perpetrator several years later. Brewer was exonerated on February 15, 2008.\textsuperscript{108} (See Brewer Order, attached as Appendix J).

\begin{itemize}
  \item **Johnny Bourn**
  
  In 1992, Dr. West matched a bite mark on an elderly rape victim to Mr. Bourn, who on that basis was arrested and imprisoned for eighteen months. Subsequent DNA testing showed that hair and fingerprint belonged to a third person, and Mr. Bourn was released.

  Dr. West nevertheless maintained that Mr. Bourn bit the woman and that the DNA results were faulty. Additionally Dr. West claims that Mr. Bourn may not have raped the victim, but he may have had an accomplice.\textsuperscript{109} (See Hansen, Mark, \textit{Out of the Blue}, ABA Journal, February, 1996, attached as Appendix L; and Affidavit of Ross Parker Simons, attached as Appendix M).
  
  \item **Blind Proficiency Test**
  
  In 1991, Kim Ancona, a cocktail waitress in Phoenix, Arizona, was stabbed to death at the bar where she worked. Ray Krone was arrested for the murder on the basis of testimony that Ms. Ancona closed up the bar that evening with a man named “Ray” and
\end{itemize}

\textsuperscript{106} Brewer Tr. at 731, attached as Appendix I.
\textsuperscript{107} Brewer Tr. at 745.
\textsuperscript{108} See Brewer Order, attached as Appendix J; In a peer review report dated February 21, 2007, three noted odontologists found that in their “considered opinion . . . none of the injuries . . . are human bitemarks.” See also Peer Review Report of Dr. Iain Pretty, Dr. David Senn, Dr. David Sweet, February 21, 2007, attached as Appendix K.
\textsuperscript{109} Hansen, Mark, “Out of the Blue,” ABA Journal, February, 1996, attached as Appendix L; Ross Simons’ Affidavit, attached as Appendix M.
also because she was found with a bite mark on her breast that resembled the odd tooth structure of Mr. Krone.\textsuperscript{110} Dubbed the “Snaggletooth Killer,” Mr. Krone was convicted and sentenced to death based almost entirely on the testimony of a forensic odontologist who claimed that Mr. Krone’s teeth matched the bite mark.

A decade later, DNA tests from the crime scene – including DNA from the trace saliva left on Ms. Ancona’s tank top through which one of the bites had been inflicted – excluded Mr. Krone. One of Mr. Krone’s appellate lawyers decided to conduct an external blind proficiency test of his own. He chose Dr. West because he was certified by the American Board of Forensic Odontology and, by virtue of his geographical location in Mississippi, likely to be unfamiliar with Mr. Krone’s case.

Using the photographs of the injuries in the Ancona case, as well as dental molds from a suspect who had no connection whatsoever to the case, he sent the material to Dr. West for his opinion about the existence, or non-existence, of a match between the molds from the suspect and the photographs of the injuries. Dr. West was paid seven hundred and fifty dollars for his time and told that the evidence was from the three year-old murder case of a college student from Idaho that had gone unsolved because of a lack of evidence against the prime suspect.

Two months later, in a videotaped report, Dr. West claimed that the teeth conformed to the wounds and that the “odds of that happening if these weren’t the teeth that created this bite would be almost astronomical.”\textsuperscript{111} “I feel very confident,” Dr. West added, “that there are enough points of unique individual characteristics in this study

\textsuperscript{110} Mr. Krone had been involved in a traumatic car accident as a child that required extensive reconstructive surgery.

\textsuperscript{111} See Blind Proficiency Test, Dr. Michael West (DVD), attached as Appendix N.
model to say that these teeth inflicted this bite mark.”  

**American Board of Forensic Odontology (ABFO) Report**

On March 25, 1994, the American Board of Forensic Odontology suspended Dr. West from the organization for violating the Board’s Code of Ethics, Section I, paragraphs A and B, and Section II, Guiding Principles, Paragraphs B and C, Section V, page 21 of the ABFO Bylaws. In particular the Board was concerned with Dr. West’s conduct in the Larry Maxwell case.

According to the findings of the Board’s Ethics Committee, as well as the Board itself, Dr. West committed the following breaches of the ABFO’s ethical guidelines: material misrepresentation of evidence and data; misrepresentation as a fact, instead of expert, witness; acting in an impartial manner; presenting the “West Phenomena” (his trace photography technique used in Maxwell’s and Brooks’ case, among others) without it being founded on scientific principles; presenting testimony regarding physical evidence that is outside the field of forensic odontology.  

(See Letter from Richard R. Souviron, D.D.S., to Gary L. Bell, D.D.S., dated March 25, 1994, attached as Appendix P.)

**American Academy of Forensic Sciences (AAFS) Report**

On April 13, 1994, the AAFS issued an ethics report against Dr. West. Like the ABFO, the AAFS was concerned with Dr. West’s work in the Maxwell case. The AAFS also considered Dr. West’s work in the Mark Oppie case (See Appendix M). The complaints to the Board centered around two issues: Dr. West’s use of procedures not generally recognized in the field, and misrepresentation of data.

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112 Id; see also Affidavits of Christopher J. Plourd and James Rix, attached as Appendix O.
In a unanimous opinion, the AAFS found that Dr. West’s work did “not meet appropriate professional standards.” 114 (See AAFS Report, attached as Appendix Q). More particularly, the report found that Dr. West had violated Article II, Sections 1(a) and (c) of the Board’s bylaws. 115 Additionally, the Board found that Dr. West exhibited a pattern of general “disregard for, or lack of acceptance of, generally accepted professional standards.” 116 Finally, the report concluded that Dr. West misrepresented data in order to support his procedure, and misused, as the Board’s report termed it, his “approach to the utilization of science for the development of opinions.” 117 The Board recommended that Dr. West be expelled. Dr. West resigned before his expulsion. 118

1. Dr. West Engaged in the Same Pattern and Practice to Manufacture Evidence in Petitioner’s Case.

Mr. Howard had been developed as a suspect in the sexual assault and murder of Ms. Kemp on or about February 6th, 1992. Dr. West began his examination of the victim’s body on February 7th, 1992, after the victim’s body had been exhumed.

As the NAS Report makes abundantly clear, though Dr. West claimed to match three areas on the victim’s body to Howard’s dental molds, Dr. West’s methodologies

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114 AAFS Report, attached as Appendix Q.
115 Id.
116 Id.
117 Id.
118 Id.
119 These cases and incidents are only a partial listing of Dr. West’s forensic malfeasance. Several other reported cases are not included because there currently exists no objectively verifiable evidence, like a DNA exclusion, that would show that Dr. West’s work was erroneous. Nonetheless, Dr. West’s conduct in those cases appears to be based on the same methodology as those cited above and in all likelihood is also devoid of any requisite scientific or evidentiary value. See e.g., *Davis v. State*, 611 So.2d 906 (Miss. 1992); *Harrison v State*, 635 So.2d 894 (Miss. 1994); *Case v. State*, 651 So.2d 567; 616 So.2d 345; *Duplantis v. State*, 644 So.2d 1235 (Miss. 1994); *State v. Duncan*, 802 So.2d 533 (La. 2001); *Banks v. State*, 725 So.2d 711 (Miss. 1997)
were both erroneous and affirmatively false. As a member of this Court wrote in a dissent in *Howard II*:

Under the methodology employed by Dr. West, there is no statistical probability, no control group, and no check on the materials and regents used in performance. Essentially, there are no independent checks on Dr. West’s scientific findings and opinions. He is given free rein to account for himself without any independent confirmation of his methodology or techniques.

853 So.2d at 803.

2. Dr. West’s So-called Findings and Resulting Testimony Were Central to the State’s Prosecution.

The only physical evidence linking Mr. Howard to the crimes are the alleged bite marks discovered by Dr. West on the victim’s exhumed body. As the District Attorney made clear in his closing statement, “[t]his is a circumstantial evidence case. I don’t apologize for that. Abraham Lincoln once said that eyewitnesses may lie, but circumstances can never lie.”

This circumstantial evidence, however, at least as presented through Dr. West’s findings, was compelling. Dr. West was the only witness to have found tangible proof of Mr. Howard’s presence at the crime scene. Once Dr. West testified that the bite marks were either consistent with or, in the case of the last bite mark analyzed, was doubtless the result of Howard’s teeth biting the victim, the State’s case was complete.

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120 Tr. 617.
121 Again, Dr. West stated thus about his confidence in his determination regarding the bite mark on Ms. Kemp’s breast: “Do I have any doubt [Mr. Howard’s] teeth made that bite on [Ms. Kemp’s] breast? I don’t have any.” (Tr. 584).
122 Tr. 573–78, 584; the breast bite mark appears to be the most problematic of the three. Dr. West emphasized that he based his determination of certainty off of the front four teeth that made the bite mark: “if you look at the impression of, uh, . . . [Howard’s] dentition, you will note that the front four teeth are set off to one another at different angles, and the pattern of the bite mark matched the pattern of the teeth.” (Tr. At 561). Dr. West’s
used the findings not only to prove Mr. Howard’s presence at the crime scene, but also to help prove the sexual assault charge, arguing that, “[Mr. Howard] was a biter, ladies and gentlemen. He bit his girlfriend\textsuperscript{123} when he had intercourse with her, and not just anywhere. He bit her on the neck and he bit her on the breast and the bite marks on Mrs. Kemp are found on the neck and the breast.”\textsuperscript{124}

More importantly, by convicting Mr. Howard, the jury had to make the following conclusions (either implicitly or explicitly) regarding Dr. West’s bite mark testimony:

- An individual’s teeth and his bite pattern are unique and remain unique throughout the course of his life.

- When a perpetrator bites a victim’s body, the unique characteristics of the perpetrator’s teeth and bite pattern are transferred to the victim’s body.

- The procedures and methods utilized by qualified bite mark experts can accurately identify the unique teeth and bite pattern characteristics that have been inflicted onto the victim’s skin.

- The unique teeth and bite pattern characteristics inflicted onto the victim’s body can be accurately identified five months after the perpetrator inflicted the bite mark.

- The procedures used by Dr. West to expose, capture, compare, and individualize the bite mark on the victim’s shoulder to Petitioner’s bite mark are reliable and valid.

- It is scientifically possible to conclusively link an unknown bite mark (from human skin) to a known bite pattern to the exclusion of all others.

\textsuperscript{123} The identification of Mr. Howard relied on Howard’s teeth having unique characteristics. However, Howard’s front four teeth were dentures. “[T]he gentleman was wearing a prosthetic device which was — uh — replacing — uh — four missing teeth in the upper front part of his mouth . . . a partial, if you will.” (Testimony of Dr. David Curtis, dentist, Tr. 401). That denture could match any vast number of people, given the mass production of dentures. \textit{Howard II} at 802.

\textsuperscript{124} The State called as a witness Howard’s girlfriend, Kayfen Fulgham, who testified that Howard had on occasion bitten her when they engaged in sexual intercourse. (Tr. 516). Ms. Fulgham also testified that Mr. Howard smelled like smoke when she saw him on the day of the murder. (Tr. 517).

\textsuperscript{125} Tr. 561, 562, 584.
• Qualified bite mark experts are capable of accurately linking an unknown bite mark (from human skin) to a known bite pattern to the exclusion of all others.

As if there were any doubt about the State’s need to vouch for the credibility of its witness, the prosecutor had this to say about Dr. West and his so-called scientific findings: “[W]hether we like to think so or not, the progress of mankind has been carried forward on the backs of people like Michael West. . . The church threatened to burn Copernicus because he dared to say that the planets didn’t revolve around the earth. So it was with Michael West.”

3. **Because**

**Petitioner was Unable to Present Evidence of Dr. West’s Entire Record of Malfeasance, Petitioner Was Denied a Fair Trial.**

Petitioner’s counsel did not seek to preclude Dr. West’s testimony. This failure was raised in an ineffective assistance of counsel claim in Petitioner’s state post-conviction brief. *Howard*, 945 So.2d 326, 348. In support Petitioner attached with his brief two affidavits from Dr. Richard Souviron, a forensic odontologist. Dr. Souviron’s affidavits, however, did not go to the merits of Dr. West’s claims but were instead concerned primarily with whether or not Petitioner’s counsel had accurately represented conversations that he had had with Dr. Souviron about the doctor’s assessment of Dr. West’s findings. Therefore this Court, using the standard set forth in *Strickland v. Washington*, denied relief, stating in part:

Accordingly, in order for . . . [Petitioner] to show that the result of the proceeding would have been different [pursuant to *Strickland*], he must offer an affidavit from an expert

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125 Tr. 620.
witness who rebuts the State’s expert testimony. For example, the expert might opine that Kemp did not have any injuries at the locations where Dr. West found bite marks, or that the marks Dr. West found were not human bite marks, or that the expert has compared... [Petitioner's] teeth to the injuries and Howard could not have been the biter. In support of his post-conviction claim, ... [Petitioner] has offered numerous expert affidavits and other documents which attack Dr. West, his testimony, and bite mark evidence in general. These affidavits and other documents point out how many times Dr. West has been proven wrong and they discuss how unscientific his methods are. One affidavit even states that Dr. West made a mis-diagnosis in... [Petitioner's] case, but, it does not go on and opine that... [Petitioner] did not bite Kemp. Just because Dr. West has been wrong a lot, does not mean, without something more, that he was wrong here.

*Id.* at 352.

The problem with this analysis, we now know, is several-fold. First of all, it presupposes that the field possesses scientific rigor. It also assumes that there are materials available that an expert could even use to assess Dr. West’s findings. Though Dr. West claimed to have made certain observations, the physical documentation of them seems never to have existed. Dr. Hayne did not note any marks in his autopsy report. Only Dr. West noted marks subsequent to the exhumation. The photographs that he claimed to have taken were evidently never turned over to either the prosecution or defense. They were not entered into evidence or mentioned in detail at the trial; nor was any other physical evidence produced at the trial – either for use as a demonstrative aid or otherwise admitted into evidence – which an expert could now rely on to counter Dr. West’s findings. This is not the first time that Dr. West had made claims without
providing empirical evidence in support. Dr. West engaged in similar conduct in the cases of Larry Maxwell, Calvin Banks, and David Duplantis and Ken Strickland.\footnote{126}{See Note 109, supra.}

Notwithstanding these issues, Petitioner has included the affidavit of Dr. Charles Michael Bowers, which illustrates the fundamental problems with Dr. West's testimony and the bases and methodologies that he claimed as support.\footnote{127}{See Affidavit of Charles Michael Bowers, attached as Appendix R.} In particular, Dr. Bowers notes that the NAS Report constitutes newly discovered scientific evidence because its conclusions are from one of the foremost scientific organizations in the world, and also because "finally exposed the emergence of a legitimate and significant dispute within the bite mark community as to whether trained forensic dentists can accurately individualize a known bite pattern to an unknown bite mark."\footnote{128}{Id at 9.}

Additionally, Dr. Bowers states that with respect to Dr. West's trial testimony in Petitioner's trial that The following must be true:

A. Mr. Howard's natural teeth, his manufactured prosthetic false teeth and his bite pattern are unique and have remained unique throughout the course of his life;

B. When a perpetrator bites a victim's body, the unique characteristics of the perpetrator's teeth and bite pattern are transferred to the victim's body;

C. The ability of the dentition to transfer a unique pattern to human skin and the ability of the skin to maintain that uniqueness has been scientifically established for the following factors:

   i. The ability to analyze and interpret the scope or extent of distortion of bite mark patterns on human skin has been demonstrated by scientific means.

\footnote{126}{See Note 109, supra.}
\footnote{127}{See Affidavit of Charles Michael Bowers, attached as Appendix R.}
\footnote{128}{Id at 9.}
ii. The effect of skin distortion on comparison techniques is fully understood and therefore has been quantified and is controllable by reproducible and approved methods.

iii. The affects of decomposition on human remains has been proven to have no deleterious influence on the forensic identification methods used on patterned skin injuries on said decomposed remains;

D. The procedures and methods utilized by qualified bite mark experts have been tested for scientific validity, are reproducible by multiple dental examiners and can accurately, with a published error rate, identify the unique teeth and bite pattern characteristics that have been inflicted onto the victim’s skin;

E. The procedures used by Dr. West to expose, capture, compare, and positively identify the bite mark on the victim’s shoulder to Petitioner’s dental features are reliable and valid.

F. It is scientifically possible to conclusively link an unknown bite mark (from human skin) to a known bite pattern to the exclusion of all others, as in this case;

G. Qualified bite mark experts are scientifically capable of accurately linking an unknown bite mark (on human skin) to a known bite pattern to the exclusion of all others.

Id. at 10-11.

According to Dr. Bowers, "[n]one of the principles above can be said to be scientifically validated. As such, Dr. West’s methodologies and the claims that he derived from them in Mr. Howard’s trials are flawed and scientifically unacceptable."¹²⁹ Dr. Bowers’ affidavit also identifies numerous factual errors in Dr. West’s testimony — errors that are simply wrong or flatly false as an objective matter. In sum, Dr. Bowers’ opinion, as supported by the NAS Report, is that "It is my opinion and conclusion from the

¹²⁹ Affidavit of Charles Michael Bowers at 11.
research data I have cited that bite mark analysis is unreliable. Dr. West’s opinions in this case are scientifically unsupported and are equally unreliable."

Petitioner has been limited further in his ability to challenge Dr. West’s testimony because the full extent of Dr. West’s malfeasance had yet to be discovered. In fact, when this Court denied Petitioner’s post-conviction petition, Levon Brooks was still serving a life sentence; Kennedy Brewer was on death row awaiting execution. Brooks and Brewer are innocent. The so-called bite marks identified by Dr. West were, in fact, not bite marks at all but instead the product of insect and aquatic activity. The true perpetrator of the offenses for which Brooks and Brewer were falsely charged and convicted has not only admitted to the rapes and murders, but also acknowledged that neither he nor anyone else bit the two victims.

Moreover, and perhaps as important, when confronted by the developments in the Brooks and Brewer cases, Dr. West remains undaunted. Instead of pointing to some flaw in his, or the discipline’s, methodology, which might explain the egregious mistakes in Brooks’ and Brewer’s cases, Dr. West to this day maintains that while Brooks and Brewer may not have killed the victims, they bit them.

Additionally, Petitioner’s counsel did not have available several incidents occurring subsequent to Petitioner’s conviction that provide additional proof of Dr. West’s fraud. Petitioner’s counsel did not have documentation of Dr. West’s self-videotaped and completely erroneous claim that the bite molds from an uninvolved individual were “indeed and without doubt” the bite marks left on the breast of Arizona murder victim Kim Ancona. Petitioner’s attorneys did not have available to them the NAS

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130 Id at 22.
131 See Appendix K.
Report, see discussion supra, that, after rigorous review, found that there are simply no “criteria . . . to determine whether the bite mark can be related to a person’s dentition and with what degree of probability. There is no science on the reproducibility of the different methods of analysis that lead to conclusions about the probability of a match. This includes reproducibility between experts and with the same expert over time.”132

In sum, what Petitioner’s counsel lacked, and what the NAS Report supports, is the fact that anyone who testified in a manner like that of Dr. West was making claims that were wholly unsupported by the known science. The unjust results are sui generis.

As important as the cases and incidents are that Petitioner’s counsel was unable to raise because information about them was not then extant are the series of cases and incidents that Petitioner’s counsel did raise in support of precluding Dr. West’s testimony. However, because of counsel’s inability to view these cases as anything other than discrete acts, Petitioner’s counsel was constrained in his ability to characterize them accurately as illustrative of a larger pattern of failure. In short, their true evidentiary meaning and value – or lack thereof – had yet to come to fruition. The newly discovered evidence, unavailable at the time of trial, is this evidence’s complete evolution.

The consequence was that these incidents were considered to be contested facts: Petitioner’s counsel arguing that they were collateral evidence of the testimony’s inadmissibility; the State arguing that they were, at best, fodder for cross---examination because they were nothing more than either aberrations or the natural result of resistance to a novel discipline and its beleaguered proponent, Dr. West. The fact is, of

course, that they were not only discrete examples of professional fraud, they were also smaller parts comprising a much larger fabric of professional malfeasance.

Newly discovered evidence is a means for post--conviction relief under Mississippi Code § 99-39-5(2)(a)(i) of the Mississippi Uniform Post--Conviction Collateral Relief Act. To be “newly discovered,” the evidence must not have been discoverable through due diligence at the time of trial; rather, the evidence must have been discovered since the close of trial. *Mikes v. State*, 781 So.2d 109, 112 (Miss. 2001). The newly discovered evidence must also be likely to produce a different result or a different verdict in a new trial. See *id*; see also, *Williams v. State*, 669 So.2d 44, 55 (Miss. 1996) (“The court must be satisfied that the evidence came to defendant’s knowledge since trial, could not have been discovered sooner by diligence, and would probably produce different result, if a new trial were granted.”) (citing *Gaston v. State*, 562 So.2d 61, 63 (Miss. 1990)). In other words, the new evidence must demonstrate a “reasonable probability” of changing the trial outcome – “a probability sufficient enough to undermine confidence in the outcome.” *United States v. Bagley*, 473 US 667, 681 (1985). Additionally, the newly discovered evidence should be material to the issue, and not merely cumulative or impeaching. See, e.g., *Moore v. State*, 508 So.2d 666, 668 (Miss. 1987); *Ormond v. State*, 599 So.2d 951, 962 (Miss. 1992).

The newly discovered evidence in this case includes not only the NAS Report that conclusively demonstrates the scientific and evidentiary shortcomings of several forensic disciplines, but also the evidence of Dr. West’s long history of malfeasance. Taken together, this evidence changes the analysis in which any trial court would engage to determine the admissibility of the bite mark testimony. Given what is now common
knowledge about the invalidity of this discipline as a forensic science, it would be error for a court to admit the evidence in the first instance. There is simply no indication that the field satisfies any of the pillars normally associated with a science such that it would be ripe for analysis under Rule 702 or any of that Rule’s guiding cases.

Even assuming for the sake of argument, however, that the discipline itself did pass scientific muster, the evidence presented by Dr. West would be inadmissible. Dr. West has gone so far beyond the pale of this then--nascent (and since--debunked) field, that he both ran afoul of his peers and routinely engaged in a pattern of deception and fraud that spiraled out of control. The result is that Dr. West has condemned innocent people, Petitioner among them. Without Dr. West’s testimony, the State was left with virtually no evidence of inculpatory conduct. It is unlikely that the case could have been indicted, much less prosecuted.

V. Conclusion

In over 240 cases to date from all over the country, post-conviction DNA testing had helped to prove prisoners innocent and exonerate them from their convictions. Many of these wrongful convictions were based on evidence of guilt that was much stronger than the evidence against Petitioner. Each of these post-conviction DNA exonerees appeared guilty beyond a reasonable doubt when they were tried, but in each of those cases, a court allowed DNA testing to conclusively settle the accuracy of the conviction.

Petitioner’s request for post-conviction relief and the opportunity to conduct DNA testing of material biological evidence in his case under the mandate of the Mississippi
Legislature and the Post-Conviction Relief Act are both meritorious. In case after case Dr. West’s findings have been repudiated over the years. Undersigned knows of no efforts made by Dr. West to address the underlying problems with his methodology. The reasons for that are singular: both Dr. West and his methodology have been completely repudiated. Dr. West’s continued claim, for example, that Levon Brooks and Kennedy Brewer bit the child victims in their cases is not the claim of a disinterested scientist but instead that of a fraud.

For the reasons stated herein, Petitioner respectfully requests this Court grant these requests, or, in the alternative, grant a hearing on these matters.

Respectfully Submitted,

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H. Mississippi Rules of Professional Conduct
MISSISSIPPI RULES OF PROFESSIONAL CONDUCT

Table of Rules

Preamble.

Scope.

Terminology.

CLIENT-LAWYER RELATIONSHIP

1.1 Competence.

1.2 Scope of Representation.

1.3 Diligence.

1.4 Communication.

1.5 Fees.

1.6 Confidentiality of Information.

1.7 Conflict of Interest: General Rule.

1.8 Conflict of Interests: Prohibited Transactions.

1.9 Conflict of Interest: Former Client.

1.10 Imputed Disqualification: General Rule.

1.11 Successive Government and Private Employment.

1.12 Former Judge or Arbitrator.

1.13 Organization as Client.
1.14 Client Under a Disability.

1.15 Safekeeping Property.
Mississippi IOLTA Program Notice of Election.

1.16 Declining or Terminating Representation.

1.17 Sale of Law Practice.

**COUNSELOR**

2.1 Advisor.

2.2 Intermediary.

2.3 Evaluation for Use by Third Persons.

**ADVOCATE**

3.1 Meritorious Claims and Contentions.

3.2 Expediting Litigation.

3.3 Candor Toward the Tribunal.

3.4 Fairness to Opposing Party and Counsel.

3.5 Impartiality and Decorum of the Tribunal.

3.6 Trial Publicity.

3.7 Lawyer as Witness.

3.8 Special Responsibilities of a Prosecutor.

3.9 Advocate in Nonadjudicative Proceedings.

**TRANSACTIONS WITH PERSON OTHER THAN CLIENTS**

4.1 Truthfulness in Statements to Others.
4.2 Communication With Person Represented by Counsel.
4.3 Dealing with Unrepresented Person.
4.4 Respect for Rights of Third Persons.

LAW FIRMS AND ASSOCIATIONS
5.1 Responsibilities of a Partner or Supervisory Lawyer.
5.2 Responsibilities of a Subordinate Lawyer.
5.3 Responsibilities Regarding Non-Lawyer Assistants.
5.4 Professional Independence of a Lawyer.
5.5 Unauthorized Practice of Law.
5.6 Restrictions on Right to Practice.

PUBLIC SERVICE
6.1 Voluntary Pro Bono Public Service.
6.2 Accepting Appointments.
6.3 Membership in Legal Services Organization.
6.4 Law Reform Activities Affecting Client Interests.

INFORMATION ABOUT LEGAL SERVICES
7.1 Communications Concerning a Lawyer’s Services.
7.2 Advertising.
7.3 Direct Contact With Prospective Clients.
7.4 Legal Service Information.
7.5 Submission of Advertisements.

7.6 Communication of Certificate or Designation.

7.7 Firm Names and Letterheads.

MAINTAINING THE INTEGRITY OF THE PROFESSION

8.1 Bar Admission and Disciplinary Matters.

8.2 Judicial and Legal Officials.

8.3 Reporting Professional Misconduct.

8.4 Misconduct.

8.5 Jurisdiction.

MISSISSIPPI RULES OF PROFESSIONAL CONDUCT
Effective July 1, 1987

PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.
In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See Rule 8.4.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients; employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civil influence to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should
strive to attain the highest level of skill to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer’s obligation to zealously protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these
responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

[Amended effective November 3, 2005 to address lawyers' responsibilities as arbitrators, mediators and other third party neutrals and to emphasize lawyers' responsibilities to promote public understanding of the rule of law and promoting equal access to the legal system.]

SCOPE

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

The Rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law. Compliance with the Rules, as with all laws in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only
after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in the private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state’s attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intra governmental legal controversies where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to
promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative. Research notes were prepared to compare counterparts in the Mississippi Code of Professional Responsibility (adopted 1971, as amended) and to provide selected references to other authorities. The notes have not been adopted, do not constitute part of the Rules and are not intended to affect the application or interpretation of the Rules and Comments.

[Amended effective November 3, 2005 to make technical changes in text.]

**TERMINOLOGY**

"Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

“Confirmed in writing,” when used in reference to the informed consent of a person denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

"Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.
“Firm” or “law firm” denotes a lawyer or lawyers in a partnership, professional corporation, professional association, professional limited liability company, sole proprietorship, governmental agency, or other association whose members are authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

"Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

“Informed consent” denotes voluntary acceptance and agreement by a person of a proposed course of conduct after adequate information has been imparted to the person that allows the person to arrive at a decision.

"Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

“Partner” denotes the member of a partnership, a shareholder in a law firm organized as a professional corporation, professional association, or a member of a professional limited liability company or an entity whose members are authorized to practice law.

"Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

“Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

“Writing” or “written” denotes a tangible or electronic record of a communication or
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill. In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or
association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client’s interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

**Thoroughness and Preparation.** Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

**Maintaining Competence.** To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

**Code Comparison**

DR 6-101(A)(1) provides that a lawyer shall not handle a matter “which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.” DR 6-101(A)(2) requires “preparation adequate in the circumstances”; Rule 1.1 more fully particularizes the elements of competence.

**RULE 1.2 SCOPE OF REPRESENTATION**

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, a lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
(c) A lawyer may limit the objectives of the representation if the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that a lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

[Amended effective November 3, 2005]

Comment

Scope of Representation. Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer’s scope of authority in litigation varies among jurisdictions.

In a case in which the client appears to be suffering mental disability, the lawyer’s duty to abide by the client’s decisions is to be guided by reference to Rule 1.14.

Independence from Client’s Views or Activities. Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client’s views or activities.

Services Limited in Objectives or Means. The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer’s services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may
be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means that the lawyer regards as imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer’s services or the right to settle litigation that the lawyer might wish to continue.

**Criminal, Fraudulent and Prohibited Transactions.** A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client’s conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer is not permitted to reveal the client’s wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper, but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

**Code Comparison**

Rule 1.2(a) has no counterpart in the Disciplinary Rules of the Code. EC 7-7 states
that “In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client. . . .” EC 7-8 states that “In the final analysis, however, the . . . decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client. . . . In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.” DR 7-101(A)(1) provides that “A lawyer shall not intentionally . . . fail to seek the lawful objections of his client through reasonable available means permitted by law. . . . A lawyer does not violate this Disciplinary Rule, however, by . . . avoiding offensive tactics. . . .”

Rule 1.2(b) has no counterpart in the Code.

Rule 1.2(c) has no counterpart in the Code.

With regard to paragraph (d), DR 7-102(A)(7) provides that a lawyer shall not “counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.” DR 7-102(A)(6) provides that a lawyer shall not “participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.” DR 7-106 provides that “A lawyer shall not . . . advise his client to disregard a standing rule of a tribunal . . . but he may take appropriate steps in good faith to test the validity of such rule or ruling.” EC 7-5 states that “A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.”

With regard to Rule 1.2(e), DR 2-110(C)(1)(c) provides that a lawyer may withdraw from representation if a client “insists” that the lawyer engage in “conduct that is illegal or that is prohibited under the Disciplinary Rules.” DR 9-101(C) provides that “a lawyer shall not state or imply that he is able to influence improperly . . . any tribunal, legislative body or public official.”

See also MSB Ethics Opinion No. 92.

RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction
or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer’s workload should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client’s interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer’s employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client’s affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Code Comparison

DR 6-101(A)(3) requires that a lawyer not “neglect a legal matter entrusted to him.” EC 6-4 states that a lawyer should “give appropriate attention to his legal work.” Canon 7 states that “a lawyer should represent a client zealously within the bounds of the law.” DR 7-101(A)(1) provides that “a lawyer shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules. . . .” DR 7-101(A)(3) provides that “a lawyer shall not intentionally . . . prejudice or damage his client during the course of the professional relationship. . . .”

RULE 1.4 COMMUNICATION
(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injury or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.
Withholding Information. In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer’s own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Code Comparison

This Rule has no direct counterpart in the Disciplinary Rules of the Code. DR 6-101(A)(3) provides that a lawyer shall not “neglect a legal matter entrusted to him.” DR 9-102(B)(1) provides that a lawyer “shall promptly notify a client of the receipt of his funds, securities, or other properties.” EC 7-8 states that “a lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations.” EC 9-2 states that “a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client.”

RULE 1.5 FEES

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

   (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

   (2) a contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

   (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

   (2) the client is advised of and does not object to the participation of all the lawyers involved; and

   (3) the total fee is reasonable.

Comment

Basis or Rate of Fee. When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a
new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of a misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer’s customary fee schedule is sufficient if the basis or rate of the fee is set forth.

**Terms of Payment.** A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer’s special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in such a way contrary to the client’s interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services will probably be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client’s ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client’s best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Paragraph (d)(1) does not prohibit a contingent fee agreement for the collection of past due alimony or support. See MSB Ethics Opinion No. 88.

**Division of Fee.** A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on either the basis of
the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

Disputes Over Fee. If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer’s fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Code Comparison

DR 2-106(A) provides that “A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.” DR 2-106(B) provides that “A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.” DR 2-106(B) further provides that “Factors to be considered . . . in determining . . . reasonableness . . . include . . . : (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly. (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. (3) The fee customarily charged in the locality for similar services. (4) The amount involved and the results obtained. (5) The time limitations imposed by the client or by the circumstances. (6) The nature and length of the professional relationship with the client. (7) The experience, reputation, and ability of the lawyer or lawyers performing the services. (8) Whether the fee is fixed or contingent.” The Rule includes the factor of ability to pay; a person of ample means may justly be charged more for a service, and a person of limited means less, other factors being the same. EC 2-17 states that “A lawyer should not charge more than a reasonable fee. . . .”

There is no counterpart to Rule 1.5(b) in the Disciplinary Rules of the Code. EC 2-19 states that “It is usually beneficial to reduce to writing the understanding of the parties concerning the fee, particularly when it is contingent.”

With regard to Rule 1.5(c), DR 2-106(C) prohibits “a contingent fee in a criminal case.”
With regard to Rule 1.5(d), DR2-107(A) permits division of fees only if: “(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made. (2) The division is in proportion to the services performed and responsibility assumed by each. (3) The total fee does not exceed clearly reasonable compensation. . . .” Rule 1.5(d) permits division without regard to the services rendered by each lawyer if they assume joint responsibility for the representation.

See also MSB Ethics Opinion Nos. 40, 59, 88, 91, 92 and 100.

**RULE 1.6  CONFIDENTIALITY OF INFORMATION**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another and in furtherance of which the client has used or is using the lawyer’s services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

(4) to secure legal advice about the lawyer’s compliance with these rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(6) to comply with other law or a court order.
(c) A lawyer who participates in an intervention on a lawyer, judge or law student by the Lawyers and Judges Assistance Committee shall not reveal any information learned through the intervention from or relating to the lawyer, judge or law student on whom the intervention is conducted except as may be permitted by the Rules of Discipline of the Mississippi Bar or required by law or court order.

(d) A lawyer shall reveal information to the Lawyers and Judges Assistance Committee in accordance with approved monitoring procedures of the Lawyers and Judges Assistance Committee relating to the status of compliance of a lawyer, judge or law student with the terms and conditions imposed upon the lawyer, judge or law student by the Lawyers and Judges Assistance Committee.

(e) A lawyer may reveal such information to the extent required by law or court order.

[Amended June 23, 1994; amended April 18, 2002; amended effective November 3, 2005 to add circumstances under which disclosure of otherwise confidential information is permitted.]

Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer’s functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation. See Terminology for definition of “informed consent.” This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.
The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege the work product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and the work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever the source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer’s use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

**Authorized Disclosure.** Except to the extent that the client’s instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.

Lawyers in a firm may, in the course of the firm’s practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

**Disclosure Adverse to Client.** Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that
a client has accidentally discharged toxic waste into a town’s water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer’s disclosure is necessary to eliminate the threat or reduce the number of victims.

Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in the Terminology section, that is reasonably certain to result in substantial injury to the financial or property interest of another and in furtherance of which the client has used or is using that lawyer’s services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client’s misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer’s obligation or right to withdraw from the representation of the client in such circumstances.

Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client’s crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information related to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

A lawyer’s confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer’s personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer’s compliance with the Rules of Professional Conduct.

A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

Withdrawal. If the lawyer’s services will be used by the client in materially
furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the clients’ confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

**Dispute Concerning Lawyer’s Conduct.** Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client’s conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent that lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer’s right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer’s ability to establish the defense, the lawyer should advise the client of the third party’s assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence.

As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If,
however, the other law supersedes this rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

A lawyer may be ordered to reveal information, relating to the representation of a client, by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court’s order.

Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client’s interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other person having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Paragraph (b) permits but does not require the disclosure of information relating to a client’s representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this rule, the lawyer may consider such factors as the nature of the lawyer’s relationship with the client and with those who might be injured by the client, the lawyer’s own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer’s decision not to disclose as permitted by paragraph (b) does not violate this rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this rule.

**Acting Competently to Preserve Confidentiality.** A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See rules 1.1, 5.1 and 5.3.
When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.

Disclosures Otherwise Required or Authorized. The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of the law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Former Client. The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9.

[Amended June 23, 1994; amended effective November 3, 2005.]

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes:

(1) the representation will not adversely affect the relationship with the other client; and

(2) each client has given knowing and informed consent after consultation.
The consultation shall include explanation of the implications of the adverse representation and the advantages and risks involved.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless the lawyer reasonably believes:

(1) the representation will not be adversely affected; and

(2) the client has given knowing and informed consent after consultation. The consultation shall include explanation of the implications of the representation and the advantages and risks involved.

Comment

Loyalty to a Client. Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the
lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent. In some cases a client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's Interests. The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation. Paragraph (a) prohibits representation of opposing parties in litigation, including both parties to a divorce action. See MSB Ethics Opinion No. 80. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in
some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

**Interest of Person Paying for a Lawyer's Service.** A lawyer may be paid from a source other than the client, if the client is informed of the fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

**Other Conflict Situations.** Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.
Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party. Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

Code Comparison

DR 5-101(A) provides that "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of the client will be or reasonably may be affected by his own financial, business, property, or personal interests." DR 5-105(A) provides that "A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C)." DR 5-105(C) provides that "In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." DR 5-107(B) provides that "A lawyer shall not
permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such services."

Rule 1.7 goes beyond DR 5-105(A) in requiring that, when the lawyer's other interests are involved, not only must the client consent after consultation but also that, independent of such consent, the representation reasonably appears not to be adversely affected by the lawyer's other interests. This requirement appears to be the intended meaning of the provision in DR 5-105(C) that "it is obvious that he can adequately represent" the client, and is implicit in EC 5-2, which states that "A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable possibility that they will, adversely affect the advice to be given or services to be rendered the prospective client."

See MSB Ethics Opinions Nos. 43, 46, 52, 55, 58, 61, 63, 68, 80, 87, 99 and 103.

**RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS**

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or pecuniary interest adverse to a client unless:

1. the transaction and terms on which the lawyer acquires the interests are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

2. the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

3. the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client

1. to the disadvantage of the client, or

2. to the advantage of himself or a third person, unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion or representation of a client, a lawyer shall not make or
negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, or administrative proceedings, except that:

1. A lawyer may advance court costs and expenses of litigation, including but not limited to reasonable medical expenses necessary to the preparation of the litigation for hearing or trial, the repayment of which may be contingent on the outcome of the matter; and

2. A lawyer representing a client may, in addition to the above, advance the following costs and expenses on behalf of the client, which shall be repaid upon successful conclusion of the matter.
   a. Reasonable and necessary medical expenses associated with treatment for the injury giving rise to the litigation or administrative proceeding for which the client seeks legal representation; and
   b. Reasonable and necessary living expenses incurred.

The expenses enumerated in paragraph 2 above can only be advanced to a client under dire and necessitous circumstances, and shall be limited to minimal living expenses of minor sums such as those necessary to prevent foreclosure or repossession or for necessary medical treatment. There can be no payment of expenses under paragraph 2 until the expiration of 60 days after the client has signed a contract of employment with counsel. Such payments under paragraph 2 cannot include a promise of future payments, and counsel cannot promise any such payments in any type of communication to the public, and such funds may only be advanced after due diligence and inquiry into the circumstances of the client.

Payments under paragraph 2 shall be limited to $1,500 to any one party by any lawyer or group or succession of lawyers during the continuation of any litigation unless, upon ex parte application, such further payment has been approved by the Standing Committee on Ethics of the Mississippi Bar. An attorney contemplating such payment must exercise due diligence to determine whether such party has received any such payments from another attorney during the continuation of the same litigation, and, if so, the total of such payments, without approval of the Standing Committee on Ethics shall not in the aggregate exceed $1,500. Upon denial of such application, the decision thereon shall be subject to review by the Mississippi Supreme Court on petition of the attorney seeking leave to make further
payments. Payments under paragraph 2 aggregating $1,500 or less shall be reported by the lawyer making the payment to the Standing Committee on Ethics within seven (7) days following the making of each such payment. Applications for approval by the Standing Committee on Ethics as required hereunder and notices to the Standing Committee on Ethics of payments aggregating $1,500 or less, shall be confidential.

[Amended October 21, 1999.]

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

   (1) the client consents after consultation;

   (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

   (3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

   (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.

[Amended March 25, 1999.]

Comment

Transactions Between Client and Lawyer. As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights. An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

Person Paying for Lawyer's Services. Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.
**Family Relationships Between Lawyers.** Rule 1.8(i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in Rule 1.8(i) is personal and is not imputed to members of firms with whom the lawyers are associated.

**Acquisition of Interest in Litigation.** Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).

This Rule is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

**Code Comparison**

This Rule deals with certain transactions that per se involve conflict of interest.

With regard to Rule 1.8(a), DR 5-104(A) provides that "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure." EC 5-3 states that "A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested."

With regard to Rule 1.8(b), DR 4-101(B)(3) provides that a lawyer shall not "use a confidence or secret of his client for the advantage of himself, or of a third person, unless the client consents after full disclosure."

There is no counterpart to Rule 1.8(c) in the Disciplinary Rules of the Code. EC 5-5 states that "A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client."
Rule 1.8(d) is substantially similar to DR 5-104(B), but refers to "literary or media" rights, a more generally inclusive term than "publication" rights.

Rule 1.8(e)(1) is similar to DR 5-103(B), but eliminates the requirement that "the client remain ultimately liable for such expenses."

Rule 1.8(e)(2) has no counterpart in the Code.

Rule 1.8(f) is substantially identical to DR 5-107(A)(1).

Rule 1.8(g) is substantially identical to DR 5-106.

The first clause of Rule 1.8(h) deals with the same subject as DR 6-102(A). There is no counterpart in the Code to the second clause of Rule 1.8(h).

Rule 1.8(i) has no counterpart in the Code.

See MSB Ethics Opinion No. 102.

RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Comment

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in subsequent civil action against the government concerning the same transaction.
The scope of a "matter" for purposes of Rule 1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

Disqualification from subsequent representation is for the protection of clients and can be waived only by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of a new client.

With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is associated, see Rule 1.10.

**Code Comparison**

There is no counterpart to Rule 1.9(a) or (b) in the Disciplinary Rules of the Code. The problem addressed in Rule 1.9(a) sometimes has been dealt with under the rubric of Canon 9 of the Code, which provides that "A lawyer should avoid even the appearance of impropriety." EC 4-6 states that "the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."

The exception in the last sentence of Rule 1.9(b) permits a lawyer to use information relating to a former client that is in the "public domain," a use that is also not prohibited by the Code. Since the scope of Rule 1.6(a) is much broader than "confidences and secrets," it is necessary to define when a lawyer may make use of information after the client-lawyer relationship has terminated.

The provision for waiver by the former client is in effect similar to DR 5-105(C).
See MSB Ethics Opinion No. 106.

RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.4.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

   (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

   (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

[Amended effective November 3, 2005 to add reference to Rule 2.4.]

Comment

Definition of "Firm". For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access.
to confidential information concerning the clients they serve. Furthermore, it is relevant in
doubtful cases to consider the underlying purpose of the rule that is involved. A group of
lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not
represent opposing parties in litigation, while it might not be so regarded for purposes of the
rule that information acquired by one lawyer is attributed to another.

With respect to the law department of an organization, there is ordinarily no question
that the members of the department constitute a firm within the meaning of the Rules of
Professional Conduct. However, there can be uncertainty as to the identity of the client. For
example, it may not be clear whether a law department of a corporation represents a
subsidiary or an affiliated corporation, as well as the corporation by which the members of
the department are directly employed. A similar question can arise concerning an
unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers
employed in the same unit of a legal service organization constitute a firm, but not
necessarily those employed in separate units. As in the case of independent practitioners,
whether the lawyers should be treated as associated with each other can depend on the
particular rule that is involved, and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the
situation is governed by Rule 1.11(a) and (b); where a lawyer represents the government after
having served private clients, the situation is governed by Rule 1.11(c)(1). The individual
lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and 1.9.

Different provisions are thus made for movement of a lawyer from one private firm
to another and for movement of a lawyer between a private firm and the government. The
government is entitled to protection of its client confidences, and therefore to the protections
provided in Rules 1.6, 1.9, and 1.11. However, if the more extensive disqualification in Rule
1.10 were applied to former government lawyers, the potential effect on the government
would be unduly burdensome. The government deals with all private citizens and
organizations, and thus has a much wider circle of adverse legal interests than does any
private law firm. In these circumstances, the government's recruitment of lawyers would be
seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the
government is better served in the long run by the protections stated in Rule 1.11.

**Principles of Imputed Disqualifications.** The rule of imputed disqualification stated
in paragraph (a) gives effect to the principles of loyalty to the client as it applies to lawyers
who practice in a law firm. Such situations can be considered from the premise that a firm
of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client,
or from the premise that each lawyer is vicariously bound by the obligation of loyalty owned by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c).

**Lawyers Moving Between Firms.** When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.
A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

**Confidentiality.** Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

**Adverse Positions.** The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 1.10(b) and (c) concerning confidentiality have been met.

**Code Comparison**

43
DR 5-105(D) provides that "If a lawyer is required to decline or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or affiliate with him or his firm, may accept or continue such employment."

RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.
(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Comment

This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.
When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

**Code Comparison**

Rule 1.11(a) is similar to DR 9-101(B), except that the latter uses the terms "in which he had substantial responsibility while he was a public employee."

Rules 1.11(b), (c), (d) and (e) have no counterparts in the Code.

See MSB Ethics Opinion No. 45.

**RULE 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD PARTY NEUTRAL**

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in
connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or as a law clerk to such person or as an arbitrator, mediator, or other third-party neutral.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

[Amended effective November 3, 2005 to include third party neutrals generally.]

Comment

This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated
personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Terminology. Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. Rule 2.4.

Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

Requirements for screening procedures are stated in Terminology. Paragraph (c) (1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

Notice, including a description of the screened lawyer’s prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[Amended effective November 3, 2005.]

**Code Comparison**

Paragraph (a) is substantially similar to DR 9-101(A), which provides that "A lawyer shall not accept employment in a matter upon the merits of which he has acted in a judicial capacity." Paragraph (a) differs, however, in that it is broader in scope and states more specifically the persons to whom it applies. There is no counterpart in the Code to paragraphs (b), (c) or (d).

With regard to arbitrators, EC 5-20 states that "a lawyer who has undertaken to act as an impartial arbitrator or mediator, ... should not thereafter represent in the dispute any of the parties involved." DR 9-101(A) does not provide a waiver of the disqualification applied to former judges by consent of the parties. However, DR 5-105(C) is similar in effect and could be construed to permit waiver.

**RULE 1.13 ORGANIZATION AS CLIENT**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment
The Entity as the Client. An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter
to the organization's highest authority. Ordinarily, that is the board of directors or similar
governing body. However, applicable law may prescribe that under certain conditions
highest authority reposes elsewhere; for example, in the independent directors of a
corporation.

**Relation to Other Rules.** The authority and responsibility provided in paragraph (b)
are concurrent with the authority and responsibility provided in other rules. In particular, this
Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8 and 1.16, 3.3
or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud
by the organization, Rule 1.2(d) can be applicable.

**Government Agency.** The duty defined in this Rule applies to governmental
organizations. However, when the client is a governmental organization, a different balance
may be appropriate between maintaining confidentiality and assuring that the wrongful
official act is prevented or rectified, for public business is involved. In addition, duties of
lawyers employed by the government or lawyers in military service may be defined by
statutes and regulation. Therefore, defining precisely the identity of the client and
prescribing the resulting obligations of such lawyers may be more difficult in the government
context. Although in some circumstances the client may be a specific agency, it is generally
the government as a whole. For example, if the action or failure to act involves the head of
a bureau, either the department of which the bureau is a part or the government as a whole
may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of
government officials, a government lawyer may have authority to question such conduct
more extensively than that of a lawyer for a private organization in similar circumstances.
This Rule does not limit that authority. See note on Scope.

**Clarifying the Lawyer's Role.** There are times when the organization's interest may
be or become adverse to those of one or more of its constituents. In such circumstances the
lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the
organization, of the conflict or potential conflict of interest, that the lawyer cannot represent
such constituent, and that such person may wish to obtain independent representation. Care
must be taken to assure that the individual understands that, when there is such adversity of
interest, the lawyer for the organization cannot provide legal representation for that
constituent individual, and that discussions between the lawyer for the organization and the
individual may not be privileged.

**Dual Representation.** Paragraph (e) recognizes that a lawyer for an organization may
also represent a principal officer or shareholder.

**Derivative Actions.** Under generally prevailing law, the shareholders or members
of a corporation may bring suit to compel the directors to perform their legal obligations in
the supervision of the organization. Members of unincorporated associations have essentially
the same right. Such an action may be brought nominally by the organization, but usually is,
in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an
action. The proposition that the organization is the lawyer's client does not alone resolve the
issue. Most derivative actions are a normal incident of an organization's affairs, to be
defended by the organization's lawyer like any other suit. However, if the claim involves
serious charges of wrongdoing by those in control of the organization, a conflict may arise
between the lawyer's duty to the organization and the lawyer's relationship with the board.
In those circumstances, Rule 1.7 governs who should represent the directors and the
organization.

**Code Comparison**

There is no counterpart to this Rule in the Disciplinary Rules of the Code. EC 5-18
states that "A lawyer employed or retained by a corporation or similar entity owes his
allegiance to the entity and not to a stockholder, director, officer, employee, representative,
or other person connected with the entity. In advising the entity, a lawyer should keep
paramount its interests and his professional judgment should not be influenced by the
personal desires of any person or organization. Occasionally, a lawyer for an entity is
requested by a stockholder, director, officer, employee, representative, or other person
connected with the entity to represent him in an individual capacity; in such a case the lawyer
may serve the individual only if the lawyer is convinced that differing interests are not
present." EC 5-24 states "Although a lawyer may be employed by a business corporation
with non-lawyers serving as directors or officers, and they necessarily have the right to make
decisions of business policy, a lawyer must decline to accept direction of his professional
judgment from any layman." DR 5-107(B) provides that "a lawyer shall not permit a person
who ... employs ... him to render legal services for another to direct or regulate his
professional judgment in rendering such legal services."

**RULE 1.14 CLIENT UNDER A DISABILITY**

(a) When a client's ability to make adequately considered decisions in connection with
the representation is impaired, whether because of minority, mental disability or for some
other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer
relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action
with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

(c) Information relating to the representation of a client who may be impaired is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent necessary to protect the client’s interest.

[Amended effective November 3, 2005 to add subsection (c).]

Comment

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.
If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian’s misconduct. See Rule 1.2(d).

**Disclosure of the Client's Condition.** Rules of procedure in litigation generally provide that minors or persons suffering a mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

**Disclosure of the Client's Condition.** Rules of procedure in litigation generally provide that minors or persons suffering a mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client’s disability could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client’s interests before discussing matters related to the client. The lawyer’s position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

[Amended effective November 3, 2005.]

**Code Comparison**

There is no counterpart to this Rule in the Disciplinary Rules of the Code. EC 7-12 states that "Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of
a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or

**RULE 1.15 SAFEKEEPING PROPERTY**

Effective January 1, 2007

(a) A lawyer shall hold clients’ and third persons’ property separate from the lawyer’s own property. Funds shall be kept in a separate trust account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such trust account funds and other property shall be kept and preserved by the lawyer for a period of seven years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When a lawyer is in possession of property in which both the lawyer and another person claim an interest, the property shall be kept separate by the lawyer until completion of an accounting and severance of their respective interests. If a dispute arises concerning their respective interests, the lawyer shall disburse the portion not in dispute, and keep separate the portion in dispute until the dispute is resolved.

(d) Except as provided in paragraph (f) of this rule, a lawyer or law firm shall create and maintain an interest- or dividend-bearing trust account (IOLTA Account) for all funds which are nominal or short term funds that cannot earn income for the client or third party in excess of the costs incurred to secure such income (IOLTA eligible Funds), pursuant to the following:

1. All trust Funds shall be deposited in a lawyer's or law firm's IOLTA Account unless— in the lawyer’s judgment – the funds can earn income for the client or third party in excess of the costs incurred to secure such income.

2. No earnings from such an IOLTA Account shall be made available to a lawyer or law firm.

3. IOLTA Accounts shall be established only with financial institutions:

   i. authorized by federal or state law to do business in Mississippi;
ii. the deposits of which are insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation or any successors thereof;

iii. which pay a rate of interest or dividend on IOLTA Accounts that is no less than the highest rate generally available to its own non-IOLTA Account depositors when the IOLTA Account meets the same minimum balance or other eligibility requirements, provided however that: (a) IOLTA Accounts may be maintained in an interest-bearing checking account or an interest or dividend-bearing account with check-writing and with a sweep feature which is tied to either a money market account insured by an agency of the federal government or a money market fund or daily overnight repurchase agreement invested solely in or fully collateralized by U.S. Government securities (defined as U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof) so long as there is no impairment of the right to immediately withdraw and transfer principal as soon as permitted by law; (b) institutions may choose to pay these rates on a qualifying IOLTA checking account instead of establishing the higher rate product; and (c) institutions may also elect to pay a higher interest or dividend rate and may waive any fees on IOLTA Accounts.

(4) Financial institutions are prohibited from using interest from one IOLTA Account to pay fees or charges in excess of the interest earned on another IOLTA Account. If not waived by the financial institution, such fees, if any, are the responsibility of the lawyer or the law firm.

(5) Lawyers or law firms depositing funds in an IOLTA Account established pursuant to this rule shall direct the depository institution:

i. to remit all interest, net of reasonable service charges or fees, if any, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, to the Mississippi Bar Foundation, Inc. For the purposes of this paragraph, reasonable services charges or fees shall not include fees for wire transfers, insufficient funds, bad checks, stop payments, account reconciliation, negative collected balances and check printing;

ii. to transmit with each remittance to the Foundation a report showing the following information for each IOLTA Account: the name of the lawyer or law firm, the amount of interest or dividends earned, the rate and type of interest or dividend applied, the amount of any services charges or fees assessed during the remittance period, the net amount of interest or dividends remitted for the period, the average account balance for the period for which the interest was earned and such other
information as is reasonably required by the Foundation;

iii. to transmit to the depositing lawyer or law firm a periodic account statement in accordance with normal procedures for reporting to depositors.

(e) Any IOLTA Account which has or may have the net effect of costing the IOLTA program more in fees than earned in interest over a period of time may, at the discretion of the Foundation, be exempted from and removed from the IOLTA program. Exemption of an IOLTA Account from the IOLTA program revokes the permission to use the Foundation's tax identification number for that account. Exemption of such account from the IOLTA program shall not relieve the lawyer and/or law firm from the obligation to maintain the nominal or short term funds of clients and third persons separately, as required above, in a non-interest bearing account.

(f) Every lawyer admitted to practice in this State shall annually certify to this Court that all IOLTA eligible Funds are held in an IOLTA Account, or that the lawyer is exempt because the lawyer:

1. is not engaged in the private practice of law;
2. does not have an office within the State of Mississippi;
3. is a judge, attorney general, public defender, U.S. attorney, district attorney, on duty with the armed services or employed by a local, state or federal government, and is not otherwise engaged in the private practice of law;
4. is a corporate counsel or teacher of law and is not otherwise engaged in the private practice of law;
5. has been exempted pursuant to Section (e) above; or
6. has been exempted by an order of general or special application of this Court which is cited in the certification.

(g) In the exercise of a lawyer's good faith judgment in determining whether funds can earn income in excess of costs, a lawyer may take into consideration all reasonable factors including, without limitation:

1. the amount of the funds to be deposited;
2. the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;
3. the rates of interest or yield at the financial institutions where the funds are to be
deposited;

(4) the cost of establishing and administering the account, including the cost of the lawyer's services, accounting fees, and tax reporting costs and procedures;

(5) the capability of a financial institution, a lawyer or a law firm to calculate and pay income to individual clients; and

(6) any other circumstances that affect the ability of the funds to earn a net return for the client.

(h) A lawyer shall review the IOLTA Account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client.

(i) The determination of whether funds are nominal or short-term so that they can not earn income in excess of costs shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with an ethical impropriety or other breach of professional conduct based on the good faith exercise of such judgment.

(j) A lawyer generally may not use, endanger, or encumber money held in trust for a client or third person without the permission of the owner given after full disclosure of the circumstances. Except for disbursements based upon any of the four categories of limited-risk uncollected deposits enumerated in paragraph (1) below, a lawyer may not disburse funds held in trust unless the funds are collected funds. For purposes of this provision, "collected funds" means funds deposited, finally settled, and credited to the lawyer's trust account.

(1) Certain categories of trust account deposits are considered to carry a limited and acceptable risk of failure so that disbursements of trust account funds may be made in reliance on such deposits without disclosure to and permission of clients and third persons owning trust account funds that may be affected by such disbursements. Provided the lawyer has other sources of funds available at the time of disbursement (other than client or third party funds) sufficient to replace any uncollected funds, notwithstanding that a deposit made to the lawyer's trust account has not been finally settled and credited to the account, the lawyer may disburse funds from the trust account in reliance on such deposit under any of the following circumstances:

(i) when the deposit is made by certified check or cashier's check;

(ii) when the deposit is made by a bank check, official check, treasurer's check, money order, or other such instrument where the payor is a bank, savings and loan association, or credit union;

(iii) when the deposit is made by a check issued by the United States, the State of Mississippi, or any agency or political subdivision of the State of Mississippi; or
(iv) when the deposit is made by a check or draft issued by an insurance company, title insurance company, or a licensed title insurance agency authorized to do business in the State of Mississippi.

In any of the above circumstances, a lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds is at the risk of the lawyer making the disbursement. If any of the deposits fail, for any reason, the lawyer, upon obtaining knowledge of the failure, must immediately act to protect the property of the lawyer's clients and third persons. If the lawyer accepting any such check personally pays the amount of any failed deposit within three business days of receipt of notice that the deposit has failed, the lawyer will not be considered guilty of professional misconduct based upon the disbursement of uncollected funds.

(2) A lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds in any circumstances other than those four categories set forth above, when it results in funds of clients or third persons being used, endangered, or encumbered, will be grounds for a finding of professional misconduct.

[Amended effective January 1, 2007, to provide for mandatory IOLTA participation.]

Comment

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is a risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the
applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

**Interest on Lawyer's Trust Accounts.** Each lawyer or law firm, unless specifically excluded in paragraph (f), is required to establish an IOLTA Account. Only IOLTA eligible funds - those nominal or short term funds that cannot earn income for the client or third party in excess of the costs incurred to secure such income – may be placed in the IOLTA Account. This definition of IOLTA eligible funds is in compliance with the decision in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), which upheld the constitutionality of the IOLTA concept.

No earnings on the IOLTA Accounts may be made available to or utilized by the lawyer or law firm. Upon the request of the client, earnings may be made available to the client whenever possible upon deposited funds which are neither nominal in amount nor to be held for a short period of time; however, traditional attorney client relationships do not compel lawyers either to invest clients' funds or to advise clients to make their funds productive.

IOLTA eligible funds shall be retained in an interest - or dividend - bearing trust account with the interest (net of any reasonable service charge or fees) made payable to the Mississippi Bar Foundation, Inc., said payments to be made by the financial institution at least quarterly. The determination of whether client or third party funds are nominal in amount or to be held for a short period of time so that they cannot earn net income over costs rests in the sound judgment of each lawyer or law firm and no charge of ethical impropriety or other breach of professional conduct shall attend a lawyer's exercise of judgment in that regard.

Annual certification required in (f) above shall be through a form that is made a part of the members’s annual membership fees statement.

The decision to deposit client or third party funds in an IOLTA Account rests with the lawyers, so notification of such a deposit to clients whose funds are nominal in amount or to be held for a short period of time is unnecessary. This is not to suggest that many lawyers will not want to notify their clients of their participation in the program in some fashion. There is no impropriety in a lawyer or law firm advising all clients of how their participation advances the administration of justice in Mississippi.

**Unclaimed Property.** Any lawyer holding property or monies belonging to clients with whom he has lost contact must retain and account for said funds, subject to the Mississippi Uniform Disposition of Unclaimed Property Act.

**Code Comparison**

With regard to Rule 1.15(a), DR 9-102(A) provides that "funds of clients" are to be kept in a trust account in the state in which the lawyer's office is situated. DR 9-102(B)(2) provides that a lawyer shall "identify and label securities and properties of a client ... and place them in ..."
safekeeping ...." DR 9-102(B)(3) requires that a lawyer "maintain complete records of all funds, securities and other properties of a client ...." Rule 1.15(a) extends these requirements to property of a third person that is in the lawyer's possession in connection with the representation.

Rule 1.15(b) is substantially similar to DR 9-102(B)(1) and (4).

Rule 1.15(c) is substantially similar to DR 9-102(A)(2), except that the requirement regarding disputes applies to property concerning which an interest is claimed by a third person as well as by a client.

See MSB Ethics Opinions Nos. 98 and 104.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without materially adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal. A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation of the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge. A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.
Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

**Optional Withdrawal.** A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

**Assisting the Client Upon Withdrawal.** Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

See MSB Ethics Opinions Nos. 49 and 105.

**RULE 1.17 SALE OF LAW PRACTICE**

A lawyer or law firm may sell or purchase a law practice including good will if the conditions set forth in Rule 1.17 are satisfied. The estate of a deceased, disabled or disappeared lawyer may be a seller.
(a) The selling lawyer or law firm ceases to engage in the private practice of law in the geographic area wherein the practice has been conducted;

(b) The practice is sold as an entirety to another lawyer or law firm;

(c) Actual written notice is given to each of the seller’s clients regarding:

(1) the proposed sale;

(2) the client’s right to retain other counsel or take possession of the file; and

(3) the fact that the client’s consent to the sale will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of the receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by any court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of the file.

(d) The fees charged clients shall not be increased by reason of the sale. The purchaser may however refuse to undertake the representation unless the client consents to pay the purchaser's fees at a rate not exceeding the fee charged by the purchaser for rendering substantially similar services before the initiation of the purchase negotiations.

(e) For purposes of this rule, good will, as used herein, is defined as reputation, including use of the lawyer or law firm’s name that will probably generate future business. However, any use of the lawyer or law firms name, after the sale or purchase of the subject law practice has been completed, must be accompanied with a notice that the selling lawyer or law firm is no longer engaged in the active practice of law.

(f) Notwithstanding the provisions of this rule, if the selling lawyer or law firm returns to the practice of law, then use of the selling lawyer or law firm’s name must be discontinued by the purchasing lawyer or law firm.

[Adopted August 20, 1998; amended effective November 3, 2005 to remove former subpart (c)(2) relating to disclosure of proposed changes in fee arrangements.]
COUNSELOR

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice. A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.
Offering Advice. In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Code Comparison

There is no direct counterpart to Rule 2.1 in the Disciplinary Rules of the Code. DR 5-107(B) provides that "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." EC 7-8 states that "Advice of a lawyer to his client need not be confined to purely legal considerations. ... In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. ... In the final analysis, however, ... the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client. ..."

RULE 2.2 LAWYER SERVING AS AN INTERMEDIARY BETWEEN CLIENTS

(a) A lawyer represents clients as an intermediary when the lawyer provides impartial legal advice and assistance to two or more clients who are engaged in a candid and non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them.

(b) A lawyer shall not represent two or more clients as an intermediary in a matter unless:

(1) as between the clients, the lawyer reasonably believes that the matter can be resolved on terms compatible with the best interests of each of the clients, that each client will be able to make adequately informed decisions in the matter, that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful, and that the intermediation can be undertaken impartially;

(2) the lawyer's representation of each of the clients, or the lawyer's
relationship with each, will not be adversely affected by the lawyer's responsibilities to other clients or third persons, or by the lawyer's own interests;

(3) the lawyer consults with each client about:

(i) the lawyer's responsibilities as an intermediary;

(ii) the implications of the intermediation (including the advantages and risks involved, the effect of the intermediation on the attorney-client privilege, and the effect of the intermediation on any other obligation of confidentiality the lawyer may have);

(iii) any circumstances that will materially affect the lawyer's impartiality between the clients; and

(iv) the lawyer's representation in another matter of a client whose interests are directly adverse to the interests of any one of the clients; and any interests of the lawyer, the lawyer's other clients, or third persons that will materially limit the lawyer's representation of one of the clients; and

(4) each client consents in writing to the lawyer's representation and each client authorizes the lawyer to disclose to each of the other clients being represented in the matter any information relating to the representation to the extent that the lawyer reasonably believes is required to comply with Rule 1.4.

(c) While representing clients as an intermediary, the lawyer shall:

(1) act impartially to assist the clients in accomplishing their common objective;

(2) as between the clients, treat information relating to the intermediation as information protected by Rule 1.6 that the lawyer has been authorized by each client to disclose to the other clients to the extent the lawyer reasonably believes necessary for the lawyer to comply with Rule 1.4; and

(3) consult with each client concerning the decisions to be
made with respect to the intermediation and the considerations relevant in making them, so that each client can make adequately informed decisions.

(d) A lawyer shall withdraw from service as an intermediary if:

(1) any of the clients so requests;

(2) any of the clients revokes the lawyer's authority to disclose to the other clients any information that the lawyer would be required by Rule 1.4 to reveal to them; or

(3) any of the other conditions stated in paragraph (b) are no longer satisfied.

(e) If the lawyer's withdrawal is required by paragraph (d)(2) the lawyer shall so advise each client of the withdrawal, but shall do so without any further disclosure of information protected by Rule 1.6.

[Adopted September 17, 2002, effective March 1, 2003; substantially rewritten effective November 3, 2005 to address specifically and exclusively lawyers intermediating between clients.]

Comments

A lawyer acts as an intermediary under this Rule when the lawyer represents two or more clients who are cooperatively trying to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them. The hallmarks of an intermediation include the impartiality of the lawyer who serves as an intermediary; the open, candid, and non-adversarial nature of the clients' pursuit of a common objective; and the limited subject matters in which a lawyer may serve multiple clients as an intermediary (i.e., the adjustment of a consensual legal relationship among or between the clients). Because intermediation differs significantly from the partisan role normally played by lawyers, and because it requires that the lawyer be impartial as between the clients rather than an advocate on behalf of each, a lawyer should only undertake this role with client consent after consultation about the distinctive features of this role. Also, given the risks associated with joint representation of parties whose interests may potentially be in conflict, the Rule provides a number of safeguards designed to limit its applicability and to protect the interests of the several clients.
Paragraph (b) specifies the circumstances in which a lawyer may serve multiple clients as an intermediary. With respect to the clients being served by an intermediary, this Rule, and not Rule 1.7, applies. Rule 1.7 remains applicable, however, to protect other clients the lawyer may be representing or may wish to represent in other matters. For example, if the lawyer's representation of two clients as an intermediary in a matter will materially limit the lawyer's representation of another client the lawyer is representing as an advocate, the lawyer must afford that client the protections of Rule 1.7. Similarly, if the lawyer's representation of two clients as an intermediary would be materially adverse to one of the lawyer's former clients and the matters are substantially related, the lawyer must afford the former client the protection of Rule 1.9.

Rule 2.2 does not apply to a lawyer acting as a dispute resolution neutral, such as an arbitrator or a mediator, as the parties to a dispute resolution proceeding are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. Other rules of conduct govern a lawyer's service as a dispute resolution neutral. See Rule 2.4.

Because this Rule only applies to the formation, conduct, modification or termination of consensual legal relationships between clients, it does not apply to the representation of multiple clients in connection with gratuitous transfers or other matters in which there is not a quid pro quo exchange. Thus, for example, conflicts of interest arising from the representation of multiple clients in estate planning or the administration of an estate are governed by Rule 1.7 rather than by this Rule. If, however, the effectuation of an estate plan or other gratuitous transfer entails the formation, modification or termination of a consensual legal relationship between clients, and the lawyer acts as an intermediary in connection with the transaction, this Rule, and not Rule 1.7, will apply.

A lawyer may act as an intermediary in seeking to establish or adjust a consensual legal relationship among or between clients on an amicable and mutually advantageous basis, such as helping to organize a business in which two or more clients are entrepreneurs or working out the financial reorganization of an enterprise in which two or more clients have an interest. As part of the work of an intermediary, the lawyer may seek to achieve the clients' common objective or to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative may be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complications, or even litigation. Given these and other relevant factors, each client may prefer to have one lawyer act as an intermediary for all rather than hiring a separate lawyer to serve as his or her partisan.

In considering whether to act as an intermediary between clients, a lawyer should be
mindful that if the intermediation fails, the result can be additional cost, embarrassment, and recrimination. In some situations, the risk of failure is so great that intermediation is plainly impossible or imprudent for the lawyer or the clients. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations, as is often the case when dissolution of a marriage is involved. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

The appropriateness of intermediation can depend on its form. Forms of intermediation range from an informal "facilitation," in which the lawyer's responsibilities are limited to presenting alternatives from which the clients will choose, to a full-blown representation in which the lawyer provides all legal services needed in connection with the proposed transaction. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis; whether the situation involves creating a relationship between the parties or terminating one; the relative experience, sophistication, and economic bargaining power of the clients; and the existence of prior familial, business, or legal relationships.

Confidentiality and Privilege

A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as an intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper.

Paragraphs (b)(4) and (c)(2) make clear that the obligations of attorney-client confidentiality apply to clients being served by a lawyer as an intermediary, but that, as between the clients being so served, confidentiality is inappropriate and must be waived by each of the clients. Thus, while the lawyer must maintain confidentiality as against strangers to the relationship, the lawyer has no such duty to keep information provided to the lawyer by one client confidential from the other clients. Moreover, the lawyer may well, depending on the circumstances, have an affirmative obligation to disclose such information obtained from one client to other clients. Obviously, this important implication of the lawyer's responsibilities as an intermediary must be disclosed and explained to the clients.

Since the lawyer is required to be impartial between commonly represented clients,
intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

In acting as an intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so and may proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances. This consent must be in writing.

Paragraph (c)(3) is an application of the principle expressed in Rule 1.4. Where the lawyer is an intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal

Common representation does not diminish the rights of each client in the client-lawyer relationship. Each client has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.

Because of the obligations of a lawyer serving as an intermediary to the intermediation clients, the lawyer must withdraw from the representation if any of the intermediation clients so requests; if one or more of the clients denies the lawyer the authority to disclose certain information to any of the remaining clients, thereby preventing the lawyer from being able to discharge the lawyer's duties to the remaining clients to communicate with them and disclose information to them; or if any of the various predicate requirements for intermediation can no longer be satisfied.

Upon withdrawal from the role of intermediary or completion of an intermediation, the lawyer must afford all of the clients formerly served as an intermediary the protections of Rules 1.9 and 1.10.

[Amended effective November 3, 2005.]

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of
someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) The client gives informed consent in writing.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

[Amended effective November 3, 2005.]

Comment

Definition. An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in the Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under
Duty to Third Person. When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclose of Information. The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information. When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Code Comparison

There is no counterpart to Rule 2.3 in the Code.

RULE 2.4 LAWYERS SERVING AS THIRD PARTY NEUTRALS

73
(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.

[Adopted effective November 3, 2005.]

Comment

Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

Unlike non-lawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer’s service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information
will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer’s role as third-party neutral and a lawyer’s role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer’s law firm are addressed in Rule 1.12.

Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration, the lawyer’s duty of candor is governed by Rule 3.3 Otherwise, the lawyer’s duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1

[Adopted effective November 3, 2005.]

ADVOCATE

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and in fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

[Amended effective November 3, 2005 to add the phrase “in law and in fact.”]

Comment

The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of
advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Code Comparison

DR 7-102(A)(1) provides that a lawyer may not "file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Rule 3.1 is to the same general effect as DR 7-102(A)(1), with three qualifications. First, the test of improper conduct is changed from "merely to harass or maliciously injure another" to the requirement that there be a basis for the litigation measure involved that is "not frivolous." This includes the concept stated in DR 7-102(A)(2) that a lawyer may advance a claim or defense unwarranted by existing law if "it can be supported by good faith argument for an extension, modification, or reversal of existing law." Second, the test in Rule 3.1 is an objective test, whereas DR 7-102(A)(1) applies only if the lawyer "knows or when it is obvious" that the litigation is frivolous. Third, Rule 3.1 has an exception that in a criminal case, or a case in which incarceration of the client may result (for example, certain juvenile proceedings), the lawyer may put the prosecution to its proof even if there is no nonfrivolous basis for defense.

RULE 3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial
purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

**Code Comparison**

DR 7-102(A)(1) provides that "A lawyer shall not ... file a suit, assert a position, conduct a defense (or) delay a trial ... when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

**RULE 3.3 CANDOR TOWARD THE TRIBUNAL**

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

**Comment**

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty
of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

**Representations by a Lawyer.** An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

**Misleading Legal Argument.** Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

**False Evidence.** When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in
deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

**Perjury by a Criminal Defendant.** Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

**Remedial Measures.** If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that
fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done--making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

**Constitutional Requirements.** The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

**Duration of Obligation.** A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

**Refusing to Offer Proof Believed to Be False.** Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

**Ex Parte Proceedings.** Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably
believes are necessary to an informed decision.

Code Comparison

Rule 3.3(a)(1) is substantially identical to DR 7-102(A)(5), which provides that a lawyer shall not "knowingly make a false statement of law or fact."

Rule 3.3(a)(2) is implicit in DR 7-102(A)(3), which provides that "a lawyer shall not ... knowingly fail to disclose that which he is required by law to reveal."

Rule 3.3(a)(3) is identical to DR 7-106(B)(1).

With regard to Rule 3.3(a)(4), the first sentence of this subparagraph is similar to DR 7-102(A)(4), which provides that a lawyer shall not "knowingly use" perjured testimony or false evidence. The second sentence of Rule 3.3(a)(4) resolves an ambiguity in the Code concerning the action required of a lawyer when he discovers that he has offered perjured testimony or false evidence. DR 7-102(A)(4), quoted above, does not expressly deal with this situation, but the prohibition against "use" of false evidence can be construed to preclude carrying through with a case based on such evidence when that fact has become known during the trial. DR 7-102(B)(1), also noted in connection with Rule 1.6, provides that "a lawyer who receives information clearly establishing that ... his client has ... perpetrated a fraud upon ... a tribunal shall if the client does not rectify the situation ... reveal the fraud to the ... tribunal...." Since use of perjured testimony or false evidence is usually regarded as "fraud" upon the court, DR 7-102(B)(1) apparently requires disclosure by the lawyer in such circumstances. However, some states have amended DR 7-102(B)(1) in conformity with an ABA-recommended amendment to provide that the duty of disclosure does not apply when the "information is protected as a privileged communication." This qualification may be empty, for the rule of attorney-client privilege has been construed to exclude communications that further a crime, including the crime of perjury. On this interpretation of DR 7-102(B)(1), the lawyer has a duty to disclose the perjury.

Rule 3.3(c) confers discretion on the lawyer to refuse to offer evidence that he "reasonably believes" is false. This gives the lawyer more latitude than DR 7-102(A)(4), which prohibits the lawyer from offering evidence the lawyer "knows" is false.

There is no counterpart in the Code to paragraph (d).

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

   (1) the person is a relative or an employee or other agent of a client; and

   (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose
commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

**Code Comparison**

With regard to Rule 3.4(a), DR 7-109(A) provides that "a lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal." DR 7-109(B) provides that "a lawyer shall not advise or cause a person to secrete himself ... for the purpose of making him unavailable as a witness...." DR 7-106(C)(7) provides that a lawyer shall not "intentionally or habitually violate any established rule of procedure or of evidence."

With regard to Rule 3.4(b), DR 7-102(B)(6) provides that a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-109 provides that "a lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (1) expenses reasonably incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for his loss of time in attending or testifying; (or) (3) a reasonable fee for the professional services of an expert witness." EC 7-28 states that "witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

Rule 3.4(c) is substantially similar to DR 7-106(A), which provides that "A lawyer shall not disregard ... a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling."

Rule 3.4(d) has no counterpart in the Code.

Rule 3.4(e) substantially incorporates DR 7-106(C)(1), (2), (3) and (4). DR 7-106(C)(2) proscribes asking a question "intended to degrade a witness or other person," a
matter dealt with in Rule 4.4. DR 7-106(C)(5), providing that a lawyer shall not "fail to comply with known local customs of courtesy or practice," is too vague to be a rule of conduct enforceable as law.

With regard to Rule 3.4(f), DR 7-104(A)(2) provides that a lawyer shall not "give advice to a person who is not represented ... other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

**RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL**

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order: or

(2) the juror has made known to the lawyer a desire not to communicate.

(d) engage in conduct intended to disrupt a tribunal.

[Amended effective November 3, 2005 to add new subsection (c).]

**Comment**

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for
subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

**Code Comparison**

With regard to Rule 3.5(a), DR 7-108(A) provides that "before the trial of a case a lawyer ... shall not communicate with ... anyone he knows to be a member of the venire ...." DR 7-108(B) provides that "during the trial of a case ... a lawyer ... shall not communicate with ... a juror concerning the case." DR 7-109(C) provides that a lawyer shall not "communicate ... as to the merits of the cause with a judge or an official before whom the proceeding is pending except ... upon adequate notice to opposing counsel ... (or) as otherwise authorized by law."

With regard to Rule 3.5(b), DR 7-106(C)(6) provides that a lawyer shall not "engage in undignified or discourteous conduct which is degrading to a tribunal."

**RULE 3.6 TRIAL PUBLICITY**

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

1. the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

2. in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person’s refusal or failure to make a statement;

3. the performance or results of any examination or test of the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraph (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

the general nature of the claim or defense;

the information contained in a public record;

that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

the scheduling or result of any step in litigation;

a request for assistance in obtaining evidence and information necessary thereto;

a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and
the length of the investigation.

Comment

It is difficult to strike a balance between protecting the right to a fair trial and
safeguarding the right of free expression. Preserving the right to a fair trial necessarily
entails some curtailment of the information that may be disseminated about a party prior to
trial, particularly where trial by jury is involved. If there were no such limits, the result
would be the practical nullification of the protective effect of the rules of forensic decorum
and the exclusionary rules of evidence. On the other hand, there are vital social interests
served by the free dissemination of information about events having legal consequences and
about legal proceedings themselves. The public has a right to know about threats to its safety
and measures aimed at assuring its security. It also has a legitimate interest in the conduct
of judicial proceedings, particularly in matters of general public concern. Furthermore, the
subject matter of legal proceedings is often of direct significance in debate and deliberation
over questions of public policy.

No body of rules can simultaneously satisfy all interests of fair trial and all those of
free expression. The formula in this Rule is based upon the ABA Model Code of
Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as
amended in 1978.

Special rules of confidentiality may validly govern proceedings in juvenile, domestic
relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c)
requires compliance with such Rules.

Code Comparison

Rule 3.6 is similar to DR 7-107, except as follows: First, Rule 3.6 adopts the general
criteria of "substantial likelihood of materially prejudicing an adjudicative proceeding" to
describe impermissible conduct. Second, Rule 3.6 transforms the particulars in DR 7-107 into
an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable
dangers to the fair administration of justice. Finally, Rule 3.6 omits DR 7-107(C)(7), which
provides that a lawyer may reveal "at the time of seizure, a description of the physical
evidence seized, other than a confession, admission or statement." Such revelations may be
substantially prejudicial and are frequently the subject of pretrial suppression motions, which,
if successful, may be circumvented by prior disclosure to the press.

RULE 3.7 LAWYER AS WITNESS

87
(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has first hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in
determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

**Code Comparison**

DR 5-102(A) prohibits a lawyer, or the lawyer's firm, from serving as advocate if the lawyer "learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client." DR 5-102(B) provides that a lawyer, and the lawyer's firm, may continue representation if the "lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client ... until it is apparent that his testimony is or may be prejudicial to his client." DR 5-101(B) permits a lawyer to testify while representing a client: "(1) If the testimony will relate solely to an uncontested matter; (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; (4) As to any matter if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

The exception stated in (a)(1) consolidates provisions of DR 5-101(B)(1) and (2). Testimony relating to a formality, referred to in DR 5-101(B)(2), in effect defines the phrase "uncontested issue," and is redundant.

See MSB Ethics Opinion No. 76.

**RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR**

The prosecutor in a criminal case shall:
(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

**Comment**

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

With reference to paragraphs (b) and (d), see Mississippi Uniform Criminal Rules of Circuit Court Practice, 1.04 and 4.06.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived
the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

**Code Comparison**

DR 7-103(A) provides that "A public prosecutor ... shall not institute ... criminal charges when he knows or it is obvious that the charges are not supported by probable cause." DR 7-103(B) provides that "A public prosecutor ... shall make timely disclosure ... of the existence of evidence, known to the prosecutor ... that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

**RULE 3.9 ADVOCATE IN NON-ADJUDICATIVE PROCEEDINGS**

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

[Amended effective November 3, 2005 to adopt language: “legislative body or administrative agency” to replace prior text.]

**Comment**

In representation before bodies such as legislature, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

This Rule does not apply to representation of a client in a negotiation or other bilateral
transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

**Code Comparison**

EC 7-15 states that "A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law." EC 7-16 states that "When a lawyer appears in connection with proposed legislation, he ... should comply with applicable laws and regulations." EC 8-5 states that "Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a ... legislative body should never be participated in ... by lawyers." DR 7-106(B)(1) provides that "In presenting a matter to a tribunal, a lawyer shall disclose ... unless privileged or irrelevant, the identity of the clients he represents and of the persons who employed him."

**TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS**

**RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS**

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

**Comment**

**Misrepresentation.** A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

**Statements of Fact.** This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a
transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

**Fraud by Client.** Paragraph (b) recognizes that substantive law, for example, Miss. Code Ann. Section 97-1-3 (1972), may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

**Code Comparison**

Rule 4.1(a) is substantially similar to DR 7-102(A)(5), which states that "In his representation of a client, a lawyer shall not ... knowingly make a false statement of law or fact."

With regard to Rule 4.1(b), DR 7-102(A)(3) provides that a lawyer shall not "conceal or knowingly fail to disclose that which he is required by law to reveal."

**RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL**

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

**Comment**

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection
with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

**Code Comparison**

This Rule is substantially identical to DR 7-104(A)(1).

**RULE 4.3 DEALING WITH UNREPRESENTED PERSON**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonably possibility of being in conflict with the interests of the client. In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

[Amended effective November 3, 2005 to cover giving legal advice to unrepresented persons.]

**Comment**

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

**Code Comparison**

There is no direct counterpart to this Rule in the Code. DR 7-104(A)(2) provides that
a lawyer shall not "give advice to a person who is not represented by a lawyer, other than the advice to secure counsel...."

See Supplement to MSB Ethics Opinion No. 80.

**RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS**

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

[Amended effective November 3, 2005 to add new subsection (b).]

**Comment**

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the attorney-client relationship.

Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or other lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, “document” includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it is inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return
such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

[Amended effective November 3, 2005.]

Code Comparison

DR 7-106(C)(2) provides that a lawyer shall not "ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person." DR 7-102(A)(1) provides that a lawyer shall not "take ... action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." DR 7-108(D) provides that "after discharge of the jury ... the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror ..." DR 7-108(E) provides that "a lawyer shall not conduct ... a vexatious or harassing investigation of either a venireman or a juror."

LAW FIRMS AND ASSOCIATIONS

RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm or has comparable managerial authority in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
Paragraphs (a) and (b) refer to lawyers who have supervisory and/or managerial authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have immediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm’s structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).

Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner
in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

[Amended effective November 3, 2005.]

Code Comparison

There is no direct counterpart to this Rule in the Code. DR 1-103(A) provides that "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to ... authority empowered to investigate or act upon such violation."

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

Although a lawyer is not relieved of responsibility for a violation by the fact that the
lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

**Code Comparison**

There is no counterpart to this Rule in the Code.

**RULE 5.3  RESPONSIBILITIES REGARDING NON-LAWYER ASSISTANTS**

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[Amended effective November 3, 2005 to add scope to include as well as partners, other lawyers possessing managerial authority]

Comment

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in the rendition of the lawyer’s professional services. A lawyer must make reasonable efforts to give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that non-lawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[Amended effective November 3, 2005.]

Code Comparison

There is no direct counterpart to this Rule in the Code. DR 4-101(D) provides that "A lawyer shall exercise reasonable care to prevent his employees, associates and others whose services are utilized by him from disclosing or using confidences or secrets of a client...." DR 7-107(J) provides that "A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107."

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER
(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of law of a deceased, disabled or disappeared lawyer may pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

[Amended August 20, 1998].

Comment

The provisions of this Rule express traditional limitations on sharing fees. These
limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

**Code Comparison**

DR 3-102(a) provides that "A lawyer or law firm shall not share legal fees with a nonlawyer ...." DR 3-103(A) provides that "A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." DR 5-107(B) provides that "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." DR 5-107(C) provides that "A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: (1) A nonlawyer owns any interests therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; (2) A nonlawyer is a corporate director or officer thereof; or (3) A nonlawyer has the right to direct or control the professional judgment of the lawyer." EC 5-24 states that "A lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a nonlawyer. Although a lawyer may be employed by a business corporation with nonlawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant ...."

See MSB Ethics Opinions Nos. 25, 32, 33 and 91.

**RULE 5.5 UNAUTHORIZED PRACTICE OF LAW**

A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Comment

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

Code Comparison

With regard to Rule 5.5(a), DR 3-101(B) of the Code provides that "A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."

With regard to Rule 5.5(b), DR 3-101(A) of the Code provides that "A lawyer shall not aid a nonlawyer in the unauthorized practice of law."

See MSB Ethics Opinions Nos. 25, 32, 33 and 96.

RULE 5.6  RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.
This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

[Amended August 20, 1998].

Comment

An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

Code Comparison

Rule 5.6 is substantially similar to DR 2-108.

PUBLIC SERVICE

RULE 6.1 VOLUNTARY PRO BONO PUBLIC SERVICE

(a) Professional Responsibility. Each member of the Mississippi Bar in good standing and not exempt hereunder, as part of the member’s professional responsibility, should (1) render pro bono legal services to the poor and (2) participate, to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor.

(b) Discharge of the Professional Responsibility to Provide Pro Bono Legal Services to the Poor. The professional responsibility to provide pro bono legal services to the poor may be discharged by:

(1) annually providing at least 20 hours of pro bono legal services to the poor, or

(2) annually providing at least 20 hours of pro bono legal services to charitable, religious, civic, community, governmental or educational organizations for the purpose of providing legal counsel and representation to the poor, or
(3) making an annual contribution of at least $200 to the Mississippi Bar, which will be used by the Bar to provide legal services to the poor through legal aid organizations.

(c) Collective Discharge of the Professional Responsibility to Provide Pro Bono Legal Service to the Poor. Each member of the bar should strive to individually satisfy the member’s professional responsibility to provide pro bono legal service to the poor. Collective satisfaction of this professional responsibility is permitted by law firms only under a collective satisfaction plan that has been previously approved by The Mississippi Bar and only when providing pro bono legal services to the poor

(1) in a major case or matter involving a substantial expenditure of time and resources; or

(2) through a full-time community or public service staff, or

(3) in any other manner that has been approved by The Mississippi Bar.

(d) Exemptions. Those exempt from the provisions of this rule are:

(1) those lawyers who are restricted from practicing law outside their specific employment,

(2) members of the judiciary and their staff,

(3) other government lawyers who are prohibited from performing legal services by constitutional, statutory, rule, other regulatory prohibitions, or by employment policies,

(4) attorneys employed in established Legal Services Programs, and

(5) members of the bar who have acquired inactive or active exempt status or who are suspended.

Nevertheless, exempt attorneys are encouraged to assist in meeting the needs of the poor for legal services to the extent that they can, whether by monetary contributions or otherwise.

(e) Reporting Requirement. Each member of the bar shall annually certify whether the member has satisfied the member’s professional responsibility to provide pro bono legal services to the poor. Each member shall certify this information through a form that is made
a part of the member’s annual membership fees statement which shall require the member to report the following information:

(1) the number of hours the attorney dedicated to pro bono legal services,

(2) whether the attorney satisfied the obligation through a collective plan, the name or nature of that plan, and

(3) if the attorney has satisfied the obligation by contribution, the amount of that contribution.

If the attorney has not provided pro bono legal services to the poor in the current year, the form shall so state, and the reason for non-compliance shall be stated. If the attorney is exempt from the obligation to provide pro bono services to the poor, the report shall so state and indicate the nature of the exemption.

(f) Compliance.

The provisions of Rule 6.1(b) are aspirational goals and an affirmation of professional responsibility, but are not mandatory and do not constitute a basis for discipline under the Rules of Discipline for the Mississippi Bar.

The reporting requirements of Rule 6.1(e) are mandatory and the failure to report this information shall be treated in the same manner as failure to pay dues or comply with mandatory Continuing Legal Education.

The Bar shall from time to time, but at least annually, provide the Supreme Court with statistical data regarding compliance, providing such information in such form as the Chief Justice shall direct.

(g) Credit Toward Professional Responsibility in Future Years. In the event that more than 20 hours of pro bono legal service to the poor are provided and reported in any 1 year, the hours in excess of 20 may be carried forward and reported as such for up to 2 succeeding years.

[Amended effective September 12, 1996; amended effective March 24, 2005.]

Comment
Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. All lawyers are urged to provide a minimum of 20 hours of pro bono services to the poor annually. Pro bono legal service to the poor is an integral and particular part of a lawyer's pro bono public service responsibility. As our society has become one in which rights and responsibilities are increasingly defined in legal terms, access to legal services has become of critical importance. This is true for all people, be they rich, poor, or of moderate means. However, because the legal problems of the poor often involve areas of basic need, their inability to obtain legal services can have dire consequences. The vast unmet legal needs of the poor in Mississippi have been recognized by the Supreme Court of Mississippi. The Supreme Court has further recognized the necessity of finding a solution to the problem of providing the poor greater access to legal service and the unique role of lawyers in our adversarial system of representing and defending persons against the actions and conduct of governmental entities, individuals, and non-governmental entities. As an officer of the court, each member of The Mississippi Bar in good standing has a professional responsibility to provide pro bono legal service to the poor.

Certain lawyers, however, are prohibited from performing legal services outside their employment by constitutional, statutory, rule, or other regulatory prohibitions, or by the policies of their employers. Consequently, members of the judiciary and their staffs, government lawyers who are prohibited from performing legal services by constitutional, statutory, rule, or regulatory prohibitions, members of the bar who are inactive, or suspended are exempt from participation in this program. Those exempt (other than those suspended) and others who, although licensed to do so, do not engage in the practice of law and those who are prevented by their employment from performing legal services for those other than their employers, are, however, encouraged to meet the professional responsibility to render public service to the extent that they can. For definition of “inactive members,” see Miss. Code Ann. § 73-3-120(b). These attorneys, should attempt to serve the public good through activities which do not involve pro bono services but promote the public understanding of the legal system. These might include serving, without compensation, in public information and educational programs such as Law Day programs, high school moot court programs, CLE programs and the like.

Attorneys who are employed in Legal Services Programs are specifically exempt, it being recognized that they have chosen to dedicate their entire professional activities to assisting the poor.

In discharging the professional responsibility to provide pro bono legal service to the poor, each lawyer should furnish a minimum of twenty hours of pro bono legal service to the
poor annually or contribute $200 to the Mississippi Bar, which will be used by the Bar to provide legal services to indigents through legal aid organizations. “Pro bono legal service” means legal service rendered without charge or expectation of a fee for the lawyer at the time the service commences. Legal services written off as bad debts do not qualify as pro bono service. Most pro bono service should involve civil proceedings where there is no governmental obligation to provide counsel, given that government must provide indigent representation in most criminal matters. Pro bono legal service to the poor is to be provided not only to those persons whose household incomes are below the federal poverty standard but also to those persons society sees as unable to pay for legal services, those frequently referred to as the “working poor.” Lawyers providing pro bono legal service on their own need not undertake an investigation to determine client eligibility. Rather, a good faith determination by the lawyer of client eligibility is sufficient. Pro bono legal service to the poor need not be provided only through legal services to individuals; it can also be provided through legal services to charitable, religious, or educational organizations whose overall mission and activities are designed predominantly to address the needs of the poor. For example, legal service to organizations such as a church, civic, or community service organizations relating to a project seeking to address the problems of the poor would qualify. Awards of statutory attorney’s fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section.

While the personal involvement of each lawyer in the provision of pro bono legal service to the poor is generally preferable, such personal involvement may not always be possible or produce the ultimate desired result, that is, a significant maximum increase in the quantity and quality of legal service provided to the poor. The annual contribution alternative recognizes a lawyer's professional responsibility to provide financial assistance to increase and improve the delivery of legal service to the poor when a lawyer cannot or decides not to provide legal service to the poor through the contribution of time. Also, there is no prohibition against a lawyer contributing a combination of hours and financial support.

The amount of dollar contribution does not and is not intended to equate with 20 hours of services at the customary hourly rate of private practitioner. It does, however, provide an alternative recognizing that contributions to established legal services organizations can, in some cases, provide a more efficient mechanism for reaching those in need.

The limited provision allowing for collective satisfaction of the 20-hour standard recognizes the importance of encouraging law firms to undertake the pro bono legal representation of the poor in substantial, complex matters requiring significant expenditures of law firm resources and time and costs, and through the establishment of full-time community or public service staffs. When a law firm uses collective satisfaction, the total hours of legal services provided in such substantial, complex matters or through a full-time
community or public service staff should be credited among the firm's lawyers in a fair and reasonable manner as determined by the firm.

Neither providing pro bono services nor contributing is mandatory and failure to do so does not result in discipline as a violation of the Rules of Professional Conduct under the Rules of Discipline. However, attorneys are required to comply with the reporting requirements of Rule 6.1(e). The simple reporting requirement of Rule 6.1(e) is designed to provide a sound basis for evaluating the results achieved by this rule, and to remind lawyers of their professional responsibility under this rule. The reporting is designed to be as simple as possible, and does not require itemization of services rendered. Failure to comply with the reporting requirements is handled in the same manner as failure to pay bar dues.

It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation.

[Comment amended September 12, 1996; amended effective March 24, 2005.]

**RULE 6.2 ACCEPTING APPOINTMENTS**

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client to likely to result in violation of the rules of professional conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

**Comment**

A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular
matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to service unpopular clients or persons unable to afford legal services.

**Appointed Counsel.** For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

**Code Comparison**

There is no counterpart to Rule 6.2 in the Disciplinary Rules of the Code. EC 2-29 states that "When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reason. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case." EC 2-30 states that "a lawyer should decline employment if the intensity of his personal feelings, as distinguished from a community attitude, may impair his effective representation of a prospective client."

**RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION**

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision would be incompatible with the lawyer's obligations to a client under Rule 1.7; or
(b) where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Code Comparison

There is no counterpart to this Rule in the Code.

RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment

Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially
benefitted.

Code Comparison

There is no counterpart to this Rule in the Code.

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make or permit to be made a false, misleading, deceptive or unfair communication about the lawyer or lawyer's services. A communication violates this rule if it:

(a) Contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or

(b) Creates an unjustified, false or misleading expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law; or

(c) states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official; or

(d) Compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated.

[Amended effective June 22, 1994; amended February 11, 1999; amended May 29, 1999; amended effective September 1, 2003, suspended by Order of August 8, 2003, reinstated effective October 1, 2004.]

RULE 7.2 ADVERTISING

(a) An advertisement is an active quest for clients involving a public or non-public
communication. The term “advertisement” includes, but is not limited to, communication by means of telephone, television, radio, motion picture, computer-accessed communication, newspaper, sign, directory, listing or through written communication.

(b) A lawyer who advertises a specific fee or range of fees for a particular service shall honor the advertised fee or range of fees for at least 90 days unless the advertisement specifies a longer period; provided that for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.

(c) All advertisements and written communications provided for under these rules shall disclose the geographic location by city and state of one or more offices of the lawyer or lawyers whose services are advertised or shall state that additional information about the lawyer or firm can be obtained by contacting the Mississippi Bar at a number designated by the Bar and included in the advertisement.

(d) All advertisements and written communications pursuant to these Rules shall include the name of at least one lawyer or the lawyer referral service responsible for their content. A lawyer shall not advertise services under a name that violates the provisions of Rule 7.7.

(e) No lawyer shall directly or indirectly pay all or a part of the cost of an advertisement by a lawyer not in the same firm unless the advertisement discloses the name and address of the nonadvertising lawyer, the relationship between the advertising lawyer and the nonadvertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the nonadvertising lawyer.

(f) The following information in advertisements and written communications shall be presumed not to violate the provisions of Rule 7.1:

1. Subject to the requirements of this Rule and Rule 7.7, the name of the lawyer or law firm, a listing of lawyers associated with the firm, office addresses and telephone numbers, office and telephone service hours, and a designation such as "attorney" or "law firm."

2. Date of admission to The Mississippi Bar and any other Bars and a listing of federal courts and jurisdictions other than Mississippi where the lawyer is licensed to practice.

3. Foreign language ability.

4. Prepaid or group legal service plans in which the lawyer participates.

5. Acceptance of credit cards.
(6) Fee for initial consultation and fee schedule, subject to the requirements of paragraph (b) of this Rule.

(7) A listing of the name and geographic location by city and state of one or more offices of a lawyer or law firm as a sponsor of a public service announcement or charitable, civic or community program or event.

(g) Nothing in this Rule prohibits the inclusion of the name of a lawyer or law firm in law lists and law directories intended primarily for the use of the legal profession of such information as has traditionally been included in these publications.

(h) A copy or recording of an advertisement or written or recorded communication shall be submitted to the Office of General Counsel of the Mississippi Bar (hereinafter referred to as “OGCMB”) in accordance with the provisions of Rule 7.5. The OGCMB shall retain a copy of such advertisement or communication for three (3) years from the date of submission. The lawyer shall retain a copy or recording for five (5) three (3) years after its last dissemination along with a record of when and where it was used.

(i) The lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or a written or recorded communication permitted by these Rules and may pay the usual charges of a lawyer referral service or to other legal service organization.

[Amended effective June 22, 1994; amended August 20, 1998; amended February 11, 1999; amended effective September 1, 2003, suspended by Order of August 8, 2003; amended effective October 1, 2004.]

Comment

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. The public’s need to know about legal services can be fulfilled in part through advertising which provides the public with useful, factual information about legal rights and needs and the availability and terms of legal services from a particular lawyer or law firm. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. Nevertheless, certain types of advertising by lawyers create the risk of practices that are misleading or overreaching and can create unwarranted expectations by laymen untrained in the law. Such advertising can also adversely affect the public’s confidence and trust in our judicial system.
The language in Rule 7.2(a) is reflective of that set forth in the ABA’s Model Rules of Professional Conduct.

One developing area of communications to which the rules relating to communications about lawyers' services are intended to apply is computer-accessed communications. For purposes of this rule, "computer-accessed communications" are defined as information regarding a lawyer's or law firm's services that is read, viewed, or heard directly through the use of a computer. Computer-accessed communications include, but are not limited to, Internet presences such as home pages or World Wide Web sites, unsolicited electronic mail communications, and information concerning a lawyer's or law firm's services that appears on World Wide Web search engine screens and elsewhere.

This Rule is included in order to balance the public's need for useful information, the state's need to ensure a system by which justice will be administered fairly and properly, and the state's need to regulate and monitor the advertising practices of lawyers, with a lawyer's right to advertise the availability of the lawyer's services to the public. This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other factual information that might invite the attention of those seeking legal assistance. Rule 7.2(c) requires advertisements to contain a geographic office location because experience in other jurisdictions has shown, in the absence of such a rule, members of the public have been misled into employing an inaccessible lawyer in a distant city or another state. See Rule 7.04(j), Tex. Disciplinary R. Prof. Conduct.

Neither this Rule nor Rule 7.4 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

This Rule applies to advertisements and written communications directed at prospective clients and concerning a lawyer's or law firm's availability to provide legal services. The Rule does not apply to communications between lawyers, including brochures used for recruitment purposes.

**Paying Others to Recommend a Lawyer.** A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay or provide other tangible benefits to another person for procuring professional work. However, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs. Paragraph (i) does not prohibit paying regular compensation to
an assistant, such as secretary or advertising consultant, to prepare communications permitted by this Rule.

[Comment amended effective June 22, 1994; amended February 11, 1999; amended May 20, 1999; amended September 1, 2003, suspended by Order of August 8, 2003; amended effective October 1, 2004.]

**RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS**

(a) A Lawyer shall not by in-person live telephone or real-time electronic contact solicit professional employment from a particular prospective client with whom the lawyer has no family, close personal, or prior professional relationship when a significant motive of the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a particular prospective client by written, recorded or electronic communication or by in-person, telephone or real time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) Prospective client has made known to the lawyer the desire not to be solicited by the lawyer or

(2) The solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a particular prospective client known to be in need of legal services in a particular matter, with whom the lawyer has no family, close personal, or prior professional relationship, shall include the words, "solicitation material" on the outside envelope or at the beginning and ending of any recorded communication.

(d) Notwithstanding the prohibitions of paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.
Comment

There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a particular prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of particular prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or auto-dialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and are not subject to third party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that...
are false and misleading.

But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2, the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

The requirement in Rule 7.3(c) that certain communications be marked "Solicitation Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

Paragraph (d) of this Rule would permit an attorney to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization referred to in paragraph (d) must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the
organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See Rule 8.4(a).

[Amended effective June 22, 1994; amended February 11, 1999; amended effective November 3, 2005.]

**Code Comparison**

DR 2-104(A) provided with certain exceptions that "[a] lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice . . ." The exceptions include DR 2-104(A)(1), which provided that a lawyer "may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client." DR 2-104(A)(2) through DR 2-104(A)(5) provided other exceptions relating, respectively, to employment resulting from public educational programs, recommendation by a legal assistance organization, public speaking or writing and representing members of a class in class action litigation.

**RULE 7.4 LEGAL SERVICE INFORMATION**

(a) Each lawyer or law firm that advertises his, her or its availability to provide legal services shall have available in written form for delivery to any potential client:

(1) A factual statement detailing the background, training and experience of each lawyer or law firm.

(2) If the lawyer or law firm claims special expertise in the representation of clients in special matters or publicly limits the lawyer's or law firm's practice to special types of cases or clients, the written information shall set forth the factual details of the lawyer's experience, expertise, background, and training
in such matters.

Further, any advertisement or written communication shall advise any potential client of the availability of the above information by prominently displaying in all such advertisements and communications the following notice: FREE BACKGROUND INFORMATION AVAILABLE UPON REQUEST.

(b) Whenever a potential client shall request information regarding a lawyer or law firm for the purpose of making a decision regarding employment of the lawyer or law firm:

(1) The lawyer or law firm shall promptly furnish (by mail if requested) the written information described in paragraph (a) of this Rule.

(2) The lawyer or law firm may furnish such additional factual information regarding the law firm deemed valuable to assist the client.

(c) A copy of all information furnished to clients by reason of this Rule shall be retained by the lawyer or law firm for a period of five years after the last regular use of the information.

(d) Any factual statement contained in any advertisement or written communication or any information furnished to a prospective client under this Rule shall not:

(1) Be directly or inherently false or misleading;

(2) Be potentially false or misleading;

(3) Fail to disclose material information necessary to prevent the information supplied from being actually or potentially false or misleading;

(4) Be unsubstantiated in fact; or

(5) Be unfair or deceptive.
(e) Upon reasonable request by The Mississippi Bar, a lawyer shall promptly provide proof that any statement or claim made in any advertisement or written communication, as well as the information furnished to a prospective client as authorized or required by these Rules, is in compliance with paragraph (d) above.

(f) A statement and any information furnished to a prospective client, as authorized by paragraph (a) of this Rule, that a lawyer or law firm will represent a client in a particular type of matter, without appropriate qualification, shall be presumed to be misleading if the lawyer reasonably believes that a lawyer or law firm not associated with the originally retained lawyer or law firm will be associated or act as primary counsel in representing the client. In determining whether the statement is misleading in this respect, the history of prior conduct by the lawyer in similar matters may be considered.

[Adopted effective June 22, 1994; amended February 11, 1999.]

Comment

Consumers and potential clients have a right to receive factual, objective information from lawyers who are advertising their availability to handle legal matters. The Rule provides that potential clients may request such information and be given an opportunity to review that information without being required to come to a lawyer's office to obtain it. Selection of appropriate counsel is based upon a number of factors. However, selection can be enhanced by potential clients having factual information at their disposal for review and comparison.

[Amended February 11, 1999.]

RULE 7.5 EVALUATION OF ADVERTISEMENTS

(a) Mandatory Submission. A copy or recording of any advertisement to be published shall be submitted to the Office of the General Counsel of the Mississippi Bar (OGCMB) as set forth in paragraph(c) below prior to its first dissemination.
(b) **Exemptions.** The following are exempt from this submission requirement:

1. Any advertisement that contains no illustrations and no information other than that set forth in Rules 7.2 and 7.4;
2. Any telephone directory advertisement;
3. Notices or announcements that do not solicit clients, but rather state new or changed associations or membership of firms, changed location of offices, the opening of new offices, and similar changes relating to a lawyer or law firm;
4. Professional business cards or letterhead;
5. On premises office signage;
6. Notices and paid listings in law directories addressed primarily to other members of the legal profession;
7. Advertisements in professional, trade, academic, resource or specialty publications circulated to specific subscribing audiences rather than the general public at large that announce the availability of a lawyer or law firm to practice a particular type of law in many jurisdictions and that are not for the purpose of soliciting clients to commence or join in specific litigation to be performed in Mississippi;
8. Internet Web pages viewed via a Web browser, in a search initiated by a person without solicitation.
9. Informative or scholarly writings in professional, trade or academic publications;
10. A communication mailed only to existing clients, former clients or other lawyers;
11. Any written communications requested by a prospective client;
12. Any notices or publications required by law; and
13. Such other exemptions as may be authorized by the OGCMB.

(c) **Items to be submitted.** A submission with to the OGCMB pursuant to paragraph (a) shall consist of:

1. A copy of the advertisement or communication in the form or forms in which it is to be disseminated (e.g., videotapes, audiotapes, print media, photographs or other accurate replicas of outdoor advertising);
2. A transcript, if the advertisement or communication is on videotape
or audiotape;

(3) A statement of when and where the advertisement has been, is, or will be used; and

(4) A fee of twenty-five dollars ($25) per submission of advertisement or communication timely filed as provided in paragraph (a), or a fee of one hundred and fifty dollars ($150) for submissions not timely filed, made payable to The Mississippi Bar. This fee shall be used only for administration and enforcement of these Rules. A "submission of advertisement" is defined as each advertisement unless the same advertisement is to be republished in print and electronic media utilizing the same script. An advertisement does not need to be resubmitted upon each dissemination so long as no changes to form or content are made following the previous submission.

(d) Optional Advisory Opinion. A lawyer may request an advisory opinion concerning the compliance of a contemplated advertisement or communication with these Rules in advance of disseminating the advertisement or communication by submitting the advertisement or communication and fee specified in paragraph (1) below to the OGCMB at least forty-five days prior to such dissemination. The OGCMB shall, upon receipt of such request, evaluate all advertisements and communications submitted to it pursuant to this Rule for compliance with the applicable requirements set forth in this Rule. If an evaluation is requested, the OGCMB shall render its advisory opinion within forty-five days of receipt of a request unless the OGCMB determines that there is reasonable doubt that the advertisement or communication is in compliance with the Rules and that further examination is warranted but such evaluation cannot be completed within the forty-five day time period, and so advise the filing lawyer within the forty-five day time period. In the latter event, the OGCMB shall complete its review as promptly as the circumstances reasonably allow. If the OGCMB does not send any correspondence or notice to the lawyer within forty-five days, the advertisement or communication will be deemed approved.

(1) Items to be submitted to obtain Advisory Opinion. A submission to OGCMB to obtain an advisory opinion pursuant to paragraph (d) shall consist of the same items as (c)(1)(2)(3) above, and an additional fee of fifty dollars ($50) per submission of advertisement or communication made payable to The Mississippi Bar. This fee shall be used only for the purposes of evaluation and/or review of advertisements and preparing the Advisory Opinion. A “submission of advertisement” is defined as each advertisement unless the same advertisement is to be republished in print or electronic media utilizing the same script.

(2) Use of finding. A finding by the OGCMB of either compliance or
noncompliance shall not be binding in disciplinary proceedings, but may be offered as evidence.

(3) **Change of circumstances.** If a change of circumstances occurring subsequent to the OGCMB’s evaluation of an advertisement or communication raises a substantial possibility that the advertisement or communication has become false or misleading as a result of the change in circumstances, the lawyer shall promptly resubmit the advertisement or a modified advertisement with the OGCMB along with an explanation of the change in circumstances and a fee of twenty dollars ($20) per “submission of advertisement or communication.”

(e) **Substantiation.** If requested to do so by the OGCMB, the requesting lawyer shall submit information to substantiate representations made or implied in that lawyer's advertisement or communication.

(f) **Non-compliance.** When the OGCMB determines that an advertisement or communication is not in compliance with the applicable Rules, the OGCMB shall advise the lawyer by certified mail that dissemination or continued dissemination of the advertisement or communication may result in professional discipline.

(g) **Policies and procedures.** The Mississippi Bar shall formulate the necessary policies and procedures to implement and enforce the provisions of this Rule and submit same to the Supreme Court for approval pursuant to Rule 3 of the Mississippi Rules of Discipline.

[Adopted effective June 22, 1994; amended February 5, 1999; amended effective September 1, 2003, suspended by Order of August 8, 2003; amended effective October 1, 2004.]

**Comment**

This Rule has a dual purpose: to enhance the Court's and the bar's ability to monitor advertising practices for the protection of the public and to assist members of the Bar to conform their advertisements to the requirements of these Rules. This Rule requires lawyers to submit their advertisements and other communications and gives them the opportunity to obtain an advisory opinion. In such event, the OGCMB will advise the filing lawyer in writing whether the advertisement appears to comply with the Rules. The OGCMB’s opinion will be advisory only, but may be considered as evidence of a good faith effort to comply with these Rules. A lawyer who wishes to be able to rely on the OGCMB’s opinion
as demonstrating the lawyer's good faith effort to comply with these Rules has the responsibility of supplying the OGCMB with all information material for a determination of whether an advertisement or communication is false or misleading.

[Comment amended February 11, 1999; amended effective September 1, 2003, suspended by Order of August 8, 2003; amended effective October 1, 2004.]

**RULE 7.6 COMMUNICATION OF CERTIFICATION OR DESIGNATION**

(a) A lawyer may communicate the fact that he or she has been certified or designated in a field of law by a named organization or authority, but only if that certification or designation is granted by an organization or authority whose specialty certification or designation program is accredited by the American Bar Association. Notwithstanding the provisions of this Rule, a lawyer may communicate the fact that he is certified or designated in a particular field of law by a named, non-American Bar Association organization or authority, but must disclose such fact and further disclose that there is no procedure in Mississippi for approving certifying or designating organizations and authorities.

(b) Notwithstanding the provisions of Rule 7.6(a), a lawyer may state or imply as follows:

1. A lawyer who is admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation; or

2. A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation.

[Former Rule 7.4 amended and renumbered effective June 22, 1994; amended February 11, 1999.]

**Comment**

125
Rule 7.6(a) permits a lawyer to communicate that a lawyer has been certified or designated as a specialist in a field of law when the American Bar Association has accredited the organization's or authority's specialty program to grant such certification or designation. Certification or designation procedures imply that an objective entity has recognized a lawyer's higher degree of specialized ability than is suggested by general licensure to practice law. Those objective entities may be expected to apply standards of competence, experience and knowledge to ensure that the lawyer's recognition as a specialist is meaningful and reliable. In order to ensure that the consumers can obtain access to useful certification or designation information, the name of the certifying or designating organization or other agency must be included in any communication regarding the certification or designation. See Peel v. Attorney Registration & Disciplinary Com., 496 U.S. 91 110 S. Ct. 2281, 210 L. Ed. 2d 83 (1990).

However, even though this Rule permits a lawyer to communicate that a lawyer has been certified or designated as a specialist in the field of law when the American Bar Association has accredited the organization's or authority's specialty program, a lawyer may communicate the fact that he is certified or designated in a field of law by a named, non-American Bar Association accredited organization or authority, provided such fact is disclosed and further disclosure is made that there is no procedure in Mississippi for approving certifying or designating organizations and authorities.

Recognition of specialization in patent matters is a matter of law and established policy of the Patent and Trademark Office, as reflected in Rule 7.6(b)(1).

Rule 7.6(b)(2) recognizes that the designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[Amended effective June 22, 1994; amended February 11, 1999.]

RULE 7.7 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1.

(b) A lawyer shall not practice under a trade or fictitious name or a name that is
misleading as to the identity of the lawyer or lawyers practicing under such name. A lawyer in private practice may use the term "legal clinic" or "legal services" in conjunction with the lawyer's own name if the lawyer's practice is devoted to providing routine legal services for fees that are lower than the prevailing rate in the legal community for those services.

(c) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(d) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm except as permitted by Rule 1.17.

(e) Lawyers may state or imply that they practice in a partnership or to other organization only when that is the fact except as permitted by Rule 1.17.

[Former Rule 7.5 amended and renumbered effective June 22, 1994; amended August 20, 1998; amended February 11, 1999.]

Comment

A firm may be designated by the names of all or some of its members, or by the names of deceased members where there has been a continuing succession in the firm's identity. The United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

Paragraph (a) precludes use in a law firm name of terms that imply that the firm is something other than a private law firm. Two examples of such terms are "academy" and "institute". Paragraph (b) precludes use of a trade or fictitious name suggesting that the
firm is named for a person when in fact such a person does not exist or is not associated with the firm. Although not prohibited per se, the terms "legal clinic" and "legal services" would be misleading if used by a law firm that did not devote its practice to providing routine legal services at prices below those prevailing in the legal community for like services.

With regard to paragraph (c), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones", for that title suggests partnership in the practice of law.

[Amended effective June 22, 1994; amended February 11, 1999.]

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as
that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and Article 3, Section 26 of the Mississippi Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

**Code Comparison**

DR 1-101(A) provides that "A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar." DR 1-101(B) provides that "A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute." With respect to paragraph (b) of Rule 8.1, DR 1-102(A)(5) provides that "A lawyer shall not ... Engage in conduct that is prejudicial to the administration of justice."

**RULE 8.2 JUDICIAL AND LEGAL OFFICIALS**

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicating officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.
Comment

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Code Comparison

With regard to Rule 8.2(a), DR 8-102(A) provides that "A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office." DR 8-102(B) provides that "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

There is no counterpart to Rule 8.2(b) in the Code.

See MSB Ethics Opinion No. 36.

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

[Amended June 23, 1994.]

Comment

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[Amended June 23, 1994.]

Code Comparison

DR 1-103(A) provides that "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to ... authority empowered to investigate or act upon such violation."
RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

[Amended effective November 3, 2005 to add new subsection (e).]

Comment

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics.
relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

**Code Comparison**

With regard to Rule 8.4(a)-(d) DR 1-102(A) provides that "A lawyer shall not:

"(1) Violate a Disciplinary Rule.

"(2) Circumvent a Disciplinary Rule through actions of another.

"(3) Engage in illegal conduct involving moral turpitude.

"(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

"(5) Engage in conduct that is prejudicial to the administration of justice.

"(6) Engage in any other conduct that adversely reflects on his fitness to practice law."
Rule 8.4(e) is substantially similar to DR 9-101(C).

There is no direct counterpart to Rule 8.4(f) in the Disciplinary Rules of the Code. EC 7-34 states in part that "A lawyer ... is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal." EC 9-1 states that "A lawyer should promote public confidence in our legal system and in the legal profession."

See MSB Ethics Opinions Nos. 22, 38 and 75.

**RULE 8.5 JURISDICTION**

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer advertises, provides or offers to provide any legal services to be performed in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

[Amended effective September 1, 2003, suspended by Order of August 8, 2003, reinstated effective October 1, 2004.]

**Comment**

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5. It is settled law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. Nothing in this rule shall be construed to allow an unlicensed individual to engage in the practice of law in Mississippi contrary to any other rule or statute. See also
Mississippi Rules of Discipline 1(1.1) and 16. The language in Rule 8.5 is reflective of that set forth in the ABA’s Model Rules of Professional Conduct. The scope of Rule 8.5 is not intended to extend to advertisements such as those reference in Rule 7.5(b)(7), unless they are for the purpose of soliciting clients to commence or join in litigation to be performed in Mississippi.

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

[Amended effective September 1, 2003, suspended by Order of August 8, 2003, reinstated effective October 1, 2004.]

**Code Comparison**

There is no counterpart to this Rule in the Code.