

Because Death is Different: Legal and Moral Arguments for Broadening Defendants' Rights to Discovery in Federal Capital Cases

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BECAUSE DEATH IS DIFFERENT:¹ LEGAL AND MORAL ARGUMENTS FOR BROADENING DEFENDANTS' RIGHTS TO DISCOVERY IN FEDERAL CAPITAL CASES

Capital punishment has existed in America since this nation was founded,² yet there are few other legal issues that inspire such passionate debate among scholars³ and among the administrators of justice.⁴ Arguments on both sides of the line rest in

¹ See *Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976) (“[D]eath is a punishment different from all other sanctions in kind rather than degree.”) (citations omitted); HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* (1987); BARRY NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* 30 (1987) [hereinafter “ARBITRARINESS”] (explaining the “‘death is different’ doctrine” of *Furman v. Georgia*, 408 U.S. 238 (1972), as “the proposition that the death penalty cannot constitutionally be administered in a manner that might be acceptable for sentences to prison, probation, and fines”) (footnote omitted).

² See *Furman*, 408 U.S. at 242–43, for a discussion of the influence of the English Bill of Rights of 1689 on capital punishment in colonial America.

³ See FRANK G. CARRINGTON, *NEITHER CRUEL NOR UNUSUAL* 19 (1978) (“As far back as 1792, one Benjamin Rush, an energetic and apparently influential Philadelphia physician, took it upon himself to call for an end to capital punishment because a sentence of life imprisonment held out the possibility of rehabilitation of the criminal.”) (footnote omitted); see also ERNEST VAN DEN HAAG (PRO) & JOHN P. CONRAD (CON), *THE DEATH PENALTY: A DEBATE* (1983).

⁴ For an example of the vehement disagreement between Supreme Court justices, see *Callins v. Collins*, 510 U.S. 1141 (1994) (denying certiorari). Justice Blackmun dissented from the denial of certiorari and announced that he had come to believe that the death penalty could not be administered in a manner consistent with the United States Constitution. See *id.* at 1157 (Blackmun, J., dissenting); *id.* at 1145 (“From this day forward, I no longer shall tinker with the machinery of death.”). Justice Blackmun began with a description of the petitioner’s impending execution:

On February 23, 1994, at approximately 1:00 a.m., Bruce Edwin Callins will be executed by the State of Texas. Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold Callins, no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction.

Id. at 1143 (Blackmun, J., dissenting). In response to Justice Blackmun’s dissent, Justice Scalia authored a concurrence with the denial:

JUSTICE BLACKMUN begins his statement by describing with poignancy the death of a convicted murderer by lethal injection. He chooses, as the case

religion,⁵ ethics,⁶ legal principles,⁷ and sheer emotion.⁸ But rea-

in which to make that statement, one of the less brutal of the murders that regularly come before us—the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern. The death-by-injection which JUSTICE BLACKMUN describes looks pretty desirable next to that. It looks even better next to some of the other cases currently before us which JUSTICE BLACKMUN did not select as the vehicle for his announcement that the death penalty is always unconstitutional—for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. How enviable a quiet death by lethal injection compared with that!

Id. at 1142–43 (Scalia, J., concurring) (citations omitted).

⁵ See, e.g., HELEN PREJEAN, C.S.J., *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES 122–23* (1993) (recounting a conversation between Sister Helen Prejean, who served as a spiritual advisor to death row inmate Patrick Sonnier prior to his execution, and the prison chaplain).

Of course, those who justify retaliation can cite as authority numerous passages in the Bible, where divine vengeance is meted out to guilty and innocent alike: the Great Flood, the destruction of Sodom and Gomorrah, the slaying of the firstborn sons of the Egyptians . . . , to mention just a few examples. Even the Pauline injunction “Vengeance is mine, says the Lord, I will repay” can be interpreted as a command and a promise—the command to restrain individual impulses toward revenge in exchange for the assurance that God will be only too pleased to handle the grievance—in spades. That God wants to “get even” like the rest of us does not seem to be in question.

....

First, I can't accept that God has fits of rage and goes about trucking in retaliation. Second, I can't accept that any group of human beings is trustworthy enough to mete out so ultimate and irreversible a punishment as death. And, third, I can't accept that it's permissible to kill people provided you “prepare” them with good spiritual counsel to “meet their Maker.” . . .

Id. at 123 (footnotes omitted); see also VERNON W. REDEKOP, *A LIFE FOR A LIFE? DEATH PENALTY ON TRIAL 37* (1990) (“The biblical word, ‘Vengeance is mine; I will repay, says the Lord,’ could be read, ‘Punishment is for me; I will do the punishing, says the Lord.’”).

⁶ See BEDAU, *supra* note 1, at 9–10 (“Central among these ethical considerations are the value, worth, and dignity of persons—the victims of crime, the offenders, and the rest of society.”); CARRINGTON, *supra* note 3, at 136 (“Society has not only a right but an affirmative duty to punish those who transgress against its members.”); TOM SORELL, *MORAL THEORY AND CAPITAL PUNISHMENT 57* (1988) (contrasting utilitarian theory, which supports the idea that the deterrent effect of capital punishment makes “the execution of [violent] criminals . . . right or at least morally permissible[,]” with the Christian ethical theory, which is “[a]rranged into precepts flowing from a principle about charity or love”).

⁷ See CARRINGTON, *supra* note 3, at 82–112 (discussing the deterrent and incapacitation effects of capital punishment as support for the death penalty).

⁸ For a compelling dramatization of the fierce emotions on both sides of the death penalty debate, see the film version of Sister Prejean's book, *supra* note 5, *DEAD MAN WALKING* (Gramercy Pictures 1995).

sonable persons on both sides of the line would have to agree that if we are to have a death penalty, it must be justly administered. Death is the most extreme form of punishment; the utmost care is required in its imposition.⁹ There are few who would knowingly support a system that imposed death without granting the defendant due process,¹⁰ that discriminated by race or class of the defendant or victim, or regularly resulted in the execution of the innocent.

Indeed, the law demands protection against such evils if the death penalty is to be imposed. In *Furman v. Georgia*,¹¹ the Supreme Court, in a 5-4 decision, struck down Georgia's death penalty¹² on the grounds that, while the death penalty was not in and of itself unconstitutional,¹³ its arbitrary application under the Georgia statute rendered it cruel and unusual.¹⁴ The *Furman* decision was the longest in the Court's history, at 50,000 words, 243 pages.¹⁵ Despite its length, however, *Furman* offered little guidance as to the constitutional application of a death

⁹ See *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (denying certiorari) (Blackmun, J., dissenting). In his eloquent dissent, Justice Blackmun stressed the finality and the seriousness of imposing the death penalty:

The wheels of justice will churn again, and somewhere, another jury or another judge will have the unenviable task of determining whether some human being is to live or die. We hope, of course, that the defendant whose life is at risk will be represented by competent counsel—someone who is inspired by the awareness that a less than vigorous defense truly could have fatal consequences for the defendant. We hope that the attorney will . . . appear before a judge who is still committed to the protection of defendants' rights. . . . In the same vein, we hope that the prosecution, in urging the penalty of death, will have exercised its discretion wisely, free from bias, prejudice, or political motive, and will be humbled, rather than emboldened, by the awesome authority conferred by the State.

Id.

¹⁰ See *Prejean v. Maggio*, 765 F.2d 482, 484 (1985) (noting that "[s]ubstantive due process requires that a state follow procedures that insure against arbitrary or capricious imposition of the death penalty") (emphasis added).

¹¹ 408 U.S. 238 (1972).

¹² See GA. CODE ANN. § 26-1005 (Supp. 1971), amended by GA. CODE ANN. § 17-10-30 (1998).

¹³ See *Furman*, 408 U.S. at 241 (Douglas, J., concurring) ("It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous.") (citations omitted).

¹⁴ See *id.* at 253 (Douglas, J., concurring) ("Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.")

¹⁵ See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 260 (1979) [hereinafter "THE BRETHERN"].

penalty; the justices wrote nine different opinions, and they continued to interpret and reinterpret the holdings of *Furman* in later cases.¹⁶ The Supreme Court has not addressed many of the constitutional implications of the relatively new federal death penalty,¹⁷ including the fair administration of pre-trial proceedings. However, three recent decisions by federal district courts in Rhode Island and Connecticut have limited the discovery rights of defendants in capital cases.¹⁸ These decisions warrant examination, mindful that defendants, even innocent ones, are often only separated from a death sentence by the niceties of procedure.¹⁹

This Note argues for broadening the defendant's right to discovery in the early stages of a potential federal capital case. Part I sets forth the procedure a U.S. Attorney must follow in order to obtain permission to file a notice of intent to seek the death penalty and explains the defendant's right to participate in that process. Part I also reviews recent district court holdings limiting defendants' rights to discovery in these early stages of a potential death penalty case. Part II explores the need for special care in the administration of death penalty cases because of the finality of death and the limitations of the appeal process. Part III examines the risk of racial bias in the imposition of the death penalty and concludes that principles of equality and law demand a heightened protection of the defendant's right to discovery of "pattern of discrimination" materials. Finally, Part IV submits that constitutional guarantees of the rights of due process and effective counsel mandate that potential defendants be

¹⁶ See, e.g., *McKleskey v. Kemp*, 481 U.S. 279 (1987) (upholding Georgia's death penalty statute against a claim that it was discriminatorily applied, and rejecting a study offered by the petitioner supporting his claim); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (striking down North Carolina's mandatory death penalty statute on the grounds that a failure to sentence defendants individually violated the Eighth and Fourteenth Amendments).

¹⁷ See Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848 (West 1994); Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 (West 1994).

¹⁸ See *United States v. Feliciano*, 998 F. Supp. 166 (D. Conn. 1998); *United States v. Boyd*, 931 F. Supp. 968 (D.R.I. 1996); *United States v. Roman*, 931 F. Supp. 960 (D.R.I. 1996).

¹⁹ See *Cochran & Co.: Death Penalty Survivors* (Court-TV television broadcast, Nov. 16, 1998) (statement by Peter Neufeld, civil rights lawyer and co-director of the Innocence Project, an organization that assists in appeals by those wrongly convicted, that when an innocent defendant has no new evidence to present, he must turn to the Constitution and to procedure to secure a reversal of his conviction).

granted broader discovery rights.

I. DISCOVERY IN FEDERAL CAPITAL CASES: LAW AND PRECEDENT

A. *Seeking the Federal Death Penalty: The Department of Justice Protocol*

The Department of Justice has set forth procedures to be followed by the United States Attorney's Office and the Attorney General's Office in every federal case in which the death penalty can be sought.²⁰ A U.S. Attorney may not seek the death penalty absent the Attorney General's prior written authorization.²¹ Whenever a defendant is charged with an offense subject to the death penalty, the U.S. Attorney must submit to the Assistant Attorney General for the Criminal Division a "Death Penalty Evaluation form" and a prosecution memorandum, which will include any aggravating and mitigating factors related to the crime and the defendant, as well as the defendant's background and criminal history.²² A committee appointed by the Attorney General reviews the case and makes a recommendation to the Attorney General, who ultimately may direct the U.S. Attorney to file a notice of intent to seek the death penalty with the trial court.²³

The Department of Justice protocol also provides for the defendant's participation in this pre-trial process.²⁴ The defendant has the right to present evidence of mitigating factors to both the U.S. Attorney's Office and the Attorney General's Committee.²⁵ The United States Attorneys' Manual states at section 9-10.030:

At the time an indictment charging a defendant with an offense subject to the death penalty is filed or unsealed, or before a United States Attorney's Office decides to request approval to seek the death penalty, whichever comes first, the United States Attorney should give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors,

²⁰ See UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-10.000-.100 (1997) [hereinafter "USAM"].

²¹ See *id.* § 9-10.020.

²² See *id.* § 9-10.040.

²³ See *id.* § 9-10.050.

²⁴ See *id.* § 9-10.030.

²⁵ See *id.* §§ 9-10.030 and 9-10.050.

to the United States Attorney for consideration.²⁶

Section 9-10.050 of the Manual states: "Counsel for the defendant shall be provided an opportunity to present to the [Attorney General's] Committee, orally or in writing, the reasons why the death penalty should not be sought."²⁷ The Committee considers all evidence presented to it, including evidence of racial bias, before making its recommendation.²⁸ The Committee balances the mitigating and aggravating factors and will recommend the filing of a notice of intent to seek the death penalty only if the statutory and non-statutory aggravating factors outweigh the mitigating factors.²⁹ While "any mitigating factor reasonably raised by the evidence should be considered in the light most favorable to the defendant,"³⁰ aggravating factors only "qualify for consideration in this analysis . . . [if they are] found to exist beyond a reasonable doubt."³¹

Since the defendant is permitted to present evidence on his or her behalf in this pre-trial stage of the proceeding, and because the Committee is compelled to consider it, a question has arisen regarding how much, if any, discovery the defendant should be entitled to in order to facilitate the presentation of this evidence. The federal district courts in the cases that follow considered this question.

B. The District Court Cases: Feliciano, Boyd, and Roman

The defendants in *United States v. Feliciano*³² were charged with a violent crime in aid of racketeering.³³ They moved for discovery of material they alleged was necessary to facilitate their presentation of evidence to the U.S. Attorney's office under section 9-10.030 of the United States Attorneys' Manual.³⁴

The *Feliciano* defendants made their motions following a discovery conference during which the government informed them "of the opportunity to provide any information the defense

²⁶ *Id.* § 9-10.030.

²⁷ *Id.* § 9-10.050.

²⁸ *See id.* § 9-10.080.

²⁹ *See id.*

³⁰ *Id.*

³¹ *Id.*

³² *Feliciano*, 998 F. Supp. 166 (D. Conn. 1998).

³³ *See id.* at 168; 18 U.S.C. § 1959(a)(5) (1994).

³⁴ *See Feliciano*, 998 F. Supp. at 168; *supra* notes 24-31 and accompanying text.

deems relevant to the issue of mitigation which the government should consider in determining whether to seek the death penalty.³⁵ The government nonetheless opposed the discovery motions as “premature.”³⁶

The defendants sought disclosure of both aggravating and mitigating factors, including “[e]vidence that the government has prosecuted minorities with death-eligible offenses with greater frequency than it has prosecuted whites who have committed similar offenses.”³⁷

The district court dealt perfunctorily with the defendants’ motion to discover aggravating factors. It ruled that the defendants were not entitled to discovery of aggravating factors the U.S. Attorney presented to the Assistant Attorney General if those factors were not subsequently to be presented in the penalty phase³⁸—though under section 9-10.050 of the U.S. Attorneys’ Manual, the Attorney General’s Committee would still be entitled to consider those factors in determining whether to recommend seeking the death penalty.³⁹ With respect to discovery of aggravating factors that *would* be deemed relevant in the penalty phase, the district court ruled that the defendants were not entitled to such materials until the U.S. Attorney had filed a notice of intent to seek the death penalty⁴⁰—after the defendants’ opportunity to present evidence to the U.S. Attorney and the Attorney General’s Committee had already passed.⁴¹

³⁵ *Feliciano*, 998 F. Supp. at 168.

³⁶ *Id.*

³⁷ *Id.* at 173. In addition, the defendants sought as mitigating evidence: evidence relating to “equally culpable” defendants who were charged with the same murder but were not facing the death penalty, *id.* at 170; evidence that the victims had “knowingly exposed” themselves to “deadly force” as active members of “rival gangs,” *id.* at 171; evidence relating to co-conspirators and co-defendants who had committed other death-eligible offenses in furtherance of the charged criminal enterprise, but who were not facing the death penalty, *see id.* at 172; and evidence relating to other co-conspirators or co-defendants who had committed other death-eligible offenses in furtherance of other racketeering enterprises within the state of Connecticut, *see id.* at 173. The scope of the defendants’ motions led the government to also oppose them as “overbroad.” *Id.* at 168.

³⁸ *See id.* at 175.

³⁹ *See* USAM, *supra* note 20, § 9-10.050 (“The Committee will consider all information presented to it . . .”).

⁴⁰ *See* *United States v. Feliciano*, 998 F. Supp. 166, 175 (D. Conn. 1998).

⁴¹ *See* USAM, *supra* note 20, § 9-10.030 (providing that the defendant have an opportunity to present evidence to the United States Attorney “[a]t the time an indictment charging [the] defendant with an offense subject to the death penalty is

The district court's discussion of mitigating factors was more extensive. In all criminal cases, the defendant's pre-trial discovery of mitigating factors is governed by the rule in *Brady v. Maryland*,⁴² upon which the *Feliciano* defendants relied.⁴³ In *Brady*, a criminal prosecution for murder committed during the perpetration of a robbery,⁴⁴ the Supreme Court held "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."⁴⁵ Despite the fact that the *Feliciano* defendants were entitled to present mitigating evidence to attempt to dissuade the government from filing a notice of intent to seek the death penalty,⁴⁶ prior to trial, the district court ruled that they were only entitled to discovery of mitigating factors that would also mitigate at the penalty phase, following a conviction.⁴⁷

The district court considered the defendants' request for evidence of racial disparity separately,⁴⁸ applying the *Armstrong*⁴⁹ standard for discovery of selective prosecution material. Under *Armstrong*, a defendant claiming that he or she is being selectively prosecuted on the basis of race must prove "that similarly situated individuals of a different race were not prosecuted."⁵⁰ The *Armstrong* standard for discovery of material to support this claim is strikingly similar to the standard of proof for the claim itself: In order to compel the prosecution to turn over material tending to prove selective prosecution, the defendant must "produce some evidence that similarly situated defendants of

filed or unsealed, or before a United States Attorney's Office decides to request approval to seek the death penalty"); see also *id.* § 9-10.050 (providing that the defendant have an opportunity to present evidence to the Attorney General's Committee prior to its recommendation to the Attorney General).

⁴² 373 U.S. 83 (1963).

⁴³ See *Feliciano*, 998 F. Supp. at 168. The *Feliciano* defendants also cited the Fifth, Sixth, and Eighth Amendments and Federal Rule of Criminal Procedure 16. See *id.*

⁴⁴ See *Brady*, 373 U.S. at 85.

⁴⁵ *Id.* at 87 (emphasis added).

⁴⁶ See *USAM*, *supra* note 20, § 9-10.030.

⁴⁷ See *Feliciano*, 998 F. Supp. at 172.

⁴⁸ See *id.* at 173-74.

⁴⁹ See *United States v. Armstrong*, 517 U.S. 456 (1996).

⁵⁰ *Id.* at 465 (citing *Ah Sin v. Wittman*, 198 U.S. 500 (1905)).

other races could have been prosecuted, but were not."⁵¹ The result is that defendants must *have* evidence of selective prosecution before they can *get* evidence of selective prosecution. The *Feliciano* court ruled that the defendants had not met this burden.⁵²

In reaching its decision, the *Feliciano* court relied, in part, on the interpretation of the United States Attorneys' Manual by the District of Rhode Island in *United States v. Roman*.⁵³ The *Roman* court ruled that the Department of Justice protocol merely sets forth internal procedure and "does not create substantive or procedural rights."⁵⁴ Therefore, the defendant, who had been charged with racketeering,⁵⁵ was not entitled to discovery of any "information relevant to the decision to seek the death penalty."⁵⁶ The following week, the same district court ruled on a discovery motion made by the defendants in *United States v. Boyd*,⁵⁷ a case involving the same event and one of the same defendants as *Roman*.⁵⁸ The *Boyd* defendants sought discovery of aggravating factors, this time claiming violation of their Sixth Amendment right to effective counsel.⁵⁹ The defendants alleged that without discovery, their attorneys could not adequately represent them⁶⁰ when offering evidence to the U.S. Attorney or Attorney General's Committee, pursuant to sections 9-10.030 and 9-10.050 of the United States Attorneys' Manual.⁶¹ The court denied discovery of the aggravating factors on the grounds that the Department of Justice death penalty authorization procedure was not a critical stage in the proceedings and, therefore, denial of discovery did not violate the defendants' Sixth Amendment

⁵¹ *Id.* at 469.

⁵² See *Feliciano*, 998 F. Supp. at 174. The discovery of material evidencing racial disparity in the imposition of the death penalty is discussed more extensively *infra* Part III.

⁵³ 931 F. Supp. 960 (D.R.I. 1996); see *Feliciano*, 998 F. Supp. at 169 (citing *Roman*, 931 F. Supp. at 964).

⁵⁴ *Roman*, 931 F. Supp. at 964.

⁵⁵ See *id.* at 962. The defendant was eligible for the death penalty because he was charged under 18 U.S.C. § 3591.

⁵⁶ *Id.* at 964.

⁵⁷ 931 F. Supp. 968 (D.R.I. 1996).

⁵⁸ See *id.* at 969.

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ See USAM, *supra* note 20, §§ 9-10.030, 9-10.050.

rights.⁶²

II. THE NEED FOR CARE: THE PHYSICAL FINALITY OF DEATH AND THE LEGAL FINALITY OF A DEATH SENTENCE

In a time when race often "plays a decisive role"⁶³ in sentencing, and quality legal representation is largely unavailable to the poor, courts are simultaneously stream-lining the judicial process, thereby "facilitating swifter executions."⁶⁴ In 1998, facing "undeniable evidence" that innocent people were being sentenced to die, the American Bar Association called for a moratorium on all executions at the state level.⁶⁵

It cannot be denied: Death is forever.⁶⁶ Since one cannot "take back" an execution once it has been carried out, extreme care must be exercised in deciding whom to execute. Chief Justice William Rehnquist conceded that the imposition of the death penalty requires extremely attentive review.⁶⁷ "Nothing could be more contrary to contemporary standards of decency or more shocking to the conscience than to execute a person who is actually innocent."⁶⁸ Yet, more defendants are wrongly sentenced to death than most people would probably feel comfortable admitting; in the last 20 years at least 70 people in the United States have been released from death rows after being found innocent.⁶⁹ Innocent people are convicted on false testimony by

⁶² See *Boyd*, 931 F. Supp. at 973. The argument that denial of discovery in this phase violates the defendant's right to effective counsel is discussed extensively *infra* Part IV.

⁶³ Stephen B. Bright, *Death Penalty Moratorium: Fairness, Integrity at Stake*, 13 CRIM. JUST. 28, 29 (1998).

⁶⁴ *Id.*

⁶⁵ See *id.*

⁶⁶ See *Woodson v. North Carolina*, 428 U.S. 280, 323 (1976) (Rehnquist, J., dissenting) ("One of the principal reasons why death is different is because it is irreversible. . .").

⁶⁷ See David Von Drehle, *When Harry Met Scalia: Why the Death Penalty is Dying*, WASH. POST, Mar. 6, 1994, at C3, available in 1994 WL 2274882.

⁶⁸ *Herrera v. Collins*, 506 U.S. 390, 430 (1993) (Blackmun, J., dissenting) (citations omitted).

⁶⁹ See Bright, *supra* note 63, at 30; see also Joseph P. Shapiro, *The Wrong Men on Death Row: A Growing Number of Bad Convictions Challenges the Death Penalty's Fairness*, U.S. NEWS & WORLD REP., Nov. 9, 1998, at 22 (stating that since 1976 there have been 486 executions and for every 7 executions, 1 other prisoner on death row has been found innocent); *Justice Stevens Criticizes Election of Judges*, WASH. POST, Aug. 4, 1996, at A14 (quoting Supreme Court Justice John Paul Stevens) ("The recent development of reliable scientific evidentiary methods has made

jailhouse informants,⁷⁰ mistaken eyewitness identifications,⁷¹ and coerced confessions.⁷² In 1992, Jay Smith was released from prison after spending six years on death row—the Pennsylvania Supreme Court ruled that the prosecutor had hidden evidence and lied to the jury.⁷³

Convicted murderers are not necessarily being released from prison on technicalities; in many cases, they are exonerated by DNA evidence⁷⁴ or when the real killers are found.⁷⁵ Sometimes,

it possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent.' ”)

⁷⁰ See Abraham McLaughlin, *Tales of Journey from Death Row to Freedom: Conference Put on by Critics Intended to Raise Question: How Many Innocents Are Being Executed?*, CHRISTIAN SCI. MONITOR, Nov. 16, 1998, at 3 (reporting that one-third of death row inmates later exonerated were convicted by false testimony from jailhouse informants), available in 1998 WL 2371951.

⁷¹ See *id.*; see also Welsh S. White, *Government Psychiatric Examinations and the Death Penalty*, 37 ARIZ. L. REV. 869, 886–87 (citing *United States v. Wade*, 388 U.S. 218 (1967)) (indicating that current police line-up procedures are conducive to mistaken identifications); cf. Erica Beecher-Monas, *Blinded by Science: How Judges Avoid the Science in Scientific Evidence*, 71 TEMP. L. REV. 55, 56 (1998) (recognizing the frequent unreliability of “scientific” evidence, such as “hair identification, bite-mark analysis, voice spectography, [and] handwriting analysis”).

⁷² See, e.g., Leonard Pitts Jr., *A Wrongful Sentence Compelling Reason to Scrap the Death Penalty*, CHI. TRIB., Nov. 24, 1998, at 25 (describing the conviction, death sentence, and later release of Freddie Pitts and Wilbert Lee), available in 1998 WL 2919190. Pitts and Lee were both beaten into confessing:

Thirty-five years ago, Pitts, now a 54-year-old trucker, and Lee, a 62-year-old Miami-Dade County corrections officer, were savagely beaten by sheriff's deputies until they confessed to a double murder in Port St. Joe, Fla. When the death sentence was handed down, said Pitts, “I was still rather dazed and confused by all the beatings. I don't think it ever really sunk in”

Id. (omission in original); see also Gail Johnson, *False Confessions and Fundamental Fairness: The Need For Electronic Recording Of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719 (indicating the need for electronic recording of interrogations to ensure against coerced confessions); Howard S. Liberson, Note and Comment, *People v. Cahill—California and Coerced Confessions—“Harmless” Evidentiary Bombshell*, 27 LOY. L.A. L. REV. 1559, 1572 (1994) (discussing a case in which a conviction was reversed because the defendant had been coerced to confess “by the police officers’ ‘implied promise of benefit or leniency’ ”).

⁷³ See McLaughlin, *supra* note 70.

⁷⁴ See *id.* (“In Kirk Bloodsworth’s case, DNA alone led to exoneration. This blond, burly former marine was put on Maryland’s death row in 1984 for the rape and murder of a young girl—based largely on an eyewitness identification. But a 1993 DNA test indicated Mr. Bloodsworth wasn’t at the scene. He was released.”); Shapiro, *supra* note 69 (reporting that, in the last ten years, ten people have been released from death row on the basis of DNA evidence).

⁷⁵ See Michael J. Muskat, Note, *Substantive Justice and State Interests in the Aftermath of Herrera v. Collins: Finding an Adequate Process for the Resolution of*

however, exoneration does not come until much later, and the wrongly convicted who are lucky enough to be released must continue to live under a shadow of suspicion.⁷⁶ In 1993, Gary Gauger found his parents dead, their throats slashed.⁷⁷ Police interrogated Gauger for eighteen hours about the slaying, eventually convincing him that he had murdered his parents during an alcoholic blackout by telling him they had a "stack of evidence" against him.⁷⁸ By the time the year was over, Gauger had been convicted, with no physical evidence,⁷⁹ of slashing his parents' throats and leaving their bodies rolled-up in pieces of carpet at their Illinois farm.⁸⁰ At trial, the police testified that Gauger had confessed.⁸¹ He was under sentence of death until

Bare Innocence Claims Through State Post Conviction Remedies, 75 TEX. L. REV. 131, 133 n.6 (1996) (noting cases in which innocent people were released when the real killer came forward).

⁷⁶ See Christine Alice Corcos, *Presuming Innocence: Alan Pakula and Scott Turow Take on the Great American Legal Fiction*, 20 OKLA. CITY U. L. REV. 129 (1997) (discussing film that illustrates the public's continued suspicion of accused individuals despite the legal presumption of innocence).

⁷⁷ See Shapiro, *supra* note 69, at 22.

⁷⁸ See *id.* at 24.

[I]t was Gauger's trusting nature that gave police a murder tale that day in 1993. Gauger says that during 18 hours of nonstop interrogation, detectives insisted they had a "stack of evidence" against him. They didn't—but it never occurred to the laid-back farmer that his accusers might be lying. Instead, he worried he might have blacked out the way he sometimes did in the days when he drank heavily. So Gauger went along with police suggestions that, to jog his memory, he hypothetically describe the murders. After viewing photos of his mother's slit throat, Gauger explained how he could have walked into her rug shop next to the house ("she knows and trusts me"), pulled her hair, slashed her throat and then done the same to his dad as he worked in his nearby antique-motorcycle shop. To police, this was a chilling confession. Even Gauger, by this point suicidal, believed he must have committed the crimes.

Id.

⁷⁹ See Carolyn Tuft, *In the Past 10 Years, 8 in Illinois Were Sentenced to Die, Later Found Innocent*, ST. LOUIS POST DISPATCH, Apr. 12, 1998, at A7, available in 1998 WL 3329588; see also *CBS Evening News* (CBS television broadcast, Nov. 10, 1998) (indicating that the only solid evidence in the case was a series of statements Gauger gave to the police after 14 hours of interrogation), available in 1998 WL 5149700.

⁸⁰ See Ray Quintanilla & Meg Murphy, *17 Indicted in Trail of Violence by Biker Gang: Gauger Slayings Linked to Robbery by the Outlaws*, CHI. TRIB., June 11, 1997, at 1, available in 1997 WL 3557502.

⁸¹ See *CBS Evening News*, *supra* note 79; see also Shapiro, *supra* note 69, at 24 ("At Gauger's trial, a fellow inmate made a dubious claim to hearing Gauger confess. The man, contacted in jail by *U.S. News*, offered to tell a very different story if the

September 1994, when Professor Laurence Marshall and his students at Northwestern University got Gauger's sentence reduced to life in prison.⁸² He was released two years later when the appellate court ruled that the police had had no probable cause to arrest him.⁸³ Only after Gauger's release, however, did the police admit that they truly had the wrong man. In the course of investigating a crime spree throughout Illinois and Wisconsin by members of a gang called the Outlaws, the police identified Randall E. Miller and James W. Schneider as the likely murderers of Mr. Gauger's parents.⁸⁴

The lead prosecutor in the Gauger case later acknowledged that "important information linking the slayings of Gauger's parents to Outlaws members began trickling in while Gauger was in prison."⁸⁵ Yet, in some instances, prosecutors have continued to oppose exoneration of a convicted defendant, even after another person has actually confessed to the crime.⁸⁶

Perhaps the most infamous example of procedural flaws leading to wrongful execution is the 1995 execution of Jesse Dewayne Jacobs. Jacobs was convicted of murder in Texas and sentenced to death. He had been at the scene of the crime, waived his right to counsel, and agreed to confess to the murder on condition that the district attorney promise to seek the death penalty—Jacobs believed that execution was preferable to life in prison.⁸⁷ At trial, however, Jacobs pleaded not guilty and re-

magazine would pay for an interview.”)

⁸² See Shapiro, *supra* note 69, at 26.

⁸³ See *id.*; see also Tuft, *supra* note 79, at A7.

⁸⁴ See Carolyn Starks, *Wisconsin Crime Led to Biker Suspect: Police Saw Similarities Between 1995 Burglary and Richmond Killings*, CHI. TRIB., June 12, 1997, at 1; Tom Held, *Justice Gets 2d Chance in Murder Case: Victims' Son Wants Fair Trial, No Death Penalty Threat for Accused Outlaws*, MILWAUKEE J. SENTINEL, June 12, 1997, at 1.

⁸⁵ Quintanilla & Murphy, *supra* note 80, at 18 (quoting Phillip Prossnitz of the District Attorney's office of McHenry County, Illinois).

⁸⁶ See, e.g., Shapiro, *supra* note 69, at 22 (“Even when another person confesses the legal system can be slow to respond.”). In 1983, Alejandro Hernandez and Rolando Cruz were sentenced to death for the rape and murder of a ten-year-old girl. Another man, Brian Dugan, later confessed to the crime but was never tried. Instead, Hernandez and Cruz were tried two more times. At the final trial in 1995, a police officer admitted on the stand that he had previously lied under oath. Hernandez and Cruz were acquitted and several police officers and former prosecutors were charged with official misconduct. See Tuft, *supra* note 79, at A7.

⁸⁷ See David Blumberg, Note, *Habeas Leaps from the Pan into the Fire: Jacobs v. Scott and the Antiterrorism and Effective Death Penalty Act of 1996*, 61 ALA. L. REV.

canted his confession, offering a different version of the murder and implicating his sister, Bobbie Hogan, as the killer.⁸⁸ Although Jacobs was convicted, the state later tried Hogan as the sole murderer, relying extensively on testimony by Jacobs.⁸⁹ In open court the prosecutor stated that he had changed his mind about what actually happened and that he was convinced that Bobbie Hogan was the one who pulled the trigger and that Jesse Jacobs was telling the truth.⁹⁰ Nevertheless, the state opposed Jacobs' appeals in state court and his habeas corpus petition in federal court,⁹¹ asserting that "[d]espite these post-trial developments . . . it [could] constitutionally carry out Jacobs' death sentence."⁹² Despite the prosecution's disavowal of Jacobs's confession and the unavailability of the death penalty for co-conspirators under Texas law, the Fifth Circuit upheld Jacobs's death sentence on the grounds that he had failed to prove "an independent constitutional violation."⁹³ The Supreme Court denied an application for a stay of execution and petition for certiorari.⁹⁴

The *Jacobs* case serves to illustrate the *de facto* legal finality of a death sentence.⁹⁵ Since *Jacobs*, a prisoner's ability to challenge his or her conviction or sentence has become even more limited, due to federal habeas reform enacted in the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA).⁹⁶

The major argument for limiting habeas relief is based on a need for judicial efficiency and "finality" in the judicial process.⁹⁷ To accomplish this end, the AEDPA imposes time limits, procedural limits, and limits on the number of petitions that may be

557, 562 (1997); *Jacobs v. Scott*, 513 U.S. 1067, 1067 (Stevens, J., dissenting).

⁸⁸ See *Jacobs v. Scott*, 513 U.S. at 1068 (Stevens, J., dissenting).

⁸⁹ See Blumberg, *supra* note 87, at 564-67.

⁹⁰ See *id.* at 564-65.

⁹¹ See *id.* at 565.

⁹² *Jacobs*, 513 U.S. at 1069 (Stevens and Ginsburg, JJ., dissenting).

⁹³ Blumberg, *supra* note 87, at 566 (quoting *Jacobs v. Scott*, 31 F.3d 1319, 1324 (5th Cir. 1994)).

⁹⁴ See *Jacobs v. Scott*, 513 U.S. at 1067.

⁹⁵ *De facto* means in fact, actually. See BLACK'S LAW DICTIONARY 416 (6th ed. 1990).

⁹⁶ See 28 U.S.C. §§ 2254-55 (1994).

⁹⁷ See, e.g., *Herrera v. Collins*, 506 U.S. 390, 392 (1993); Blumberg, *supra* note 87, at 562, 566.

filed,⁹⁸ as well as limitations on the grounds for which habeas relief may be granted.⁹⁹ For example, federal prisoners challenging the imposition of a sentence may be granted habeas relief on one of only four grounds: (1) that the sentence was imposed in violation of the Constitution or the laws of the United States; (2) that the court was without jurisdiction to impose such sentence; (3) that the sentence was in excess of the maximum authorized by law; (4) that the sentence is subject to collateral attack.¹⁰⁰ The net effect of federal habeas reform is that it is significantly more difficult for convicted petitioners to remedy constitutional defects in their convictions or sentencing.¹⁰¹

III. CHALLENGING RACIAL BIAS: THE ERRONEOUS APPLICATION OF THE ARMSTRONG STANDARD TO DISCOVERY OF "PATTERN OF DISCRIMINATION" MATERIALS

At the federal level, the Department of Justice protocol potentially provides a safeguard against racial bias in sentencing by requiring the Attorney General's Committee to consider any evidence presented by the defendant "that the Department has engaged in a pattern or practice of racial discrimination in the administration of the Federal death penalty."¹⁰² The defendants in *Feliciano* and *Roman* sought discovery of such material, but their motions failed because they could not meet the stringent test of *Armstrong*.¹⁰³ In *Roman*, the court denied discovery because the defendants had failed to offer evidence that the United States Attorney had not pursued the death penalty in cases of similarly-situated defendants of a different race¹⁰⁴—though this is precisely what the defendants were attempting to discover.

Whether the *Armstrong* standard is proper under any cir-

⁹⁸ See 28 U.S.C. §§ 2254-55 (1994).

⁹⁹ See *id.*

¹⁰⁰ See *id.*; see also Kevin T. Godlewski & Michael Golden, *Habeas Relief for Federal Prisoners*, 85 GEO. L.J. 1545 (1997) (outlining jurisdiction, venue, and recognizable claims pursuant to 28 U.S.C. § 2255 (1994)).

¹⁰¹ See generally Godlewski & Golden, *supra* note 100. Some critics have also suggested that the habeas provisions of the AEDPA violate the constitutional guarantees of due process. See, e.g., A.B.A. Panel Discussion, *Dead Man Walking without Due Process? A Discussion of the Antiterrorism and Effective Death Penalty Act of 1996*, 23 N.Y.U. REV. L. & SOC. CHANGE 163 (1997).

¹⁰² USAM, *supra* note 20, § 9-10.050.

¹⁰³ For a discussion of the *Feliciano* and *Roman* cases see *supra* Part I.B.

¹⁰⁴ See *United States v. Roman*, 931 F. Supp. 960, 968 (D.R.I. 1996).

cumstances is debatable.¹⁰⁵ Regardless, its application in federal capital cases is legally unsound. The circumstances of *Armstrong* are clearly distinguishable from the district court cases in which it was invoked: In *Armstrong* the defendant claimed selective prosecution.¹⁰⁶ In the cases discussed above, the defendants were not seeking to have their indictments dismissed, as was acknowledged by the court in *Feliciano*.¹⁰⁷ Rather, the defendants sought to obtain evidence they were entitled to have considered by the Government, in attempting to dissuade it from seeking the death penalty. Recognizing the broad discretion granted to the Government in deciding whom to prosecute,¹⁰⁸ the *Armstrong* court placed the burden of proving selective prosecution squarely on the shoulders of the defendant.¹⁰⁹ In contrast, the prosecutor in a capital case has little discretion in determining whether to seek the death penalty: The authorization process is strictly governed by the United States Attorneys' Manual and the prosecutor cannot file a notice of intent without the permission of the Attorney General.¹¹⁰ The U.S. Attorney who wishes to seek the death penalty has the burden of proving to the Attorney General's Committee the existence of aggravating factors "beyond a reasonable doubt,"¹¹¹ while any mitigating factor "reasonably raised by the evidence should be considered in the light most favorable to the defendant."¹¹² Clearly, then, the district courts were wrong to apply the *Armstrong* test.

However, applying the *Armstrong* test to discovery by capital defendants is not only a mistake of law, it is also fundamentally unjust. In his *Furman v. Georgia* concurrence, Justice Douglas stated that "[i]t would seem to be incontestable that the death

¹⁰⁵ See *supra* notes 50–52 and accompanying text (discussing the circular nature of the *Armstrong* test). For a justification of the *Armstrong* test, see *United States v. Armstrong*, 517 U.S. 456, 468 (1996) ("Discovery . . . imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. . . . The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such claim.").

¹⁰⁶ See *Armstrong*, 517 U.S. at 459.

¹⁰⁷ See *United States v. Feliciano*, 998 F. Supp. 166, 174 (D. Conn. 1998).

¹⁰⁸ See *Armstrong*, 517 U.S. at 464.

¹⁰⁹ See *id.* at 465–66.

¹¹⁰ See USAM, *supra* note 20, § 9-10.030.

¹¹¹ *Id.* § 9-10.080.

¹¹² *Id.*

penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."¹¹³ The guidelines set down by *Feliciano* and *Roman* constitute just such a procedure.

The history of capital punishment in this country reflects our nation's sad history of racial inequality.¹¹⁴ Between 1930 and 1989, 3984 people were lawfully executed.¹¹⁵ Two thousand one hundred and thirteen of those people were black, "over half of the total and almost five times the proportion of blacks in the population as a whole."¹¹⁶ The plurality in *Furman* recognized that death penalty statutes, as administered in 1972, violated the Constitutional proscription against "cruel and unusual punishment" because they allowed the death penalty to be discriminatorily imposed:¹¹⁷ "The vice in this case is not in the penalty but in the process by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties . . ."¹¹⁸

Despite the warning of *Furman*, there continues to be significant racial disparity in the administration of the death penalty at the state level, not only according to the race of the defendant,¹¹⁹ but also according to the race of the victim.¹²⁰ In 1990,

¹¹³ *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) (emphasis added).

¹¹⁴ See generally CAPITAL PUNISHMENT IN THE UNITED STATES (Hugh Adam Bedau & Chester M. Pierce eds. 1975); SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989) [hereinafter "DISCRIMINATION"]; RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA (1991).

¹¹⁵ See DISCRIMINATION, *supra* note 114, at 17.

¹¹⁶ *Id.* (footnotes omitted).

¹¹⁷ See *Furman*, 408 U.S. at 245 (Douglas, J., concurring) ("[I]t is 'cruel and unusual' to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.") (footnote omitted).

¹¹⁸ *Furman*, 408 U.S. at 247–48 (Douglas, J., concurring) (quoting Ernest van den Haag at the hearings on the Death Penalty Suspension Act, H.R. 8417, before Subcommittee No. 3, House Committee of the Judiciary, 92d Cong. 116–17 (1972)).

¹¹⁹ See, e.g., Robin L. West, *Justice and Care*, 70 ST. JOHN'S L. REV. 31, 33 (1996) ("We will also be inspected, measured, held to account for our breaches, for our culture's failure to administer the death penalty evenhandedly between black and white offenders . . .") (footnote omitted); Blackmun *Reevaluating His Death Penalty Stand: Supreme Court Justice Says He Is Now Uncertain About Constitutionality of Executions*, WASH. POST, Nov. 19, 1993, at A4 (noting Justice Blackmun's concern "about studies suggesting that blacks disproportionately suffer from application of

the United States General Accounting Office released its analysis of twenty-eight studies of death penalty sentencing.¹²¹ The report stated that the "race of [the] victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks."¹²² While black persons make up 12% of the population, almost 40% of those executed between 1976 and 1996 were black.¹²³ "Justice demands"¹²⁴ that we guard against recreating in the federal system the inequities found in the states. "If we are to be moral, we can do no less."¹²⁵

IV. UPHOLDING THE CONSTITUTION BY BROADENING DISCOVERY: DUE PROCESS AND THE RIGHT TO COUNSEL

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."¹²⁶ In *Powell v. Alabama*,¹²⁷ the seminal case in Sixth Amendment jurisprudence,¹²⁸ the Supreme Court held that the right to counsel was fundamental to ensuring a fair trial.¹²⁹ The right to counsel is, therefore, central to the constitutional guarantee of

the death penalty").

¹²⁰ See UNITED STATES GENERAL ACCOUNTING OFFICE REPORT TO SENATE AND HOUSE COMMITTEES ON THE JUDICIARY, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES, 5-6 (1990) [hereinafter "U.S. G.A.O. Report"].

¹²¹ See generally U.S. G.A.O. Report, *supra* note 120.

¹²² *Id.* at 5 (noting "[t]his finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques."); see also Bright, *supra* note 63, at 32; DISCRIMINATION, *supra* note 114, at 45 (discussing capital sentencing in Georgia, Florida, and Illinois, and stating that "when we control for the race of the victim, blacks who killed whites were several times more likely to be sentenced to death than whites who killed whites in each state.").

¹²³ See Berta Esperanza Hernández-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 LA RAZA L.J. 69, 76 (1996).

¹²⁴ West, *supra* note 119, at 33 ("These injustices must be righted; justice demands it.").

¹²⁵ *Id.*

¹²⁶ U.S. CONST. amend. VI.

¹²⁷ 287 U.S. 45 (1932).

¹²⁸ See ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN JURISPRUDENCE 4 (1992).

¹²⁹ See *Powell*, 287 U.S. at 68-72.

due process.¹³⁰

The boundaries of due process¹³¹ are not rigidly delineated, so that in any proceeding "the question remains what process is due."¹³² It is a fundamental principle of criminal jurisprudence "that due process is flexible and calls for such procedural protections as the particular situation demands."¹³³ Judicial recognition of the fluidity of the due process concept allowed the *Furman* Court to develop the "death is different" doctrine, demanding that special care be taken in the administration of death penalty proceedings.¹³⁴ Due to its seriousness, "[t]he death penalty requires the maximum measure of due process."¹³⁵

A. The Department of Justice Authorization Process is a Critical Stage of the Proceeding to which the Sixth Amendment Applies

In *Boyd*, the defendant argued that denying him discovery denied him the effective representation of counsel during the death penalty authorization process.¹³⁶ The guarantee of the Sixth Amendment, however, only extends to "critical" stages of the proceeding.¹³⁷ The *Boyd* court ruled that the authorization process was not a critical stage and, therefore, the defendant's right to counsel was not implicated.¹³⁸

The Sixth Amendment guarantees the right to counsel "[i]n all criminal prosecutions."¹³⁹ A "prosecution" is "[t]he continuous

¹³⁰ See DAVID J. BODENHAMER, *FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY* 93-94 (1992) ("By accepted definition, any action to deny this right would also deny due process."); see also RICHARD C. CORTNER & CLIFFORD M. LYTLE, *MODERN CONSTITUTIONAL LAW* 150 (1971) ("The right to counsel clearly is the best known and most firmly established right in a criminal proceeding."); MARC WEBER TOBIAS & R. DAVID PETERSEN, *PRE-TRIAL CRIMINAL PROCEDURE: A SURVEY OF CONSTITUTIONAL RIGHTS* 33 (1972) [hereinafter "PROCEDURE"] ("If either a state or federal court denies the defendant the right to be represented by counsel, he is denied due process of law.")

¹³¹ See U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law.")

¹³² *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

¹³³ *Id.* ("It has been said so often by this Court and others as not to require citation of authority. . . .")

¹³⁴ See *ARBITRARINESS*, *supra* note 1, at 30.

¹³⁵ *Id.*

¹³⁶ See *United States v. Boyd*, 931 F. Supp. 968, 969-70 (D.R.I. 1996).

¹³⁷ See *PROCEDURE*, *supra* note 130, at 285.

¹³⁸ See *Boyd*, 931 F. Supp. at 973.

¹³⁹ U.S. CONST. amend. VI.

following up, through instrumentalities created by law, of a person accused of a public offense with a steady and fixed purpose of reaching a judicial determination of the guilt or innocence of the accused."¹⁴⁰ Thus, the "prosecution" is not limited to the actual trial. In fact, the Supreme Court has broadly construed the term "criminal prosecution" to mean that the Constitution guarantees the right to counsel in a variety of circumstances that are not, strictly speaking, the trial.¹⁴¹

In *Coleman v. Alabama*¹⁴², the Supreme Court ruled that the right to counsel attached at a preliminary evidentiary hearing in a criminal prosecution for murder. As they considered the case, the justices of the Burger Court wavered on whether the preliminary hearing was actually a critical stage.¹⁴³ But a memo from Justice Black to the Chief Justice¹⁴⁴ laid down what would eventually become the conceptual foundation of the *Coleman* majority's opinion: That a defendant is entitled to counsel not merely at trial, but from the first moment he or she needs it.¹⁴⁵

The preliminary hearing in *Coleman* is analogous to the pro-

¹⁴⁰ BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

¹⁴¹ See *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966) (holding that the prosecution cannot use defendant's statements from a custodial interrogation unless procedural safeguards have been used). "If . . . [defendant] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id.* (emphasis added). Thus, in *Miranda*, the defendant's right to counsel was triggered when he was questioned at the station house. See *id.* at 445. The Supreme Court has gone even further and has held that the right to counsel can be triggered even before one finds himself in a police station. See *Orozco v. Texas*, 394 U.S. 324, 326-27 (1969) (finding that police interrogation of a suspect in his own bed, thus in familiar surroundings, violated, amongst other rights, the right to have counsel); see also *Coleman v. Alabama*, 399 U.S. 1, 19 (1970) (Harlan, J., concurring and dissenting) (asserting that the above Supreme Court decisions have broadened the right to assistance of counsel) (citing *Orozco v. Texas*, 394 U.S. 324 (1969); *Mathis v. United States*, 391 U.S. 1 (1968); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966)). Justice Harlan disagrees with the extension of the right to counsel to pre-indictment events. See *id.*

¹⁴² 399 U.S. 1 (1970).

¹⁴³ See THE BROTHERS, *supra* note 15, at 76-77.

¹⁴⁴ See *id.* at 77 ("Where is there anything in the Constitution that says that although a man has the right at the time of prosecution, he cannot claim that help the first time he needs counsel?") (quoting a memo regarding the *Coleman* case sent by Justice Black to Chief Justice Burger before the Court rendered its decision).

¹⁴⁵ See *Coleman*, 399 U.S. at 7 (quoting *Powell v. Alabama*, 287 U.S. 45, 69) (1932) ("[A] person accused of [a] crime 'requires the guiding hand of counsel at every step in the proceedings against him.'").

cedures set forth in the United States Attorneys' Manual for determining whether the death penalty is to be sought.¹⁴⁶ The primary purpose of the preliminary hearing in *Coleman* was "to determine whether there [was] sufficient evidence against the accused to warrant" seeking an indictment.¹⁴⁷ The primary purpose of the Department of Justice protocol is to determine if there is sufficient evidence of aggravating factors to warrant seeking the death penalty.¹⁴⁸ Under the Department of Justice protocol, the potential capital defendant is given the opportunity to present evidence, but is not required to do so.¹⁴⁹ In *Coleman*, the mere fact that the defendant was not required to enter any arguments at the preliminary hearing did not bar it from being deemed a critical stage.¹⁵⁰

B. Effective Assistance of Counsel: The Erroneous Application of the Strickland Test

The defendant's right to counsel requires more than simply allowing the defendant to have an attorney by his or her side. Counsel must be *effective* in order for the constitutional requirement to be met.¹⁵¹ This aspect of the right to counsel must be guarded with special care in capital cases, where defendants are typically indigent and, therefore, would have difficulty retaining qualified counsel.¹⁵² A defendant compelled to accept appointed counsel is disadvantaged from the start due to a shortage of qualified legal counsel willing to take on court-appointments, and a shortage of funds to pay for such counsel.¹⁵³ This makes it

¹⁴⁶ See *supra* notes 24–31 and accompanying text (discussing defendants' opportunity to present evidence at this pre-trial stage).

¹⁴⁷ *Coleman*, 399 U.S. at 8.

¹⁴⁸ For a description of the authorization process, see *supra* Part I.A.

¹⁴⁹ See *supra* notes 25–31 and accompanying text (giving defendant's counsel the opportunity to present mitigating factors).

¹⁵⁰ See *Coleman*, 399 U.S. at 8 ("At the preliminary hearing . . . the accused is not required to advance any defenses. . . ." (quoting *Coleman v. State*, 211 So. 2d 917, 921 (Ala. Ct. App. 1968))) (alterations in original).

¹⁵¹ See *Powell v. Alabama*, 287 U.S. 45, 58 (1932) (holding defendants were not granted the right of counsel when counsel rushed to trial without proper prior investigation).

¹⁵² See Interview with Judge Emmet R. Cox, Chair of the Judicial Conference Defender Services Committee, April 1997 (stating that approximately 85% of all federal criminal defendants will be unable at some point during the proceedings to pay a lawyer).

¹⁵³ See *id.* (stating that a large number of death penalty inmates do not have

more difficult for the indigent defendant to "effectively . . . counter the prosecution's natural advantage."¹⁵⁴ In *Furman*, the Court noted that the ability to hire one's own attorney often plays a significant part in determining whether the defendant will ultimately be sentenced to death.¹⁵⁵ The Sixth Amendment makes an attempt to remedy the imbalance of power between defendant and prosecution by "furnish[ing] the individual with the pertinent tools with which to defend against the organized power of the state."¹⁵⁶ Allowing a defendant to have an attorney present, without permitting counsel the discovery necessary for effective representation of the client, is constitutionally insufficient.

The *Boyd* court, relying on *Strickland v. Washington*,¹⁵⁷ ruled that the denial of discovery did not impair counsel's effectiveness.¹⁵⁸ The *Strickland* test, however, is inapplicable in cases like *Boyd*. In *Strickland*, the Supreme Court set forth a "highly demanding," two-prong test for determining whether a conviction should be overturned based on a defendant's claim of ineffective counsel.¹⁵⁹ The defendant in *Boyd*, however, was not seeking to reverse a conviction; he was attempting to secure his right to counsel in the first instance.¹⁶⁰ Under *Strickland*, the defendant

counsel, and that costs of representation are rising as the number of death penalty cases grows).

¹⁵⁴ GARCIA, *supra* note 128, at 9 ("Resource deprivation' hampers defense attorneys who represent indigent clients. Their ability effectively to counter the prosecution's natural advantage is impaired by a combination of excessive workloads, lack of adequate funds for investigation and expert witnesses, and nominal support staff.") (footnote omitted).

¹⁵⁵ See *Furman v. Georgia*, 408 U.S. 238, 251-52 (1972) (per curiam) (Douglas, J., concurring) ("One searches our chronicles in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loeb's are given prison terms, not sentenced to death.").

¹⁵⁶ GARCIA, *supra* note 128, at 1; see also *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (requiring appointment of counsel for indigent defendants in order to ensure a fair trial); *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (holding that the typical defendant suffers a marked disadvantage against the prosecution because court proceedings are often, to the layman, "intricate, complex and mysterious").

¹⁵⁷ 466 U.S. 668 (1984).

¹⁵⁸ See *United States v. Boyd*, 931 F. Supp. 968, 971-73 (D.R.I. 1996) (finding that the government's interference with discovery did not hamper effective assistance of counsel).

¹⁵⁹ *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986).

¹⁶⁰ See *Boyd*, 931 F. Supp. at 969 n.1 (filing motion to seek effective assistance of counsel).

must prove that "counsel's performance was deficient and that the deficient performance prejudiced the defense. . . . [G]reat deference [is] accorded to counsel's performance."¹⁶¹ It is inappropriate to apply this standard when the focus is not the incompetence of counsel, but rather the interference of the judicial system with counsel's ability to act effectively. Governmental interference with a fundamental right of due process, such as the right to counsel,¹⁶² is to be strictly scrutinized.¹⁶³

V. CONCLUSION

Justice and the Constitution require that the rights of capital defendants be carefully guarded—to prevent racism, classism, and the inherent flaws of a man-made system from skewing the fair application of the law. The punishment of death is "unique and irreversible."¹⁶⁴ Its severity warrants the utmost care beginning at the earliest point in the criminal proceeding. By denying capital defendants early discovery, the courts are denying them one of the most fundamental rights of due process, the right to effective counsel. This nation's history of imposing capital punishment at the state level is steeped in bias and mistake. That the federal courts now risk traversing the same crooked road is reflected in the recent decisions of the districts of Rhode Island and Connecticut.

Stefanie Lindeman

¹⁶¹ GARCIA, *supra* note 128, at 33.

¹⁶² *See id.* at 24–25 (discussing the dueling interests of: government's goal to eliminate crime and the defendant's right to counsel).

¹⁶³ *See* Glasser v. United States, 315 U.S. 60, 76 (1942), *superseded by* Bourjaily v. United States, 483 U.S. 171 (1987) ("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.").

¹⁶⁴ Woodson v. North Carolina, 428 U.S. 280, 287 (1976).

