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Capital Punishment

Cathleen Coffey

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INTRODUCTION

Although each state within the jurisdiction of the Tenth Circuit may impose a death sentence on eligible defendants,[1] only cases originating in the state and federal courts of Oklahoma reached the Tenth Circuit Court of Appeals during the 1995-1996 survey period.[2] This Survey explores the death penalty issues addressed by the court in these cases. Part I summarizes the history of the death penalty and the treatment of capital punishment in the American judicial system. Part II examines issues raised in the sentencing phase of a capital case after determination of guilt. Part III explores the impact of the Anti-Terrorism and Effective Death Penalty Act of 1996 on a defendant's petitions for habeas corpus, the fundamental process by which state and federal courts evaluate the constitutionality of particular death sentences.

I. GENERAL BACKGROUND

Death has been inflicted as a punishment throughout history.[3] In ancient times, torture and death were compounded, because death was considered insufficient as a punishment.[4] Most scholars seem to agree that prior to the development of organized civilizations, individuals killed to avenge wrongs done to them and their families.[5] The first formal criminal codes reflected organized society's recognition of this private form of justice. They incorporated in their criminal laws a distinction between public wrongs, such as treason which was punishable by the state, and private wrongs, for which retribution could be sought by the individual harmed.[6] Eventually, this distinction disappeared, and many criminal codes established death as a standard punishment for a wide variety of offenses.[7] In seventh century Athens, death was considered the appropriate penalty for most crimes.[8] During the Middle Ages,

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1. Each state has legislation establishing the standards that must be met before a defendant may be sentenced to death. *See* COLO. REV. STAT. § 16-11-103 (1986 & Supp. 1996); KAN. STAT. ANN. § 21-4624 (1995); N.M. STAT. ANN. §§ 31-14-1 to -16 (Michie 1984); OKLA. STAT. tit. 21, § 701.7 (1983 & Supp. 1997); UTAH CODE ANN. § 76-3-207 (1995 & Supp. 1996); WYO. STAT. ANN. § 6-2-101(b) (Michie 1996).

2. The survey period extended from September 1, 1995 through August 31, 1996. The capital cases heard by the Tenth Circuit during this period include: Hatch v. Oklahoma, 92 F.3d 1012 (10th Cir. 1996); United States v. McCullah, 87 F.3d 1136 (10th Cir. 1996); United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996); Castro v. Oklahoma, 71 F.3d 1502 (10th Cir. 1995).

3. GARY E. MCCUEN & R.A. BAUMGART, REVIVING THE DEATH PENALTY 8 (1985).

4. *Id.*

5. Rudolph J. Gerber, *Death Is Not Worth It*, 28 ARIZ. ST. L.J. 335, 335 (1996).

6. STEPHEN A. FLANDERS, CAPITAL PUNISHMENT 4 (1991).

7. *Id.*; Gerber, *supra* note 5, at 336.

8. FLANDERS, *supra* note 6, at 4; Gerber, *supra* note 5, at 336.

it was a common form of punishment throughout Europe and Asia.[9] Over the next several centuries, the infliction of death became even more widespread. By 1780, British criminal laws, called the "Bloody Code," contained three hundred and fifty capital crimes.[10] Due to active reform movements in Britain, however, the number of capital crimes was drastically reduced by the mid 1800s.[11]

Although the American colonies adopted the death penalty in their criminal codes, historians, citing low rates of executions, conclude that it was rarely practiced.[12] When a hanging did occur, however, the body of the dead was displayed for days, or even months, following the execution.[13] The establishment of the first modern prison in 1790 helped alleviate the state's need for capital punishment; confinement of convicts in prisons provided a new alternative to execution.[14] Many states abolished public executions by 1845; instead, death sentences were carried out in the prison yard or inside the prison building.[15] Despite consistent efforts by abolitionist and reform movements, the death penalty remained entrenched in American jurisprudence.[16]

In 1972, the United States Supreme Court decision in *Furman v. Georgia*[17] temporarily bolstered the abolitionists' campaign to terminate executions. In a five-four decision, the Court held that the death sentence issued by a jury, which was given no guidance in its determination, was unconstitutional.[18] The Court determined that Georgia's capital sentencing statute (and indirectly, the death penalty statutes of virtually all other states) invariably led to the arbitrary execution of prisoners because the system lacked guidelines, leaving juries to determine the crucial decision between life and death without structure.[19] Unbridled jury discretion, according to the Court, allowed racism to infect the decision-making process, creating a system in which the race of the victim and the race of the defendant affected whether the defendant was executed.[20] Death sentences were "so wantonly and so

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9. FLANDERS, *supra* note 6, at 5; Gerber, *supra* note 5, at 336.

10. FLANDERS, *supra* note 6, at 5.

11. *Id.* at 5-6; FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 12 (1986); *see also* Gerber, *supra* note 5, at 337-41.

12. ZIMRING & HAWKINS, *supra* note 11, at 28. Some colonies adopted harsh criminal codes during colonization, including death as an appropriate punishment for witchcraft, blasphemy and adultery. The codes grew even more harsh until the Revolutionary War, though execution was rarely practiced. FLANDERS, *supra* note 6, at 6. In addition, historians assert that several states, including Michigan, Rhode Island and Wisconsin, had eliminated the death penalty for all crimes except treason by 1853, long before the first European countries voted to eradicate the death penalty. ZIMRING & HAWKINS, *supra* note 11, at 28.

13. Jonathan S. Abernethy, *The Methodology of Death: Reexamining the Deterrence Rationale*, 27 COLUM. HUM. RTS. L. REV. 379, 389 (1996).

14. FLANDERS, *supra* note 6, at 6.

15. Abernethy, *supra* note 13, at 390.

16. FLANDERS, *supra* note 6, at 7; Gerber, *supra* note 5, at 340-41.

17. 408 U.S. 238 (1972).

18. *Furman*, 408 U.S. at 239-40. Nine separate opinions were filed in *Furman*, none clearly indicating the direction that the law would take. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 362-63 (1995).

19. *Furman*, 408 U.S. at 242 (Douglas, J., concurring).

20. *Id.*

freakishly imposed"[21] that the executions violated the Eighth Amendment's prohibition against cruel and unusual punishment.[22] By rejecting Georgia's established criminal sentencing code, the Supreme Court avoided determining whether capital punishment itself was constitutional.[23]

More than thirty states reacted to this ruling by revising their capital sentencing statutes to include guidelines to assist the jury in consideration of the particular nature of the defendant and the offense.[24] In 1976, the Supreme Court impliedly upheld many of these statutes in *Gregg v. Georgia*,[25] finding that the death penalty was not invariably unconstitutional.[26] The Court, however, required that adequate sentencing information and guidance must be provided to the sentencing body in order to avoid the arbitrariness rejected by the *Furman* Court.[27] In addition, the *Gregg* Court held that the sentencing authority must find the existence of at least one statutory aggravating factor before sentencing the defendant to death, thereby further limiting the risk that the jury's decision-making process would be infected by arbitrariness.[28]

II. DUE PROCESS CONCERNS IN THE SENTENCING PHASE

A. *The Weighing of Aggravating and Mitigating Factors in the Sentencing Phase*

1. Background

During the sentencing phase of trial, the jury considers all of the relevant aggravating and mitigating circumstances surrounding the offense. Aggravating factors refer to those aspects related to the crime which make the offense committed more severe than the offense by itself.[29] The jury considers statutory aggravators (enumerated in the capital sentencing statute) in addition to the non-statutory factors presented by the prosecution.[30] These aggravating factors cannot be vague;[31] rather they must help the jury narrow the class of death-eligible defendants so that only those deserving of the death penalty are executed.[32] The jury also considers evidence of all relevant statutory and non-

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21. *Id.* at 310 (Stewart, J., concurring).

22. The Eighth Amendment provides excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. CONST. amend. VIII.

23. *Furman*, 408 U.S. at 240.

24. BARRY NAKELL & KENNETH A. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY 28 (1987).

25. 428 U.S. 153 (1976).

26. *Gregg*, 428 U.S. at 206-07.

27. *Id.* at 195.

28. *Id.* at 206-07.

29. FLANDERS, *supra* note 6, at 12. Aggravators may include commission of murder for pecuniary gain (OKLA STAT. tit. 21, § 701.12(3) (1983)), commission of a felony at the time of the murder (UTAH CODE ANN. § 76-5-202(1)(d) (1995 & Supp. 1996)), and commission of murder by an individual previously convicted of a felony (COLO. REV. STAT. § 16-11-103(5)(b) (1986 & Supp. 1996)).

30. Zant v. Stephens, 462 U.S. 862, 878 (1983).

31. Godfrey v. Georgia, 446 U.S. 420, 420 (1980).

32. Maynard v. Cartwright, 486 U.S. 356, 360 (1988). The narrowing function of the aggravating circumstance may occur at either the guilt or the penalty phase of the trial. Lowenfield v. Phelps, 484 U.S. 231, 244-45 (1988).

statutory mitigating circumstances presented by the defense.[33] The prosecution and the defense offer a great deal of information for the jury to weigh in its deliberations, however, the jury must conclude that at least one statutory aggravating factor exists beyond a reasonable doubt before the defendant can be executed.[34]

Some states have established a system in which jurors balance the aggravators against the mitigators.[35] In those so-called weighing states, when the jury determines the aggravators outweigh the mitigators, it may sentence the defendant to death. Other states, non-weighing or threshold states, must merely determine that one statutory aggravating factor was proven beyond a reasonable doubt; once this determination is made, the defendant becomes death-eligible.[36]

2. *United States v. McCullah*[37]

a. *Facts*

A California drug-trafficking organization had recruited McCullah to help kill a man whom they suspected of stealing drugs from them.[38] McCullah's role included luring the intended victim to an ambush site where the man would be killed.[39] Unable to lure the suspect away, McCullah substituted an employee of the intended victim and took him to the ambush site, where he was executed by another member of McCullah's team.[40] Several months later, members of the drug-trafficking organization cooperated with police, providing information leading to McCullah's arrest for his involvement in the drug conspiracy and murder.[41] McCullah was convicted.[42] During the sentencing phase, the jury determined that there was enough evidence to prove that the statutory aggravators existed beyond a reasonable doubt, and that this evidence, coupled with evidence of non-statutory aggravators, outweighed the mitigating factors which the defense presented.[43] Based on these findings, the

33. Lockett v. Ohio, 438 U.S. 586, 604-05 (1978). Mitigating factors may include evidence that, among others, the defendant was acting under another's control (UTAH CODE ANN. § 76-3-207(3)(c) (1995 & Supp. 1996)), that the defendant did not have the capacity to appreciate the criminality of his or her conduct (WYO. STAT. ANN. § 6-2-102(j)(vi) (Michie 1996)), and tend to cause the jury to resist imposing the harshest punishment possible.

34. *Gregg*, 428 U.S. at 206-07.

35. Stringer v. Black, 503 U.S. 222 (1992); Clemons v. Mississippi, 494 U.S. 738 (1990).

36. For the Supreme Court's explanation of the distinction between weighing and threshold states, and the effect on appellate reweighing of aggravating and mitigating factors, see Stringer v. Black, 503 U.S. 222, 229-32 (1992); Srikanth Srinivasan, *Capital Sentencing Doctrine and the Weighing-NonWeighing Distinction*, 47 STAN. L. REV. 1347, 1365-67 (1995).

37. 76 F.3d 1087 (10th Cir. 1996).

38. McCullah, 76 F.3d at 1095.

39. *Id.*

40. *Id.*

41. *Id.* at 1097.

42. *Id.*

43. *Id.* The prosecution submitted four statutory and four non-statutory aggravating factors for the jury to consider during the penalty phase of the trial. The jury determined that all eight aggravating factors existed. The statutory factors included that 1) the defendant "intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim" (21 U.S.C. § 848(n)(1)(C) (1994)); 2) the defen-

jury sentenced McCullah to death.[44] McCullah appealed this decision, among others, to the Tenth Circuit, arguing that multiple errors at the trial level led to his convictions and death sentence.[45] He asserted that the aggravating factors presented by the prosecution overlapped, skewing the weighing process conducted by the jury during the penalty phase.[46]

b. *Decision*

The Tenth Circuit agreed with McCullah's claim that some of the aggravators overlapped.[47] The court found that "intentionally engag[ing] in conduct intending that the victim be killed . . . which resulted in the death of the victim"[48] significantly overlapped with the non-statutory aggravator that the defendant committed the acts with which he was charged in the indictment, including that the defendant intentionally killed or caused the killing of an individual.[49] Similarly, the court asserted that the statutory aggravator relating to the defendant's intentional conduct, which was aimed at causing the death of the victim,[50] also duplicated the requirement set forth in the statutory aggravator that the defendant acted with intent, knowingly creating a grave risk of death to the victim, which resulted in the death of the victim.[51] The court held that such "double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally."[52] Weighing duplicative factors creates the risk that one aggravating circumstance will be given undue weight, essentially penalizing the defendant twice for the same act.[53] The court determined that this was improper and necessitated the reweighing of aggravating and mitigating circumstances.[54] Although the court affirmed each of McCullah's convictions, it remanded his case for resentencing.[55]

Four months later, the Tenth Circuit denied the defendant's request for a

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dant intentionally engaged in conduct which the defendant knew would create a grave risk of death to an individual, and that conduct did result in the death of an individual (21 U.S.C. § 848(n)(1)(D) (1994)); 3) the defendant committed the act with the expectation of some type of pecuniary gain (21 U.S.C. § 848(n)(7) (1994)); and 4) the defendant committed the act after substantial planning (21 U.S.C. § 848(n)(8) (1994)). *McCullah*, 76 F.3d at 1108. In addition, the non-statutory factors submitted by the prosecution and found by the jury included 1) use of a deadly weapon in the murder; 2) the defendant had a record of prior felony convictions; 3) the defendant had committed the acts detailed in the indictment; and 4) previous attempts to rehabilitate the defendant had been unsuccessful. *Id.* at 1106.

44. *McCullah*, 76 F.3d at 1097.
45. *Id.* at 1087.
46. *Id.* at 1111.
47. *Id.*
48. 21 U.S.C. § 848(n)(1)(C) (1994).
49. *McCullah*, 76 F.3d at 1111; *United States v. McCullah*, 87 F.3d 1136, 1138 (10th Cir. 1996).
50. 21 U.S.C. § 848(n)(1)(C).
51. 21 U.S.C. § 848(n)(1)(D) (1994).
52. *McCullah*, 76 F.3d at 1111.
53. *Id.*
54. *Id.* at 1112.
55. *Id.* at 1114.

rehearing, as well as the government's request for a rehearing en banc, and affirmed its earlier decision that some of the aggravating circumstances were duplicative.[56] The court reiterated that the multiple aggravators were predicated on the same act of identifying the victim and driving him to the ambush site, and therefore could not be the basis for two separate aggravating circumstances.[57]

3. Other Circuits

The issue of duplicative aggravators was raised before the Eighth Circuit in *Ruiz v. Norris*,[58] where the defendant asserted that an aggravating circumstance duplicated an element of the definition of death-eligible homicides presented to the jury.[59] Relying on *Lowenfield v. Phelps*,[60] the Eighth Circuit held that the narrowing of the class of death-eligible defendants occurred in the definition of the crime, which was so specific that the duplication of the element of the offense and the aggravator was inconsequential.[61] The court asserted that this mere duplication "does not render Arkansas's death-penalty scheme unconstitutional or violate the petitioners' rights."[62]

In the Fifth Circuit, *United States v. Flores*[63] also raised the issue of redundancy among aggravating factors.[64] As in *McCullah*, the jury sentenced the defendant to death upon finding that evidence beyond a reasonable doubt proved that the defendant intentionally killed and intentionally engaged in conduct, intending that the victim be killed, for two of the murders with which the defendant was charged. They also found that the defendant engaged in conduct intending the victim to be killed in a third murder.[65] The defendant argued that two of his death sentences were invalid because they relied on duplicative aggravating factors.[66] The Fifth Circuit determined, however, that the aggravators did not simply describe the same conduct in two different ways; rather, according to the court, an individual who personally murders a victim and pays another individual to kill has a "dual intent."[67] The jury's weighing of duplicative factors, according to the court, is permissible when those factors are supported by separate acts.[68] The court upheld the validity

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56. McCullah, 87 F.3d at 1137.

57. *Id.* at 1137. The court argued that:

> "[d]riving the victim to the murder site (intentionally engaging in conduct intending the victim be killed) and driving the victim to the murder site (engaging in conduct which creates a grave risk of death) is still the same conduct . . . . The same act can be described in several ways, but it is still the same act."

Id. at 1138.

58. 71 F.3d 1404 (8th Cir. 1995).

59. *Ruiz*, 71 F.3d at 1407-08.

60. 484 U.S. 231, 244-45 (1988) (asserting that the narrowing function of an aggravating circumstance may occur at either the guilt or penalty phase of a trial).

61. *Ruiz*, 71 F.3d at 1408.

62. *Id.*

63. 63 F.3d 1342 (5th Cir. 1995).

64. *Flores*, 63 F.3d at 1372.

65. *Id.* at 1366-67.

66. *Id.* at 1372.

67. *Id.*

68. *Id.*

of the aggravators and affirmed the death sentences.[69]

4. Analysis

When a jury undertakes the process of weighing mitigating factors against aggravating factors of a crime, the jury must consider all relevant evidence to best understand the character of the defendant and the circumstances of the offense.[70] One scholar argues that the jury's consideration of aggravators and mitigators, however, has the tendency to make the decision both easier and harder.[71] The decision is harder because the jury is required to master difficult statutory language and apply it; the decision is easier because the jury rationalizes it based on the capital sentencing framework provided by the state, which requires the weighing of mitigating and aggravating factors.[72] In reality, however, these factors are often essentially incommensurate with one another, requiring the jury to make a virtually impossible determination.[73] A decision that requires the jury to conclude that amount of viciousness which is offset by the defendant's limitations gives "the illusion that the decision can be reduced to a formula that obviates the need for the exercise of moral judgment."[74]

While the Tenth Circuit Court asserts that duplicative factors will likely produce a "skewed" result, that notion presupposes a result that is not "skewed." The court's discussion of a "skewed" result indicates that there is a correct, or scientifically accurate, result possible; however, in pitting a mitigator against an aggravator, a jury is compelled to make a subjective, deeply personal evaluation.

Although some aggravating factors enumerated in 21 U.S.C. § 848(n), the statute applied in *McCullah*, may permit an objective evaluation other factors are less objective.[75] Whether the defendant knew that he would create a "grave" risk of harm to a person requires a subjective analysis of "gravity," "risk," and "harm." While examining the weight of duplicative factors may disrupt a balance perceived by the court, that "balance" is little more than an illusion.

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69. *Id.* at 1378.

70. Eric Wade Richardson, Note, *Due Process Requirements of Jury Charges in Capital Cases:* Simmons v. South Carolina, *114 S.Ct. 2187 (1994)*, 64 U. CIN. L. REV. 755, 759 (1996) (citing Lockett v. Ohio, 438 U.S. 586, 603 (1978)).

71. Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590, 2613-14 (1996).

72. *Id.* at 2614.

73. *Id.*

74. *Id.*

75. Objective factors may include an analysis of whether the defendant has ever been convicted of a felony, 21 U.S.C. § 848 (n)(3), as compared to an evaluation of the risk that a defendant may constitute a danger to society in the future.

B. *Psychiatric Evaluations for Capital Defendants*

1. Background

In *Ake v. Oklahoma*,[76] the Supreme Court established the indigent defendant's right to the assistance of a psychiatric expert when the defendant makes a threshold showing that "his sanity is likely to be a significant factor in his defense."[77] Under those circumstances, the state must provide the defendant access to a competent psychiatrist who will examine the defendant and assist in preparation and presentation of the defense at trial.[78] In addition, the *Ake* Court asserted that due process standards require that when the state presents the defendant's continuing threat to society as an aggravating circumstance, the defendant is entitled to a court-appointed psychiatrist to rebut the state's assertions.[79] Several years later, the Tenth Circuit reiterated these requirements, and affirmed that the defendant's claim that his or her sanity will be an issue at trial must be "clear and genuine, one that constitutes a 'close' question which may well be decided one way or the other."[80]

2. *Castro v. Oklahoma*[81]

a. *Facts*

Castro was charged with felony murder and armed robbery of a fast food restaurant in 1984.[82] When the police apprehended him, he confessed to robbing the restaurant with an unloaded gun.[83] He also admitted that the restaurant manager attempted to defend herself with a knife during the middle of the robbery and that he gained control of the knife, stabbed the manager multiple times, and killed her.[84] Prior to trial, Castro's court-appointed attorney repeatedly expressed concern that the defendant's depression and confusion about the murder hindered his ability to assist in his own defense.[85] Castro's attorney requested a psychological review of his client, and made repeated requests for money to enable Castro to pursue an expert psychiatric exam, though no funds were provided.[86] Instead, defense counsel arranged for a psychiatrist, who was a specialist in pediatric and geriatric analysis, as well as a friend of counsel, to examine Castro.[87] Although the psychiatrist agreed to evaluate the defendant, he refused to testify on Castro's behalf.[88] At trial, the jury convicted Castro and sentenced him to death for the murder.[89]

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76. 470 U.S. 68 (1985).
77. *Ake*, 470 U.S. at 82-83.
78. *Id.* at 83.
79. *Id.* at 83-84.
80. Liles v. Saffle, 945 F.2d 333, 336 (10th Cir. 1991) (quoting Cartwright v. Maynard, 802 F.2d 1203, 1211 (10th Cir. 1986)).
81. 71 F.3d 1502 (10th Cir. 1995).
82. *Castro*, 71 F.3d at 1504.
83. *Id.* at 1505.
84. *Id.*
85. *Id.* at 1506.
86. *Id.* at 1507.
87. *Id.*
88. *Id.* at 1507 n.6.
89. During the penalty phase, the state presented two statutory aggravators to justify Castro's

In preparation for the petition for habeas corpus, Castro submitted to a comprehensive psychological and neurological exam.[90] Examination results indicated that Castro suffered from paranoid thought disorder and brain damage.[91] A social worker's examination of the defendant uncovered new issues as well.[92] Castro's habeas petition to the Tenth Circuit asserted that he was denied due process when the court refused to grant him access to an expert psychiatrist.[93]

b. *Decision*

The Tenth Circuit determined that the denial of expert psychiatric assistance during the penalty phase of Castro's trial did not constitute harmless error.[94] The court maintained that Castro had established that his sanity could be a significant mitigating factor at trial, and therefore should have been appointed an expert psychiatrist.[95] According to the court, the state's presentation of future dangerousness triggered the *Ake* duty to appoint expert assistance.[96]

The court found that the testimony of both a forensic psychiatrist and social worker would have framed the mitigating testimony in a manner not achieved at trial.[97] This different framework might have allowed the jury greater insight into the defendant's circumstances, placing the defendant's crime "in an altogether different and appropriate context."[98] In addition, the

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execution: "(1) the murder was especially heinous, atrocious or cruel; and (2) Mr. Castro constituted a continuing threat to society." *Id.* at 1506; OKLA. STAT. tit. 21, §§ 701.12(4),(7) (1983 & Supp. 1997). Castro's presentation of mitigating evidence included his rationale for committing the murder. He stated that "something [was] wrong with [his] mind." In addition, Castro described his unhappy childhood, which included his devastation upon learning that his mother worked as a prostitute, being seduced by his mother, and witnessing his brother bludgeon their father to death. The jury determined that both aggravating factors were present, justifying the imposition of a death sentence.

On direct appeal, the Oklahoma Court of Criminal Appeals struck down the "especially heinous, atrocious or cruel" aggravator for insufficient grounds. *Castro*, 71 F.3d at 1506 (citing Castro v. State, 745 P.2d 394, 408 (Okla. Crim. App. 1987)). In determining that Castro was a future danger, the jury relied on three factors: Castro's pretrial escape from jail, his confession to the commission of a prior murder, and his confession to the commission of two prior armed robberies. Castro spoke extensively of these other crimes during the penalty phase of his trial. *Id.* at 1506.

90. *Castro*, 71 F.3d at 1509.

91. *Id.*

92. *Id.* at 1510. According to the examining social worker, the pervasive addiction to drugs and alcohol among Castro's family members was an important issue that should have been raised at trial. *Id.* In addition, the possibility that Castro suffered from Fetal Alcohol Syndrome, the lack of positive male role models in the defendant's life, and his diagnostic classification of Paranoid Personality Disorder were all issues that should have been made known to the jury. According to the social worker, without this information the jury could not make an accurate determination to sentence the defendant to death. *Id.*

93. *Id.* at 1513.

94. *Id.* at 1515-16. The court conducted a harmless error analysis and determined the error had "substantial and injurious effect" on the jury's determination (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

95. *Id.* at 1515.

96. *Id.* at 1514 (citing Liles v. Saffle, 945 F.2d 333, 340-41 (10th Cir. 1991)).

97. *Id.*

98. *Id.*

Tenth Circuit concluded that the psychiatrist's refusal to testify on the defendant's behalf made his assistance to Castro inadequate.[99] The expert's role in taking the stand on the defendant's behalf is inherent in *Ake*.[100]

3. Other Circuits

In a similar case,[101] the Fourth Circuit determined that the trial court committed two errors in the sentencing phase of a capital murder case. Specifically, the trial court erred in admitting the prosector's evidence that the defendant constituted a future danger to society and by depriving the defendant of expert psychiatric testimony to rebut the future dangerousness claim.[102] Citing the Tenth Circuit's decision in *Castro*,[103] the Fourth Circuit applied the harmless error test to the trial court's mistakes.[104] Because Virginia is a non-weighing state, the court determined that despite the errors made at the trial level, "there [was] no constitutional violation."[105]

4. Analysis

The Tenth Circuit correctly determined that Castro was denied due process when the trial court failed to appoint an expert to assist him in his defense. The jury's consideration of all relevant mitigating evidence, including an explanation by a psychiatrist, is a well-settled principle in capital punishment jurisprudence.[106] Additionally, the Supreme Court has recognized that a capital defendant must be permitted to rebut or deny evidence presented against him at trial.[107] Therefore, when the state presented evidence that Castro constituted a future danger to the community—an elusive claim—the defendant should have been permitted to rebut this evidence.[108] Due to the ambiguity of a claim of future dangerousness, juries must make difficult determinations, and must therefore be afforded accurate and relevant information from both the defense and the prosecution.[109]

The *Ake* Court asserted that an individual's poverty should not be determinative of whether the defendant has an "opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."[110] Access "to

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99. *Id.* at 1515. The court also suggested that the doctor's expertise in child and geriatric psychiatry may have rendered him unqualified as an expert in a capital murder trial. *Id.*

100. *Id.*

101. Tuggle v. Netherland, 79 F.3d 1386 (4th Cir. 1996).

102. *Tuggle*, 79 F.3d at 1389.

103. *Castro*, 71 F.3d at 1502.

104. *Tuggle*, 79 F.3d at 1392-93.

105. *Id.* at 1393 (citing Stringer v. Black, 503 U.S. 222, 232 (1992)).

106. Lockett v. Ohio, 438 U.S. 586 (1978).

107. Gardner v. Florida, 430 U.S. 349 (1977).

108. Joseph T. McCann, *Standards for Expert Testimony in New York Death Penalty Cases*, N.Y. ST. B.J., July-Aug. 1996, at 30. Juries rely on evidence presented by both sides to determine whether the defendant constitutes a continuing threat to society; however, these projections may be unreliable. "Predictions by mental health professionals have been shown to be highly inaccurate." *Id.*; *see* Ake v. Oklahoma, 470 U.S. 68, 81 (1985).

109. *Ake*, 470 U.S. at 81-82.

110. *Id.* at 76; *see also* Karla C. McGrath, Sommers v. Commonwealth: *An Indigent Criminal Defendant's Right to Publicly Funded Expert Assistance Other Than the Assistance of Counsel*, 84

the raw materials integral to the building of an effective defense," and not simply to the courthouse doors, is required to meet the standards of the Due Process Clause of the United States Constitution.[111] By compelling the appointment of an expert psychiatrist to assist in Castro's defense, the Tenth Circuit appropriately upheld the requirements of *Ake* and the Due Process Clause of the Constitution.

III. THE IMPACT OF THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 ON CAPITAL CASES

A. *Background*

The Supreme Court has repeatedly acknowledged the uniqueness of a death sentence;[112] the irrevocability of execution demands procedural safeguards to ensure that the death penalty is administered according to constitutional standards.[113] In addition to safeguards established at the trial level, the appeals process helps to protect against the unconstitutional administration of the death penalty.[114]

Two avenues are available for the capital defendant challenging a death sentence. Initially, the defendant appeals the conviction in state court, a process called direct appeal.[115] If there is a federal question, the direct appeal terminates when the Supreme Court acts on the defendant's petition for writ of certiorari. When this occurs, a "presumption of finality and legality attaches to the conviction and sentence."[116]

The defendant may then file a petition for relief under the writ of habeas corpus, a civil claim that allows post-conviction review. A convicted defendant, "restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States," may petition the court for relief under the doctrine of habeas corpus.[117] This petition for review allows the defendant an opportunity to contest those convictions and sentences that are illegally obtained at the trial level.[118]

KY. L.J. 387 (1995) (discussing the rights of indigent defendants).

111. *Ake*, 470 U.S. at 77; U.S. CONST. ART. XIV, § 1.

112. Caldwell v. Mississippi, 472 U.S. 320, 329 (1985); Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Gregg v. Georgia, 428 U.S. 153, 188 (1976); Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).

113. FLANDERS, *supra* note 7, at 26.

114. Mark Miller, *Twenty-Fifth Annual Review of Criminal Procedure: Appellate Review of Sentences*, 84 GEO. L.J. 1389, 1389-91 (1996).

115. Barefoot v. Estelle, 463 U.S. 880 (1983). When a defendant is convicted and sentenced under federal law in federal court, the defendant pursues his direct appeal in the federal courts. *Id.*

116. *Id.* at 887.

117. The Judiciary Act of 1867, ch. 28, § 1, 14 Stat. 385; The United States Constitution provides that "the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. In Latin, "habeas corpus" means "you have the body." BLACK'S LAW DICTIONARY 709 (6th ed. 1990).

118. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (to be codified as amended at 28 U.S.C. §§ 2241-2266) [hereinafter Anti-Terrorism Act]. In addition to altering the provisions for habeas corpus procedures, the Anti-Terrorism and Effective Death Penalty Act of 1996 also added 28 U.S.C. §§ 2261-66, which contain rules for special

Concerns for finality of convictions and federalism have limited the potentially broad scope of the habeas corpus doctrine.[119] Although habeas review is not conducted to correct errors of fact, factual allegations may be reviewed if they pertain to a constitutional violation.[120] With few exceptions, the petitioner may rely only on law available at the time his conviction became final.[121] In addition, a defendant may be procedurally barred from raising a claim if he failed to raise it first in state court.[122] When a reviewing court determines that an error did occur at the trial level, relief will only be granted to the petitioner if the error caused a "substantial and injurious effect or influence in determining the jury's verdict."[123]

Post-conviction review is available at both the state and federal levels. A petitioner's post-conviction review at the state level focuses on violations of the state and federal constitution.[124] When state habeas procedures terminate, federal habeas corpus proceedings are the next available means of appeal for the capital defendant.[125] Filing of a second or successive petition for habeas relief is permissible; however, the standard for acceptance of those petitions was recently modified by Congress.[126]

The Anti-Terrorism and Effective Death Penalty Act of 1996 significantly reduced the breadth of habeas corpus.[127] The Act established a statute of lim-

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habeas corpus procedures, applicable when states appoint counsel for the indigent defendant. Under those circumstances, the statute of limitations for filing of a habeas petition is six months. John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. REV. 271, 278 (1996).

119. Blume & Voisin, *supra* note 118, at 273.

120. Herrera v. Collins, 506 U.S. 390, 400 (1993).

121. Teague v. Lane, 489 U.S. 288, 290 (1989). "New" constitutional laws were defined by the *Teague* Court as those which were not dictated by precedent at the time the defendant's conviction became final. *Teague*, 489 U.S. at 290. Retroactive application of a new constitutional rule is permissible only when 1) the new rule decriminalizes behavior which had been previously considered criminal; or 2) if application of the new rule is required by the observance of "'those procedures that . . . are implicit in the concept of ordered liberty.'" *Id.* at 307 (quoting Desist v. United States, 394 U.S. 244 (1969) (Harlan, J., dissenting)). In 1991, the Supreme Court refined the definition of a new rule as one that is "susceptible to debate among reasonable minds." Butler v. McKellar, 494 U.S. 407, 415 (1990); *see* Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus*, 30 U. RICH. L. REV. 303, 304-27 (1996).

122. Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977).

123. Brecht v. Abrahamson, 507 U.S. 619, 619 (1993).

124. While the petitioner used to have to exhaust all available state remedies before filing a petition for habeas relief in federal court in deference to state court proceedings, Congress has modified this requirement in the Anti-Terrorism and Effective Death Penalty Act. Prior to the passage of the Act, the dismissal of a mixed petition, one containing both claims that were exhausted in state courts and those that were not, was without prejudice (Rose v. Lundy, 455 U.S. 509, 510 (1982)). Under the new habeas statute, however, federal courts are permitted to dismiss a mixed petition on the merits, thereby barring the petitioner from raising those claims again. Anti-Terrorism Act § 106(b).

125. Many scholars assert that federal courts provide the best opportunity for vacating a defendant's death sentence. Some of the possible reasons for reliance on federal courts were addressed at a recent American Bar Association panel discussion, which included timidity of elected judges in state court to reverse the decision, ineffective assistance of counsel at the state level, and judicial unwillingness to correct prosecutorial and state court errors. Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in this Corpus?*, 27 LOY. U. CHI. L.J. 523, 529-30 (1996).

126. Anti-Terrorism Act §§ 101,105. *See infra* notes 131-37 and accompanying text.

127. Anti-Terrorism Act § 106(b). *See* Tom C. Smith, *Crime Legislation Passes in Election*

itations for the filing of habeas petitions,[128] specified that federal courts will defer to the conclusions of state courts,[129] and modified the requirements of the filing of second or successive habeas petitions.[130]

Under the Anti-Terrorism Act, a petitioner seeking to have a second or successive habeas corpus petition heard by the district court must initially apply for the ability to have that petition considered by a three-judge panel in the appropriate federal Court of Appeals.[131] The Court of Appeals fulfills a "gatekeeper" function; if the original application is denied by the court, all successive petitions are automatically rejected by the district court.[132] The three-judge panel's decision regarding the acceptability of subsequent petitions is not appealable by the defendant, eliminating the appellate power of the courts of appeal and the Supreme Court.[133] The new standards a habeas petitioner must meet to file a successive habeas petition are stringent. A second or successive petition will be dismissed unless the defendant is able to show that he or she relies on a new rule of constitutional law, made retroactive according to the standards established in *Teague v. Lane*.[134] The petition may also be accepted by the court when the petitioner is able to show that despite due diligence, the factual foundation for a claim was not discoverable at the time of trial. Based on those newly discovered facts, the defendant must show that no reasonable factfinder could have found the defendant guilty of the underlying offense.[135] The Supreme Court upheld these provisions in the Anti-Terrorism Act in recent decision of *Felker v. Turpin*.[136]

Year, 11 CRIM. JUST. 50 (1996); *see generally* Note, *Blown Away? The Bill of Rights After Oklahoma City*, 109 HARV. L. REV. 2074 (1996) (discussing habeas corpus reform movements).

128. Anti-Terrorism Act §§ 101, 105. The petitioner in state custody has one year to file a petition for habeas corpus after the latest of the following: conclusion of direct review; the removal of an impediment created by state action which prevents the petitioner from filing a petition; the Supreme Court's recognition of a new constitutional right, combined with the Court's determination that the right should be retroactively applied; or the date on which the factual basis of a claim was discoverable. *Id.*

129. *Id.* at § 104(3).

130. *Id.* at § 104(4)(e)(1).

131. *Id.*

132. *Id.*

133. *Id.* at § 106(b)(3)(E). This section indicates that "the grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." *Id.*

134. 489 U.S. 288 (1989). For a description of retroactivity, see *supra* note 122.

135. Anti-Terrorism Act § 106.

136. 116 S. Ct. 2333 (1996). In *Felker*, the Supreme Court speedily reviewed the constitutionality of the Anti-Terrorism Act. *See* Smith, *supra* note 127. In an unusual decision, the Supreme Court agreed to consider the constitutionality of the Anti-Terrorism and Effective Death Penalty Act on an expedited schedule. *Id.* The defendant-petitioner had been convicted of multiple offenses and sentenced to death. *Felker*, 116 S.Ct. at 2336. The Court asserted that although its review of a judgment on an application for leave to file a successive petition for habeas was limited by the Act, it was still able to review habeas petitions filed as original matters, thus granting the Court original jurisdiction. *Id.* at 2338-39. In addition, the Court held that the gatekeeping mechanism was not a new tool to evaluate petitions for habeas relief. *Id.* at 2340. The Court asserted that the provision in the Act merely transferred the screening function, formerly performed by the district court, to the courts of appeals. *Id.*

B. Hatch v. Oklahoma[137]

1. Facts

An Oklahoma state court convicted Hatch of two counts of first degree murder.[138] Two sentencing procedures were declared invalid. In the third attempt, however, Hatch was sentenced to die by lethal injection, a decision affirmed by the appellate court.[139] Hatch's petitions for habeas relief were denied by state and federal courts.[140]

After the passage of the Anti-Terrorism Act, Hatch filed applications for a stay of execution and for the ability to file successive habeas petitions in the Tenth Circuit, in compliance with the Act.[141] Hatch initially asserted, however, that the Act did not apply to him because it would constitute a retroactive application of penal legislation, prohibited by the Ex Post Facto Clause of the Constitution.[142]

2. Decision

The Tenth Circuit denied the defendant's application to file subsequent habeas petitions, as well as the application for the stay of execution.[143] The Court determined that none of Hatch's claims met the standards established by the Anti-Terrorism Act's requirements for second or successive petitions.[144] Hatch was executed by lethal injection on August 10, 1996.[145]

3. Analysis

The writ of habeas corpus has been celebrated as one of the fundamental components of the American criminal justice system.[146] In 1961, the Supreme Court cautioned that "there is no higher duty than to maintain [the writ] unimpaired."[147] Yet, Congress' Anti-Terrorism Act—relied on in *Hatch*—and the "procedural maze" created by the Supreme Court have profoundly altered the breadth of habeas review.[148]

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137. 92 F.3d 1012 (10th Cir. 1996).
138. *Hatch*, 92 F.3d at 1013.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 1014. The Ex Post Facto Clause provides that "No Bill of Attainder or ex post facto Law shall be passed." U.S. CONST. art. I, § 9, cl. 3. The Tenth Circuit determined that Hatch's claim did not violate the Ex Post Facto Clause because his application was filed two months after the passage of the Anti-Terrorism Act. *Hatch*, 92 F.3d at 1014.
143. *Hatch*, 92 F.3d at 1017.
144. *Id.* at 1014-17.
145. Lois Romano, *Execution Closes A Tragic Circle: Douglas's Children Watch Their Parents' Killer Die*, WASH. POST, August 10, 1996, at A3. Interestingly, State Senator Brooks Douglass, who witnessed Hatch's execution for the murder of his parents, authored legislation allowing surviving relatives to witness the execution of individuals convicted of murdering their family members. *Id.*
146. Stephen B. Bright, *Does the Bill of Rights Apply Here Anymore? Evisceration of Habeas Corpus and Denial of Counsel to Those Under Sentence of Death*, CHAMPION, Nov., 1996, at 25.
147. Smith v. Bennett, 365 U.S. 708, 712-13 (1961) (quoting Bowen v. Johnston, 306 U.S. 19, 26 (1939)).
148. Smith v. Murray, 477 U.S. 527, 541 (1986) (Stevens, J., dissenting).

Hatch's application for successive petitions was dismissed because it failed to meet the requirements of the new Anti-Terrorism Act, provisions which the White House publicly acknowledged may be unconstitutional.[149] By adhering to those requirements, the Tenth Circuit Court of Appeals, like the Supreme Court in *Felker*, chose brevity over thoroughness in its review of capital cases.

The Tenth Circuit's preference for efficiency in *Hatch* directly contravenes the otherwise-settled doctrine that death is different, and because of the uniqueness of the sentence, heightened procedural safeguards are necessary to ensure that executions are not administered in an unconstitutional manner. Supporters of the Act maintain that without limits, death row prisoners file seemingly endless habeas petitions, thereby abusing the court system. The efficiency of the new Act, however, has detrimental effects.[150] By emphasizing speed, the criminal justice system risks the likelihood that innocent defendants will be executed,[151] that race will continue to infect the determination made in the sentencing phase,[152] and that a defendant may suffer fatal consequences because of an attorney's error.[153]

CONCLUSION

The Tenth Circuit Court of Appeals' decisions in *McCullah* and *Castro* illustrate a strong commitment to ensuring that capital defendants are afforded due process throughout the sentencing phase of a capital case. The recent passage of the Anti-Terrorism and Effective Death Penalty Act, however, may threaten that commitment if the court sacrifices thoroughness of review for efficiency. If the Act survives challenges to its constitutionality,[154] its amendments to the habeas corpus statutes, coupled with its new provisions, will have a significant impact on the outcome of cases brought before the Tenth Circuit Court of Appeals in the future.

Cathleen Coffey

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149. Tabak, *supra* note 125, at 523 n.1 (citing Alison Mitchell, *Clinton Signs Measure on Terrorism and Death Penalty Appeals*, N.Y. TIMES, Apr. 25, 1995, at A18); Stephen Labaton, *Senate Easily Passes Counterterrorism Bill*, N.Y. TIMES, Apr. 18, 1996, at B7.

150. *Supreme Court Hands Prosecutors Two Victories*, 30 PROSECUTOR, Sept.-Oct. 1996, at 34.

151. *See* MICHAEL L. RADELET, ET AL. IN SPITE OF INNOCENCE (1992) (documenting the execution of over 400 innocent defendants in the United States since 1900).

152. *See* McCleskey v. Kemp, 481 U.S. 279 (1987). Statistics offered on behalf of the defendant indicating that black defendants were over four times more likely to be executed than white defendants were insufficient to "demonstrate a constitutionally significant risk of racial bias." *McCleskey*, 481 U.S. at 313.

153. Bright, *supra* note 146; *see* Coleman v. Thompson, 501 U.S. 722 (1991). In *Coleman*, the Court determined that the filing of a notice of appeal three days late in state court by the defendant's attorney constituted a default by the defendant, thereby barring the defendant from raising those issues in federal court. *Coleman*, 501 U.S. at 750. Bright asserts that Congress has revealed its indifference to injustice most remarkably in the combination of the denial of assistance of counsel for post-conviction review, coupled with the imposition of a statute of limitations which will inevitably result in a capital defendant's inability to pursue relief before the statute of limitations tolls. *Id.*

154. *Id.*