

***Styers v. Ryan***  
**811 F.3d 292 (9th Cir. 2015)**

- Styers sentenced to death, and AZ Supreme Court affirms.
- Ninth Circuit invalidates death sentence on habeas review because it thought AZ Supreme Court failed to consider all relevant mitigating evidence under *Eddings v Oklahoma*, 455 U.S. 104 (1982).
  - *Eddings* says you must consider all mitigating evidence, even if it didn't have any causal nexus with the crime
- Case returns to the AZ Supreme Court to reweigh aggravation and mitigation.
- AZ Supreme Court says they got it right the first time, but reweighs again anyway and again finds mitigation insufficient for leniency.

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***Styers v. Ryan***  
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- In the meantime, the U.S. Supreme Court had decided *Ring v. Arizona*, 536 U.S. 584 (2002), which required juries to determine the presence or aggravating factors.
- The defendant argues that, because the AZ Supreme Court reweighed his sentence, it also re-opened direct review, *Ring* now applied to the case, and the death phase should be retried in front of a jury.
- The AZ Supreme Court rejected that argument, and the issue again made its way to the Ninth Circuit.
- Oral argument, Oct. 23, 2013, at 29:08-32:21.

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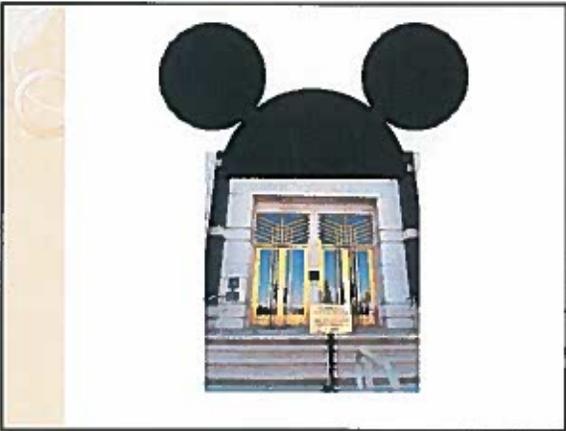
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### Modern practice

- Although we have tools to defend convictions, federal courts can be a hostile forum.
- Federal courts are skeptical of the competence of state courts and prosecutors.
- This can result in reversed convictions or in new evidentiary hearings years—or even decades—after the original trial.
- Often, reversal comes so far along that retrial is practically impossible.

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### Outline

- History of habeas corpus
- Overview of modern habeas practice
- Practical advice for trial prosecutors

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### Tools

- Requirement that the petitioner be “in custody.”

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**Tools**

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- Must be an error of *federal law*, not state law

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**Tools**

- Requirement that the petitioner be "in custody."
- Must be an error of *federal law*, not state law
- Statute of limitations

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**Tools**

- Requirement that the petitioner be "in custody."
- Must be an error of *federal law*, not state law
- Statute of limitations
- Exhaustion

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**Tools**

- Requirement that the petitioner be "in custody."
- Must be an error of *federal law*, not state law
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- Exhaustion
- Procedural default

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**Tools**

- Requirement that the petitioner be "in custody."
- Must be an error of *federal law*, not state law
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- Exhaustion
- Procedural default
- Different harmless-error standard

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- No Fourth Amendment exclusionary rule claims

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- No Fourth Amendment exclusionary rule claims
- No retroactive applications of new Supreme Court precedents except in rare cases.

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- Factual deference to state-court fact findings

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- Factual deference to state-court fact findings
- Limitations on federal evidentiary hearings

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## Tools

- Requirement that the petitioner be "in custody"
- Must be an error of federal law, not state law
- Issues of habeas
- Habeas
- Procedural default
- Different habeas-error standard
- No Fourth Amendment habeas remedy
- No retroactive application of new Supreme Court precedents except in rare cases
- Federal deference to state-court fact findings
- Limitations on federal habeas hearings
- Legal deference to state-court determinations of law

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## Tools

- Requirement that the petitioner be "in custody"
- Must be an error of federal law, not state law
- Issues of habeas
- Habeas
- Procedural default
- Different habeas-error standard
- No Fourth Amendment habeas remedy
- No retroactive application of new Supreme Court precedents except in rare cases
- Federal deference to state-court fact findings
- Limitations on federal habeas hearings
- Legal deference to state-court determinations of law
- Limitations on the filing of successive federal habeas petitions

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## Tools

- Requirement that the petitioner be "in custody"
- Must be an error of federal law, not state law
- Issues of habeas
- Habeas
- Procedural default
- Different habeas-error standard
- No Fourth Amendment habeas remedy
- No retroactive application of new Supreme Court precedents except in rare cases
- Federal deference to state-court fact findings
- Limitations on federal habeas hearings
- Legal deference to state-court determinations of law
- Limitations on the filing of successive federal habeas petitions
- Death of state habeas petitioner

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## Tools

- Requirements that the professor be "in control"
- Must be in control of class time and class size
- Nature of classroom
- Expenses
- Prerequisite subject
- Different forms of assessment
- The Faculty Development program has issues
- The individual applications of each program. Each program is unique and varies
- Faculty salaries to encourage participation
- Limitations on faculty's individual knowledge
- Legal differences in individual departments of law
- Limitations on the ability of departments beyond these programs
- Benefits of various faculty distribution models
- Limitations on the rights to appeal to the faculty about issues

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## Tools

- You learned this in law school, right?

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### Practical advice

- Reasoning matters as much as result.
- When in doubt, federal courts will presume we're Mickey Mouse and must have screwed up.
- Don't be Mickey Mouse. Show the federal courts we can get it done right.

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### Reasons for issuance of the writ

- Survey of Ninth Circuit decisions granting habeas relief from state-court convictions in 2015 and 2016.
- This does not include:
  - Cases where federal court ordered evidentiary hearing. See, e.g., *Tarango v. McDaniel*, 815 F.3d 1211, 1227 (9th Cir. 2016).
  - Cases where federal trial court ordered relief.

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**Reasons for issuance of the writ**

- **Faretta (1)**
  - *Burton v. Davis*, 816 F.3d 1132 (9th Cir. 2016)
- **Miranda two-step interrogation (1)**
  - *Reyes v. Lewis*, 798 F.3d 815 (9th Cir. 2015)
- **Faulty premeditation instruction (1)**
  - *Riley v. McDaniel*, 786 F.3d 719, 723 (9th Cir. 2015)
- **Surprise expert testimony (1)**
  - *Camp v. Neven*, 606 F.App'x 322 (9th Cir. 2015)

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**Reasons for issuance of the writ**

- **Batson (2)**
  - *Shirley v. Yates*, 807 F.3d 1090 (9th Cir. 2015), as amended (Mar. 21, 2016)
  - *Williams v. Plier*, 616 F.App'x 864 (9th Cir. 2015)
  - *Cf. Sifuentes v. Brazelton*, 815 F.3d 490, 496 (9th Cir. 2016) (reversing district court's grant of the writ under *Batson*)
- **Again, shows willingness to second-guess state courts.**

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**Reasons for issuance of the writ**

- **Capital sentencing (7)**
  - *Hedlund v. Ryan*, 815 F.3d 1233 (9th Cir. 2016)
  - *Smith v. Ryan*, 813 F.3d 1175 (9th Cir. 2016), as corrected (Feb. 17, 2016)
  - *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc) (cert. petition pending)
  - *Rogers v. McDaniel*, 793 F.3d 1036 (9th Cir. 2015)
  - *Bemore v. Chappell*, 788 F.3d 1151, 1177 (9th Cir. 2015) (IAC)
  - *Doe v. Ayers*, 782 F.3d 425 (9th Cir. 2015) (IAC)
  - *Pensinger v. Chappell*, 787 F.3d 1014 (9th Cir. 2015)

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**Reasons for issuance of the writ**

- Ineffective assistance of counsel (7)
  - *Yun Hseng Liao v. Junious*, 817 F.3d 678 (9th Cir. 2016)
  - *Gugliotta v. Garcia*, 630 F.App'x 651 (9th Cir. 2015)
  - *Sampson v. Palmer*, 628 F.App'x 477 (9th Cir. 2015)
  - **\*\*Bemore v. Chappell**, 788 F.3d 1151, 1177 (9th Cir. 2015)
  - *Dorsett v. Uribe*, 599 F.App'x 808 (9th Cir. 2015)
  - **\*\*Doe v. Ayers**, 782 F.3d 425 (9th Cir. 2015)
  - *Crace v. Herzog*, 798 F.3d 840 (9th Cir. 2015)

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**Reasons for issuance of the writ**

- Takeaways:
  - Take *Batson* seriously.
  - Death is different.
  - Biggest threat is in IAC.

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**Practical advice**

- Protecting the record
- Sentencing issues
- Miscellaneous

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**Practical advice**

- **Protecting the record**
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**Protecting the record**

- **The three most important tools:**
  - (1) AEDPA deference;
  - (2) exhaustion;
  - (3) statute of limitations.

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**AEDPA deference**

- 28 U.S.C. § 2254(d):  
Federal court cannot grant relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim"—
  - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
  - (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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### AEDPA deference

- In other words, if a state court addresses a claim on the merits, a federal court can't overturn it merely because it thinks the state court was wrong. The state court's decision must be:
  - (1) directly contrary to a Supreme Court case; or
  - (2) completely, objectively unreasonable.

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### AEDPA deference

- This is designed, in part, to address the problem of federal trial judges overruling state supreme courts.
- This is our best defense in habeas proceedings; we lose only if the state court misapplied directly applicable Supreme Court precedent.
- The Supreme Court has been aggressive about policing this requirement, particularly re: the Ninth Circuit.

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### Exhaustion

- 28 U.S.C. § 2254(b)(1): "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State."
- In other words, a prisoner must present his claim to a state court before presenting it to a federal court.

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### Exhaustion

- If he has not presented the claim to the state court :
  - If there's still time to do so, he has to go back to state court.
    - E.g., defendant is convicted and files a federal habeas petition the day after the jury rendered its verdict.
  - If it's too late to go back, the claim is "procedurally defaulted" and cannot be heard in federal court.
    - E.g., defendant is convicted, never appeals, and files a federal habeas petition a year after the jury rendered its verdict.

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### Exhaustion

- If defendant *has* presented the claim in state court, but the state court rejected it on procedural grounds instead of addressing the merits, the claim is also procedurally defaulted.
  - E.g., defendant alleges ineffective assistance of counsel in Rule 32 petition, but the petition is dismissed as untimely.

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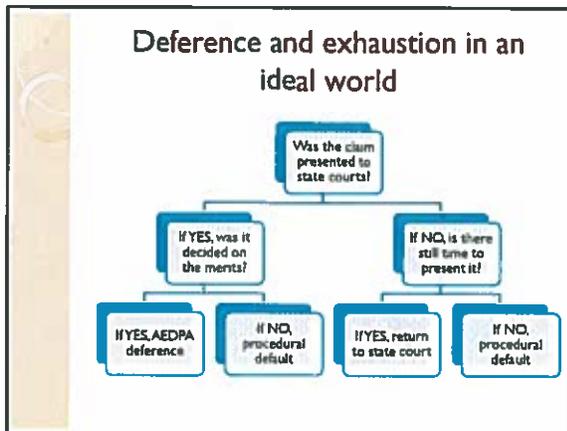
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### Ideal world v. real world

- In an ideal world, we would only see claims that have already been presented to state courts
- In practice there are lots of excuses to exhaustion requirement.
- When an excuse applies, it results in *de novo* review and sometimes in evidentiary hearings years or decades after the fact.
- In one of my current cases, an evidentiary hearing was held more than two decades after the crime. Defense attorney was only witness because the trial judge and trial prosecutor were both dead.

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### Most common bases for excusing procedural defaults

- (1) state court applies the wrong procedural rule.
- (2) state court does not apply procedural rule clearly enough.
- (3) ineffective assistance of trial, appellate, or PCR counsel.

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### What can you do to protect procedural defaults?

- Reasoning matters as much as result.
- 3 Cs: Reasoning must be correct, clear, and consistently applied.

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### Correctly applied

- The state court needs to get procedural reasoning correct. *You cannot count on the "right result, wrong reason" doctrine to save you.*
- Example: the defendant files an obviously untimely Rule 32. The state court mistakenly rejects it as successive instead of rejecting it as untimely.
  - Even if the Rule 32 is obviously untimely, the federal court won't reject it on that basis. If the state court didn't *actually* apply the procedural bar, then the federal court won't either, even if it is obvious from the record.

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### Clearly applied (1)

- **BAD:** "This claim is precluded under Rule 32.2(a)."
  - Rule 32.2(a) has 3 subsections.
  - Subsection (2) precludes relief if the claim was already "adjudicated on the merits." That doesn't bar federal review because it implies the claim was properly addressed somewhere else.
  - Federal court won't apply the default, even if it's obvious from the record that the claim was probably precluded under subsection (3) and not subsection (2).

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### Clearly applied (1)

- **BAD:** "This claim is precluded under Rule 32.2(a)."
- **GOOD:** "This claim is precluded under Rule 32.2(a)(3)."
  - The addition of (3) makes clear that we're relying on waiver, which is an adequate bar.
  - The addition of this "(3)" can save hours of work in habeas review.

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### Clearly applied (2)

- **BAD:** "All of these claims are precluded under Rule 32.2(a) because they either were raised, or could have been raised, on direct appeal."
  - This doesn't specify which claims ~~were~~ and ~~were~~n't previously raised.
  - Federal courts won't review the record to determine what which claims were and weren't raised.
  - "By failing to specify which claims were barred for which reasons, the Nevada Supreme Court did not clearly and expressly rely on an independent and adequate state ground."
    - *Waters v Crawford*, 304 F.3d 742, 774-75 (9th Cir. 2002) (en banc)

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### Clearly applied (2)

- **BAD:** "All of these claims are precluded under Rule 32.2(a) because they either were raised, or could have been raised, on direct appeal."
- **GOOD:** "Claims A, B, and C are precluded under Rule 32.2(a)(2). Claim D, E, and F are precluded under Rule 32.2(a)(3)."
- Clear identification of which claims are and aren't defaulted.

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### Clearly applied (3)

- State argues that the Rule 32 petition should be denied because it is (1) untimely; (2) precluded; and (3) meritless.
- **BAD:** "The petition is denied for the reasons discussed in the State's response."
  - Does not clearly identify whether decision was procedural or on the merits.
- **GOOD:** "For the reasons discussed in the State's response, all of petitioner's claims are untimely, precluded, and meritless."

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### Consistently applied

- "To qualify as an adequate procedural ground, a state rule must be firmly established and regularly followed." *Walker v. Martin*, 562 U.S. 307, 316 (2011) (quotation marks omitted).
- Rationale: prevent recalcitrant state courts from making up new procedural rules on the fly. See *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 455-58 (1958)
- "Use it or lose it." If we don't regularly assert a procedural bar, federal courts will not honor it.

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### Consistently applied

- This means:
  - (1) although some variation is okay in the interests of justice, we need to raise procedural bars regularly; and
  - (2) we need to insist that the courts apply regularly, even in close cases.
    - Courts can be resistant to this, see *State v. Goldin*, 239 Ariz. 12, 16, ¶ 18, 365 P.3d 364, 368 (App. 2015), but we need to insist.

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### How to ensure correct reasoning?

- Submit proposed orders in the trial court using sample language.
- Consider filing short motions for reconsideration/clarification from ambiguous decisions.
- See your materials for examples of motions for clarifications where:
  - (1) the procedural basis for the ruling is not apparent from the order;
  - (2) the ruling is based on "Rule 32.2(a)" instead of "Rule 32.2(a)(3)."

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### Sample text for motion for clarification

The State respectfully requests the Court to clarify whether its ruling was based on procedural grounds. This clarification is necessary to ensure efficient disposition of this case if the defendant later seeks habeas corpus relief in federal court.

A federal court will not grant habeas relief on a claim if the state courts rejected it on adequate and independent state-law grounds. *Murray v Schro*, 745 F.3d 984, 1016 (9th Cir. 2014). Under such circumstances, the claim is "procedurally defaulted," and the federal court will not entertain it. However, "[a] procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review." *Volero v Crawford*, 306 F.3d 742, 773 (9th Cir. 2002) (en banc) (internal brackets omitted).

Here, the State has argued the petition is [untimely/precluded] under [Rule]. While this Court's order appears to agree, it does not state so explicitly. As a result, a federal court might later construe it to be "ambiguous" and hold that is not sufficient to preclude federal collateral review." *Volero*, 306 F.3d at 773. Accordingly, the State respectfully requests this Court to clarify that its ruling is based on [Rule].

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### Special consideration: Untimely PCRs

- It is very important to get timeliness correct.
- There is a 1-year limitations period to file a federal habeas petition. 28 U.S.C. § 2244(d)(1).
- That period is tolled if "a properly filed" Rule 32 petition is "pending."
- A petition is not "properly filed" if it is untimely under state law.

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### Special consideration: Untimely PCRs

- This means that having a state court reject a petition as "untimely" helps us in two ways:
  - (1) It allows us to assert a procedural default; and
  - (2) It affects the statute-of-limitations analysis.
- Dismissing a habeas petition on limitations grounds is the easiest way to get rid of it.
- Mistakenly admitting that a Rule 32 is "timely" is one of the easiest ways to magnify work on habeas review.

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### Exhibits

- Use audio and visual exhibits.
- But be aware that exhibits can cause problems down the road.
- Sometimes exhibits are released before we get to federal habeas, and even when we have exhibits they can be hard to file in federal court

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### Exhibits

- Use visual exhibits, but *also* ensure that they are summarized in the written record.
- It need not be long, it just needs to be on the record.
- For lengthy recorded interviews, consider also submitting a transcript as an exhibit.

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### Guilty pleas

- Normal review usually looks like this:



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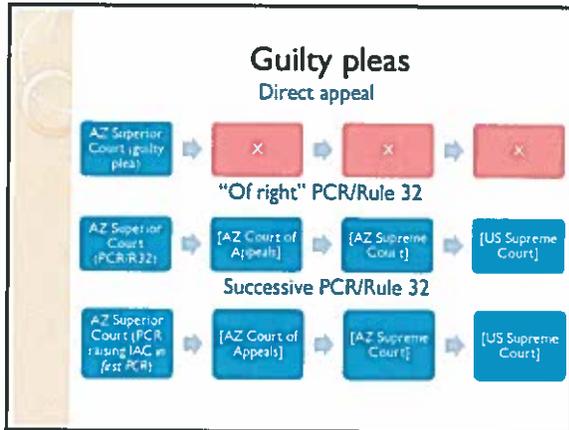
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### Guilty pleas

- Although a defendant normally can't file a successive Rule 32, he can if there has been a guilty plea.
- “[E]ncourag[ing] pleading defendants to raise claims of ineffective assistance of Rule 32 of-right counsel in the second post-conviction proceeding. . . [is] precisely the purpose for which that second proceeding was designed.” *Osterkamp v. Browning*, 226 Ariz. 485, 491, ¶22, n. 5, 250 P.3d 551, 557 (App. 2011)

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### Guilty pleas

- We frequently see cases where the defendant pleaded guilty, lost his first PCR, and then argues his first PCR counsel was ineffective.
- Normally that's not a valid claim, but it is a valid claim if there's been a guilty plea because the first PCR is the equivalent of direct appeal.
  - In other words, it's the equivalent of an ineffective-assistance-of-appellate-counsel claim.
- If you see one of these claims, address it on the merits; do not argue that it is precluded.

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### Ineffective assistance of counsel (IAC)

- IAC claims are particularly important in habeas cases because IAC acts as *both*:
  - (1) a substantive ground for relief; and
  - (2) an excuse for procedural default
- IAC is the most common way around the procedural defenses we've been discussing.
- That's why it's the most common basis for relief.

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### Ineffective assistance of counsel (IAC)

- Treat IAC claims seriously, particularly when it comes to factual development.
- In close cases, its always better to develop facts immediately in state court instead of years later in federal court.

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### Practical advice

- Protecting the record
- **Sentencing issues**
- Miscellaneous

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### Concurrent state and federal sentences

- Do not try to run a state sentence concurrent with a pre-existing federal sentence.
- "The federal circuits are unanimous in holding that a state judge has no authority to require that a state sentence of imprisonment be served concurrently with a previously imposed federal sentence."
  - *Reynolds v. Thomas*, 603 F.3d 1144, 1155 (9th Cir. 2010) (Fletcher, J., concurring) (collecting cases); accord *Taylor v. Sawyer*, 284 F.3d 1143, 1151-52 (9th Cir. 2002), abrogated on other grounds by *Setser v. United States*, 132 S. Ct. 1463, 1465 (2012); *Del Guzzi v. United States*, 980 F.2d 1269 (9th Cir. 1992).

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### Concurrent state and federal sentences

- If you try to run a state sentence concurrent to a pre-existing federal sentence, it may actually result in a consecutive sentence because the feds won't necessarily give the defendant credit for time-served.
- This can cause obvious problems with plea bargains. See, e.g., *Pittman v. Ryan*, No. CV-14-01665-PHX-GMS, 2016 WL 282689 (D. Ariz. Jan. 25, 2016)

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### Life-without-parole for juvenile offenders

- *Miller v. Alabama*, 132 S. Ct. 2455 (2012): 8th Amendment forbids states to sentence juvenile offenders to mandatory natural life.
- Initially, we thought this wasn't an issue in Arizona because we don't have mandatory natural life; we have natural life or life with a possibility of parole after a term of years.
- Later the Supreme Court decided *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

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### Life-without-parole for juvenile offenders

- Narrow holding: *Miller* applies retroactively to cases where appeal has already concluded.
- Some courts have also read *Montgomery* to suggest that all juvenile natural life sentences violate the Eighth Amendment unless the sentencing court expressly found that the juvenile's crimes "reflect permanent incorrigibility."
  - *State v. Valencia*, No. 2 CA-CR 2015-0151-PR, 2016 WL 1203414 (Ariz. Ct. App. Mar. 28, 2016) (petition for review pending).
  - Justices Sotomayor and Ginsburg have also adopted this position in concurring opinions. Justices Alito and Thomas have opposed it. It is unclear where the remaining justices stand.

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### Life-without-parole for juvenile offenders

- If you have a case in the trial court, and
- The defendant is under the age of 18 and is facing either: (1) natural life; or (2) a very lengthy term of years...
- Then:
  - Seek an express finding from the trial court that the defendant is not amenable to rehabilitation and is "permanently incorrigible."
  - Consider likelihood of success on appeal.

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### Life-without-parole for juvenile offenders

- If you have a *Miller/Montgomery* claim in Rule 32 ...
  - Contact someone familiar with these issues:
    - David Simpson, [David.Simpson@azag.gov](mailto:David.Simpson@azag.gov)
    - Jacob Lines, PCAO, [jacob.Lines@pcao.pima.gov](mailto:jacob.Lines@pcao.pima.gov)
    - Diane Meloche, MCAO, [meloched@mcao.maricopa.gov](mailto:meloched@mcao.maricopa.gov)

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### Practical advice

- Protecting the record
- Sentencing issues
- **Miscellaneous**

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### Death cases

- Death really is different.
- It's difficult to pinpoint one narrow issue; every death case will be evaluated with a fine-toothed comb.
- Some judges on the Ninth Circuit are very hostile to the death penalty.

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### *McKinney v. Ryan* 813 F.3d 798 (9th Cir. 2015) (en banc)

- *Eddings* requires consideration of all mitigation, even if it doesn't directly relate to the crime.
- The Arizona Supreme Court quoted *Eddings* and applied its holding
- 6-5 en banc majority of 9th Circuit reversed anyway
- Reasoning: the Arizona Supreme Court misapplied *Eddings* in other cases, and so it must have misapplied it in *McKinney* too under *stare decisis*
- Calls into doubt 16 years of capital cases.
- Cert. petition currently pending in U.S. Supreme Court.

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### Prosecutorial misconduct

- Latent conflict between Arizona and federal law.
- "Prosecutorial misconduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal[.]"
  - *State v. Ramos*, 235 Ariz. 230, 237, ¶ 22, 330 P.3d 987, 994 (App. 2014) (quotation marks omitted)

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### Prosecutorial misconduct

- This originally comes from *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984), which addressed whether misconduct bars retrial under Double Jeopardy.
- Standard has been expanded in later cases to suggest "misconduct" is only reversible if it was "intentional" and the prosecutor acted with an improper purpose.
- In other words, reversal turns on the culpability of the prosecutor. If the prosecutor acted in good faith, it's not reversible.

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### Prosecutorial misconduct

- "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

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### Prosecutorial misconduct

- *Darden v. Wainwright*, 477 U.S. 168, 180-81 (1986)
  - (although prosecutor's comments "undoubtedly were improper, they did not require reversal because "they did not deprive petitioner of a fair trial").
- *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)
  - (question is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process").

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### Prosecutorial misconduct

- Is Arizona's "intentional misconduct" standard "contrary to" or "an unreasonable application of, clearly established" Supreme Court law under 28 U.S.C. § 2254(d)(1)?
- Good faith doesn't matter. At the end of the day you are responsible making sure the defendant gets a fair trial.

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### Prosecutorial misconduct

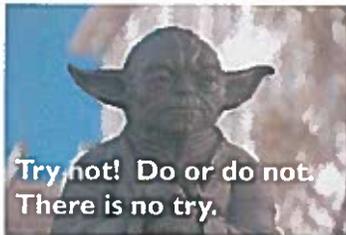


Photo: Yoda Fountain, SW77 on Flickr.  
<https://www.flickr.com/photos/3192552+@N04/4576790053/>; photo 11; ram. Creative Commons license. Color saturation altered and text added.

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### Questions



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