

TABLE OF CONTEXTS

---

CHAPTER ONE  
JURISDICTION AND RELATED MATTERS

A. The Custody Requirement . . . . . 1

1. The Rule . . . . . 1

2. “Custody” Defined . . . . . 1

3. Requirement Is Jurisdictional . . . . . 1

4. Timing Of When Custody Requirement Must Be Satisfied . . . . . 1

5. Custody Requirement Applies To Both Citizens And Aliens . . . . . 1

6. Petitioner’s Claim Must Involve The Right To Be Released . . . . . 2

7. Each Claim Must Be Analyzed Separately . . . . . 2

8. Application Of The Custody Requirement . . . . . 2

    a. Circumstances Where Custody Requirement Is Satisfied . . . . . 2

        1) Incarceration . . . . . 2

        2) Probation And Parole . . . . . 2

        3) Detention On A Parole Warrant, Bail Or O/R Release . . . . . 3

        4) Rehabilitation . . . . . 3

        5) Consecutive Sentences . . . . . 3

        6) Concurrent Sentences . . . . . 4

        7) Suspended Or Stayed Sentences . . . . . 5

        8) Community Service . . . . . 5

        9) Awaiting Execution Of Sentence . . . . . 5

        10) Deportation Order . . . . . 6

        11) Commitment To Mental Institution . . . . . 6

        12) Civil Commitment . . . . . 6

    b. Circumstances Where Custody Requirement Is Not Satisfied . . . . . 7

        1) Fines . . . . . 7

        2) Restitution . . . . . 8

        3) Sexual Offender/Narcotics Registration . . . . . 9

        4) Deportation . . . . . 9

        5) Fugitives . . . . . 10

        6) Licenses And Other Privileges . . . . . 10

        7) Economic Loss . . . . . 10

        8) Expired Prior Conviction Or Parole Revocation . . . . . 10

B. Subject Matter . . . . . 11

    1. Federal Question Jurisdiction . . . . . 11

a.	Federal Prisoners	11
1)	Section 2255	11
2)	Section 2241	12
3)	Error <i>Coram Nobis</i>	14
4)	<i>Audita Querela</i>	15
5)	Civil Rights Claims	16
6)	Terrorism Statutes	16
b.	State Prisoners	17
2.	Cognizability	20
a.	Federal Prisoners	20
1)	Constitutional Violations	21
2)	Federal Law Violations	22
3)	Treaty Violations	23
b.	State Prisoners	23
1)	Generally	23
a)	Constitutional Violations	24
b)	Federal Law Violations	24
c)	Treaty Violations	25
2)	State Law Violations	25
a)	Fundamentally Unfair Trial	27
b)	State Created Liberty Interests	28
c)	Unexpected Departure In State Law	29
d)	Disparate Treatment	29
c.	Fourth Amendment Claims	31
1)	The “Full and Fair Opportunity” Standard	31
2)	Review Of The State Court’s Legal Conclusions	33
a)	Erroneous Legal Analysis	33
b)	Closed Mind Exception	34
c)	State Court Ignores Fourth Amendment Claim	35
3)	Review Of The State Court’s Factual Findings	35
4)	Intervening Fourth Amendment Decisions	37
5)	<i>Stone</i> Does Not Apply To The Government	38
6)	Application Of <i>Stone</i> In Other Contexts	38
7)	<i>Stone</i> Applies To State And Federal Prosecutions	38
d.	Newly Discovered Evidence Of Innocence	39
e.	Ineffective Assistance Of Counsel On Collateral Review	40
f.	Waiver Of Right To Collateral Review	42
g.	Conclusory Allegations	43
C.	Mootness	43
1.	Incarceration And Parole	44
2.	Post-Incarceration/Post-Parole	44

a.	Presumed Collateral Consequences .....	44
b.	Limits Of The Presumption .....	45
1)	Challenges To A Completed Sentence .....	45
2)	Parole Or Probation Revocation .....	46
3)	Prison Disciplinary Proceedings .....	47
c.	Deportation .....	47
d.	Civil Commitment: Sexually Violent Offender Statutes .....	48
3.	Death Of Petitioner .....	49
4.	Institution Of Retrial Proceedings Following Grant Of Habeas Relief .....	49
5.	Mootness Exception: Capable Of Evading Review .....	49
6.	Pretrial Detention Preceding Conviction .....	50
7.	Standard Of Review .....	50
D.	Standing .....	50
1.	Types .....	51
a.	Article III .....	51
b.	Prudential .....	52
1)	Third Party Standing .....	52
2)	“Next Friend” Standing .....	54
2.	Distinctions Between Article III And Prudential Considerations .....	58
a.	Prudential Considerations Subject To Modification By Congress .....	59
b.	Prudential Considerations Regarded As Flexible .....	59
c.	Prudential Considerations Waivable? .....	59
3.	Burden .....	60
4.	Standard Of Review .....	60
E.	Naming The Proper Respondent (A.K.A. Personal Jurisdiction) .....	60
1.	Federal Prisoners .....	61
2.	State Prisoners .....	61
3.	Special Circumstances .....	63
a.	Prisoner Incarcerated In State Other Than The One Of Conviction .....	63
b.	Prisoner Incarcerated In One State, But Subject To Detainer Issued By Another State .....	63
c.	Prisoner Obtained By A Writ Of Habeas Corpus Ad Prosequendum .....	63
4.	Consequence Of Improperly Named Respondent: Transfer Or Dismissal .....	64
5.	Waiver .....	64
F.	Identifying The Proper District Court (A.K.A. Venue) .....	65
1.	Federal Prisoners .....	65

2.	State Prisoners	66
a.	Special Circumstances	66
1)	Effect Of Prisoner's Transfer To Another State During Pendency Of Federal Petition	66
2)	When Prisoner's Residence Determines Court With Personal Jurisdiction	66
3.	Transfers	67
a.	Transfers To Another District Within The Same State (State Prisoners)	67
b.	Petition Filed In A District Without Territorial Jurisdiction	67
c.	Transfers For The Convenience Of Parties And Witnesses	68
4.	Waiver	68
G.	Abstention	68
1.	<i>Younger</i> Doctrine	68
a.	<i>Younger</i> Test	69
b.	Dismissal Versus Stay	70
2.	<i>Colorado River</i> Doctrine	70
3.	<i>Pullman</i> Doctrine	71
H.	Ripeness	72
I.	Advisory Opinions	73
J.	<i>Rooker-Feldman</i> Doctrine	73

## CHAPTER TWO

### THE INTERPLAY BETWEEN HABEAS CORPUS AND CIVIL RIGHTS ACTIONS

A.	General Principles	75
1.	The <i>Heck</i> Rule	75
2.	Prospective Relief Excluded	76
3.	<i>Heck</i> Not Applicable To Pending Criminal Matters	77
4.	Pre-Trial Diversion And The Conviction Requirement	77
5.	Dismissal Of Improper Claims	78
6.	Waiver	78
7.	Application Of § 1983 Where Habeas Unavailable	79
8.	Application Of <i>Heck</i> To <i>Bivens</i> Claims	80
B.	<i>Heck</i> Applied	80
1.	Trial Claims	80
2.	Fourth Amendment Claims	80
a.	Search And Seizure Claims	82
b.	Excessive Force Claims	83

3.	Method Of Execution Claims .....	84
4.	Prison Disciplinary Proceedings .....	85
5.	State Parole Proceedings .....	89
6.	Place Of Detention .....	91
7.	Extradition .....	91
8.	Sexually Violent Predator Statutes .....	91
9.	Biological Testing .....	92

CHAPTER THREE  
AEDPA REVIEW STANDARDS

A.	Cases Governed By AEDPA .....	94
B.	Pre-AEDPA .....	95
C.	Questions Of Law / Mixed Questions Of Law And Fact .....	95
1.	Methodology .....	95
a.	Purely Legal And Mixed Questions Of Law Distinguished .....	95
b.	Court May Proceed Directly To AEDPA Analysis Without First Deciding Whether State Court's Decision Was Wrong .....	95
2.	Merits Adjudication .....	96
a.	Circumstances That Qualify As A Merits Adjudication .....	96
1)	State Court Summarily Denies The Federal Claim .....	97
2)	State Court Applies A State Standard That Is The Functional Equivalent To, Or Stricter Than, The Federal Standard .....	97
3)	State Court Cites Directly To Opinions Of The Supreme Court Or To Cases Which Themselves Rest On Supreme Court Precedent .....	98
4)	State Court Applies Controlling Supreme Court Precedent .....	99
5)	Alternative Procedural-Merits Adjudications .....	100
6)	Federal Claim Addressed In The Context Of Adjudicating A Different Issue .....	101
7)	No Prima Facie Showing .....	101
8)	Unexhausted Claims .....	101
9)	Merits Considered In The Context Of A Procedural Default Analysis .....	102
b.	Circumstances That Do Not Qualify As Merits Adjudications .....	102
1)	No State Court Disposition .....	102
2)	Procedurally Defaulted Claims .....	103
3)	Plain Error Review .....	103

c.	Lower State Court Adjudications Entitled To Deference	104
d.	Partial State Court Adjudications	104
e.	Erroneous State Court Reasoning	105
f.	Significance Of The Last Reasoned Decision And Application Of The Look-Through Doctrine	107
1)	Summary Denials	107
2)	Multiple State Court Reasoned Decisions	108
g.	Harmless Error Analysis	108
h.	Effect Of The Receipt Of New Evidence In The Federal Proceeding	109
3.	“Contrary To”	111
a.	Defined	111
b.	Formulary Statements Not Required	113
c.	No Citation To, Or Even Awareness Of, Controlling Authority Required	114
d.	State Court Applies State Standard That Is The Functional Equivalent To, Or Stricter Than, The Federal Standard	114
e.	State Court’s Use Of Imprecise Or Shorthand Language In Describing Controlling Legal Standard	115
f.	State Court Decisions Applying The Correct Rule Are Reviewed Under The “Unreasonable Application” Clause	116
g.	The Addition, Deletion, Or Alteration Of A Factor In A Clearly Established Supreme Court Test	116
h.	Reasoning Demonstrates That The State Court Applied An Incorrect Legal Standard	117
i.	Consequence Of “Contrary To” Determination	118
4.	“Clearly Established”	118
a.	The Date Upon Which The Law Must Be “Clearly Established”	118
b.	United States Supreme Court Precedent Drives The § 2254(d)(1) Inquiry	120
c.	<i>Teague</i> Provides Guidance	120
d.	Supreme Court Holdings, Not Dicta	122
e.	Plurality And Concurring Opinions	122
f.	Non-Constitutional Supreme Court Rulings Insufficient	123
g.	Questions Expressly Reserved By The Supreme Court	123
h.	Friction Between Supreme Court Cases	123
i.	Lower Federal Court And State Court Decisions Not Irrelevant	124

j.	Lower Court Decision Based On Supreme Court Decisions Not Itself Sufficient .....	124
k.	The “Clearly Established” Requirement Applies To Treaty Violations .....	125
l.	Consequence Of No “Clearly Established” Law Determination .....	125
m.	Illustrative Cases .....	125
5.	“Unreasonable Application” .....	133
a.	Defined .....	133
1)	Court of Appeals Elaboration .....	135
2)	Specificity Of The Rule Affects The “Reasonableness” Determination .....	136
3)	State Court’s Unique Ability To Assess The Merits Of The Claim .....	137
4)	Closeness Of The Issue .....	137
b.	Extension Of Precedent .....	137
c.	Erroneous Or Incorrect Application Of Controlling Precedent Not Enough .....	140
d.	“Clearly Erroneous” State Court Adjudication Not The Same As An “Unreasonable” One .....	141
e.	Lower Federal Court And State Court Decisions Not Irrelevant .....	141
f.	Conflicting Authorities .....	142
g.	Absence Of Supreme Court Authority As Demonstrating Reasonableness .....	144
h.	Reasonableness Of State Court Decision Assessed In Light Of The Record Before It .....	144
i.	Consequence Of Unreasonable State Court Merits Adjudication .....	145
j.	Effect Of Erroneous Underlying Factual Finding Or Objectively Unreasonable Factual Determination .....	146
k.	Section 2254(d)(1) Deference Does Not Apply To Pro- Petitioner State Court Adjudications .....	146
l.	State Court Adjudication Dependent On An Antecedent Unreasonable Application Of Federal Law .....	146
m.	Illustrative Cases .....	147
6.	Constitutionality .....	151
D.	Questions Of Fact .....	152
1.	Adjudication .....	152
a.	Types Of Facts .....	152
b.	Explicit And Implicit Findings .....	152

1) Infer From Decision .....	152
2) Well-Settled Legal Principles .....	153
c. State Appellate Court Findings .....	155
d. Ambiguous State Court Record .....	156
e. Absence Of State Court Record .....	156
f. Mixed Questions Of Law And Fact .....	157
2. Deference Afforded .....	160
a. The Statute .....	160
b. The Strength Of The Presumption Of Correctness Can Vary With The Circumstances .....	161
c. Relationship Between § 2254(d)(2) and (e)(1) .....	162
1) First Circuit’s View .....	162
2) Third Circuit’s View .....	162
3) Fourth Circuit’s View .....	163
4) Fifth Circuit’s View .....	163
5) Seventh Circuit’s View .....	164
6) Ninth Circuit’s View .....	164
7) Other Views .....	165
c. Deference Applied .....	166
1) Intrinsic Challenges .....	166
a) Absence Of A Factual Finding .....	167
b) Misapprehension Of The Law .....	167
c) Defective Fact-Finding Process .....	168
d) Misapprehension Of The Facts .....	169
e) Ignoring Critical Evidence .....	169
f) Insufficient Evidence .....	170
2) Extrinsic Challenges .....	170
d. All Conflicts In Testimony Resolved .....	171
e. Effect Of Conflicting State Trial And Appellate Court Factual Findings .....	171
f. What Constitutes “Evidence Presented In The State Court Proceeding” Within The Meaning Of § 2254(d)(2) .....	172
1) All Evidence In The State Court Record Qualifies .....	172
2) Evidence Not Presented To The State Court, But Jointly Submitted By The Parties In The Federal Proceeding .....	173
3) The § 2254(d)(2) Limitation Applies Only To Facts, Not Theories .....	173
4) Waiver .....	173
g. Effect Of The Passage Of Time Between Event And The Making Of The Factual Finding .....	174
h. Change In Circumstances Underlying Competency Finding .....	174

i. Deference Limited To Judicial Findings .....	175
3. Documentary Evidence .....	175
4. No Written Findings Required .....	175
5. Full and Fair Hearing Requirement .....	176
6. Effect Of Erroneous Factual Finding .....	179
E. Waiver .....	179
F. Federal Appellate Standards Of Review .....	179
1. “Contrary To”/“Unreasonable Application Of” Determination .....	180
2. Findings Of Fact .....	180

CHAPTER FOUR  
EVIDENTIARY HEARINGS

A. Generally .....	181
1. State Prisoners .....	181
2. Federal Prisoners .....	182
B. Failure To Develop Factual Basis In State Court Proceedings .....	183
1. Evolution Of The Failure To Develop Restriction .....	183
2. Diligence .....	184
3. Exceptions .....	191
a. New Rule/Unavailable Factual Predicate And Actual Innocence ...	191
1) Only The Supreme Court Can Declare A “New Rule” .....	192
2) Only The Supreme Court Can Declare The Retroactivity Of A “New Rule” .....	192
3) How Retroactivity Is Determined .....	192
4) Application Of Innocence Exception To Sentencing Claims ...	192
b. New Evidence That Does Not Concern The Merits Of The Claim .	193
4. Diligence A Question Of Fact .....	194
5. Waiver .....	194
C. Whether An Evidentiary Hearing Is Appropriate Or Required .....	195
1. Evidentiary Hearing Mandatory .....	195
a. The <i>Townsend</i> Factors .....	195
b. The Petitioner Has Alleged Grounds For Relief Under AEDPA’s Deferential Review Standards .....	196
2. Evidentiary Hearing Discretionary .....	197
D. Other Limitations On Entitlement To An Evidentiary Hearing .....	198
1. Alleged Facts, Even If True, Would Not Entitle Petitioner To Relief ...	198
2. Failure To Demonstrate How An Evidentiary Hearing Will Further The Claim .....	198
3. No Disputed Facts .....	199

4.	Purely Legal Issue . . . . .	199
5.	Conclusory Allegations . . . . .	199
6.	Patently Frivolous . . . . .	200
7.	Self-Serving Declarations . . . . .	200
8.	Claim Can Be Resolved On Existing Record . . . . .	200
E.	Effect Of The Receipt Of New Evidence In The Federal Proceeding . . . . .	201
F.	Expansion Of The Record In Lieu Of Evidentiary Hearing . . . . .	203
G.	Evidentiary Hearing Procedures . . . . .	203
1.	Timing Of The Evidentiary Hearing . . . . .	203
2.	Appointment Of Counsel . . . . .	203
3.	Prisoner's Attendance . . . . .	204
4.	Subpoenas . . . . .	205
5.	Prehearing Conference . . . . .	206
6.	Evidentiary Rules . . . . .	207
7.	Scope Of Federal Evidentiary Hearing . . . . .	208
H.	Federal Appellate Standard of Review . . . . .	208

## CHAPTER FIVE

### EXPANSION OF THE RECORD

A.	The Rule . . . . .	209
B.	Purpose . . . . .	209
1.	Obviate Need For Evidentiary Hearing . . . . .	210
2.	To Assist The Court When An Evidentiary Hearing Is Ordered . . . . .	210
C.	Restrictions . . . . .	210
1.	Petitioner's Failure To Develop Factual Basis In State Court Proceedings . . . . .	210
2.	Relevant Materials . . . . .	212
3.	Credibility Issues . . . . .	212
4.	Post-Evidentiary Hearing Requests . . . . .	214
D.	Leave Of Court Prior To Submitting Materials Not Required . . . . .	214
E.	Federal Appellate Standard of Review . . . . .	214

## CHAPTER SIX

### DISCOVERY

A. The Rule .....	215
B. Purpose .....	216
C. Good Cause Required .....	216
1. Specific Showing .....	216
2. Not To Be Used To Conduct Fishing Expeditions .....	216
3. Effect Of Prior State Court Ruling Denying Discovery .....	217
D. Types Of Discovery .....	217
E. Timing .....	217
F. Restrictions .....	217
1. Petitioner's Failure To Develop Factual Basis In State Court Proceedings .....	217
2. Unexhausted Claims .....	219
G. Attorney-Client Privilege, Waiver, And Protective Orders .....	220
H. <i>Ex Parte</i> Requests For Discovery Prohibited .....	220
I. Federal Appellate Standard of Review .....	221

## CHAPTER SEVEN

### THE *TEAGUE* RULE

A. General Principles .....	222
1. The Rule .....	222
2. When <i>Teague</i> Is Addressed By The Court Relative To Other Issues .....	222
a. <i>Teague</i> Addressed Before The Merits .....	222
b. Procedural Bars Generally Addressed Before <i>Teague</i> .....	222
3. <i>Teague</i> Applies To Both State And Federal Prisoners .....	223
4. <i>Teague</i> Applies To Both Capital And Non-Capital Cases .....	223
5. <i>Teague</i> Defense Available To The State, But Not Prisoners .....	224
6. <i>Teague</i> Rule Not Binding On The States .....	224
B. <i>Teague</i> Limited To Procedural Rules .....	225
1. New Substantive Rules .....	225
2. Statutory Procedural Rules .....	227
C. The Parties' Burdens .....	227
1. The State's Burden Of Raising The Defense .....	227
2. The Prisoner's Burden Of Establishing That The Rule Is Not New .....	229
3. Federal Court May Raise <i>Teague</i> Rule <i>Sua Sponte</i> .....	229
D. Relationship Between AEDPA And <i>Teague</i> .....	230

1.	<i>Teague</i> Survives Enactment Of AEDPA	230
2.	<i>Teague</i> Guides What Is “Clearly Established” Law Under AEDPA	230
3.	Circumstances Where <i>Teague</i> Affords Less Protection To State Judgments Than AEDPA	230
a.	Source Of Precedent Under AEDPA More Restrictive	230
b.	Pre-Finality State Court Adjudications	231
4.	Circumstances Where <i>Teague</i> Affords Greater Protection To State Judgments Than AEDPA	231
a.	No Merits Adjudication By A State Court	231
b.	State Court Decision Contrary To Supreme Court Authority	231
c.	Post-Finality State Court Adjudications	232
d.	Pre-AEDPA Federal Petitions	232
E.	The Methodology Of Applying <i>Teague</i>	232
1.	Ascertaining The Date Of Finality	232
2.	Determining Whether The Rule Petitioner Seeks To Apply Was Dictated By Precedent As Of The Date Of Finality	233
a.	Various Formulations Of What Constitutes A “New” Rule	234
b.	General Approach	235
1)	The Underlying Supreme Court Decision Itself	235
2)	Supreme Court Decisions Rendered After The Underlying Supreme Court Decision	236
3)	Opinions Of Lower State And Federal Courts	236
4)	Institutionalized Practices	237
c.	Can Lower Federal Courts Establish “New Rules”?	238
d.	Deeply Embedded Rules Not “New”	239
e.	Availability Of Claim Under State Law Insufficient	239
f.	Rules Of General Application Applied To New Facts Not “New Rules”	239
3.	Determining If An Exception Applies	241
a.	Power To Proscribe; Category Of Punishment For Class Of Defendants	241
b.	Watershed Rules	242
F.	Leading <i>Teague</i> Cases	244

## CHAPTER EIGHT

### DISTRICT COURT PLEADINGS AND PRACTICE

A.	The § 2254 PETITION OR § 2255 MOTION	251
1.	Form And Substance	251
a.	Section 2254 Petitions – State Prisoners	251

b.	Section 2255 Motions – Federal Prisoners . . . . .	252
2.	Specificity In Pleadings . . . . .	253
3.	Preliminary Consideration By Judge . . . . .	253
4.	Filing Requirements . . . . .	254
a.	State Prisoners . . . . .	254
b.	Federal Prisoners . . . . .	255
5.	Liberal Construction . . . . .	256
6.	Incorporation . . . . .	256
7.	Service Requirements . . . . .	256
B.	Proceeding <i>In Forma Pauperis</i> In District Court . . . . .	256
1.	Right To <i>In Forma Pauperis</i> Status . . . . .	257
a.	State Prisoners . . . . .	257
b.	Federal Prisoners . . . . .	257
2.	Limited To Natural Persons . . . . .	257
3.	Extent Of Indigency Required . . . . .	258
4.	Untrue Poverty Allegations . . . . .	258
5.	Right To Immediate Appeal . . . . .	258
C.	Transcripts And Records . . . . .	258
1.	District Court Documents And Records . . . . .	258
2.	Transcripts . . . . .	258
a.	State Prisoners . . . . .	258
b.	Federal Prisoners . . . . .	259
c.	Transcript Of Proceeding Before Magistrate Judge . . . . .	259
D.	Appointment Of Counsel . . . . .	259
1.	No Constitutional Right . . . . .	259
2.	Statutory Right . . . . .	259
a.	Capital Cases . . . . .	259
b.	Non-Capital Cases . . . . .	260
E.	Summary Dismissals . . . . .	261
1.	District Court Dismissals . . . . .	261
a.	Summary Dismissal Standards . . . . .	261
b.	Timing . . . . .	262
2.	Government Dismissal Motions . . . . .	262
F.	Motion For More Definite Statement . . . . .	263
G.	The Answer . . . . .	263
1.	When Government Is Obligated To Answer . . . . .	263
2.	Form And Substance . . . . .	264
a.	Section 2254 Cases – State Prisoners . . . . .	264
b.	Section 2255 Motions – Federal Prisoners . . . . .	265
3.	Sufficiency Of The Answer . . . . .	266
4.	Affirmative Defenses . . . . .	266

a.	Consequences Of Failure To Allege Affirmative Defense .....	267
b.	Amendment To Allege An Affirmative Defense .....	268
5.	Transcripts .....	271
6.	Service .....	272
H.	Reply (Formerly Traverse) And Sur-Reply .....	273
I.	Motion For Summary Judgment .....	273
J.	Motion To Amend .....	274
1.	Rule 15(a) .....	274
2.	Application Of Rule 15 To Habeas Corpus Actions .....	275
3.	Policy Favoring Amendment .....	275
a.	Burdens .....	275
b.	Factors That Guide The Court's Discretion .....	276
1)	Undue Delay .....	276
2)	Futility .....	277
3)	Prejudice To Opposing Party .....	277
4)	Previous Efforts To Amend .....	278
c.	Effect Of Rule 16 Scheduling Orders .....	278
4.	Appellate Review Standards .....	278
K.	Notice Of Related Cases .....	279
L.	Motion For Reconsideration .....	279
M.	Certification Of Question To State's Highest Court .....	280
N.	Abandonment Of Petition .....	281
O.	Dismissal For Failure To Prosecute Or Comply With Federal Rules .....	282
P.	Magistrate Judge Practice And Procedure .....	283
1.	The Role Of Magistrate Judges Generally .....	283
a.	The Assignment Of Cases To Magistrate Judges .....	283
b.	Limited Authority Of Magistrate Judges .....	284
c.	Consent To Magistrate Judge Entering Final, Appealable Judgement .....	284
1)	Effect Of Consent .....	284
2)	Procedures To Consent .....	285
3)	Party's Attorney May Consent .....	285
4)	No Right To Withdraw Consent .....	286
5)	Appeal Of Magistrate Judge's Decision .....	286
2.	Orders Involving Non-Dispositive Matters .....	286
a.	Format .....	286
b.	Transcript Of Proceeding Before The Magistrate Judge .....	286
c.	Time To Seek District Court Review; Response .....	287
d.	Standards Of Review .....	287
e.	Additional Evidence Prohibited .....	287
f.	No Entitlement To Oral Argument Or A Hearing .....	288

g.	Consequences Of Failing To Timely Seek District Court Review . . .	288
3.	Findings And Recommendations Involving Dispositive Matters . . . . .	288
a.	Format . . . . .	288
b.	Transcript Of Proceeding Before The Magistrate Judge . . . . .	288
c.	Time To Object; Response To Objections . . . . .	289
d.	Standard Of Review . . . . .	289
e.	The Consideration Of New Evidence . . . . .	290
f.	New Arguments Raised For First Time In Objections To The District Court For De Novo Review . . . . .	291
1)	District Court Prohibited From Considering New Arguments . .	291
2)	District Court Must Consider New Arguments . . . . .	292
3)	District Court Has Discretion To Consider New Arguments . . .	292
g.	No Entitlement To Oral Argument Or A Hearing . . . . .	292
h.	Consequences Of Failing To Timely Object . . . . .	292
1)	District Court Review . . . . .	292
2)	Court Of Appeals Review . . . . .	293
a)	Unfavorable Recommendation Overall . . . . .	293
(1)	Questions Of Fact/Questions Of Law . . . . .	293
(2)	Plain Error Review . . . . .	295
(3)	Specific Warnings . . . . .	295
(4)	District Court Reviewed Issue Notwithstanding Absence Of An Objection . . . . .	296
b)	Recommendation Favorable Overall, But Contains A Non- Dispositive Adverse Determination . . . . .	296
(1)	Finding Issue Waived . . . . .	297
(2)	Finding Issue Not Waived . . . . .	297
Q.	Supplemental Pleadings – New Authority . . . . .	298
R.	Bail During Pendency Of Federal Habeas Proceeding . . . . .	298
S.	Crime Victims’ Rights . . . . .	300
1.	Specific Rights Afforded . . . . .	301
2.	Enforcement Of Rights . . . . .	301

## CHAPTER NINE

### AFFIRMATIVE DEFENSES

A.	Statute Of Limitations . . . . .	303
1.	The Rule . . . . .	303
2.	Applicability . . . . .	303
a.	State And Federal Prisoners . . . . .	304
b.	Effective Date . . . . .	305

c.	Mischaracterizing Basis For Relief	305
d.	Longer State Limitations Period Immaterial	305
e.	Interpretation	306
f.	Threshold Issue	306
3.	Constitutionality	306
4.	Effect Of Untimely Petitions	307
5.	Commencement Of The Limitations Period (The Clock Starts)	307
a.	Finality Of Judgment	307
1)	Four Common Scenarios	308
a)	No Direct Appeal Taken	308
b)	Appeal Taken To First Appellate Level, But No Discretionary Appeal Taken	309
c)	Both First Level And Discretionary Appeal Taken, But No Petition For Certiorari Filed	311
d)	Both First Level And Discretionary Appeal Taken, And Petition For Certiorari Filed	311
2)	Actual Notice Not Relevant	313
3)	Other Actions That May Affect The Date Of Finality	313
a)	Remand On Direct Appeal	313
b)	Delayed Appeals	314
c)	The Assertion Of New, Timely Claims After The Initial One Year Limitations Period Has Expired	315
d)	Finality Of Deferred Adjudications	318
e)	Finality Prior To Effective Date Of AEDPA	318
b.	State Impediment	319
1)	Violation Of Constitution Or Laws Of The United States	321
2)	“State Action” Requirement	322
3)	Nexus Requirement	322
4)	Fact-Dependent Inquiry	325
5)	Due Diligence	325
c.	Newly-Recognized, Retroactive Rights	325
1)	Only The Supreme Court Can Declare A “New Rule”	327
2)	Who Declares Retroactivity Of A “New Rule” Announced	
By The Supreme Court		327
a)	Any Federal Court (Majority View)	327
b)	United States Supreme Court Only (Minority View)	328
3)	How Retroactivity Is Determined	328
4)	When The Limitations Period Commences For Newly Recognized Rights	328
d.	Discovery Of Factual Predicate	329
1)	“Due Diligence”	329

2)	Knowledge Of Facts, Not Their Legal Significance, Controlling	332
a)	Ineffective Assistance Of Counsel	332
b)	Change In Controlling Law	333
3)	Evidence Unnecessary	333
4)	Vacating Of Prior Conviction Used To Enhance Present Sentence	334
5)	Allowance Of Time For Delivery When Petitioner Discovers Factual Predicate In A Letter	334
6.	Tolling	334
a.	Statutory Tolling For State Prisoners	334
1)	Burden	335
2)	General Tolling Principles	335
a)	Minimum Application Requirements	335
b)	Tolling Stops, Not Restarts, The Clock	335
c)	Second Or Successive Petitions Can Toll	336
d)	Tolling Principles Generally Not Applicable Where Application Filed Before Effective Date Of AEDPA	336
3)	Tolling Limited To “Properly-Filed” State Court Applications	337
a)	“Properly Filed” Defined	337
b)	Imposition Of Procedural Bar Does Not Necessarily Mean That An Application Was Not “Properly Filed”	339
c)	Independence Or Adequacy Of The State Procedural Bar Immaterial	340
d)	Application Of The <i>Ylst</i> Look-Through Doctrine	341
e)	Untimely State Petitions	341
(1)	Express Untimeliness Ruling	341
(2)	No Express Untimeliness Ruling	342
(3)	Multiple Procedural Bars Imposed, Including Untimeliness	342
f)	Petition Filed In The Wrong State Court	343
4)	Tolling While The State Postconviction Application Is “Pending”	344
a)	Tolling Where Petitioner Does Not Appeal A Lower Court’s Denial Of Postconviction Relief	345
b)	No Tolling Between State Court Petitions If There Is Unreasonable Delay	346
(1)	States With Explicit Timeliness Periods	346
(2)	States Without Explicit Timeliness Periods	347
b)	No Tolling Where Petitioner Not Moving To Next Higher Appellate Level	352

c)	No Tolling Between Series Of Habeas Actions Constituting A “New Round” .....	353
d)	No Tolling Between Finality And State Collateral Review ...	354
e)	No Tolling Between State Court Review And Commencement Of Federal Habeas Action .....	355
f)	No Tolling During Pendency Of Federal Habeas .....	355
g)	Availability Of Tolling In Seeking Certiorari To The Supreme Court Following State Collateral Review .....	356
h)	Tolling Of Exhausted Claims While Pursuing State Collateral Review Of Unexhausted Claims .....	356
i)	Effect Of Overlapping Petitions .....	356
j)	No Tolling Between Improperly Filed State Petitions .....	357
k)	Tolling Ends Upon Completion Of The State Collateral Review Process .....	357
5)	“Pertinent Judgment Or Claim” .....	359
a)	Claims In State Petition Not Alleged In Federal Petition ...	359
b)	Not Directly Attacking The Judgment .....	360
c)	Civil Rights Actions .....	361
d)	No Tolling During Clemency Proceedings .....	361
b.	Equitable Tolling .....	361
1)	Whether Equitable Tolling Is Precluded Under AEDPA .....	362
a)	Supreme Court Decisions .....	362
b)	Lower Courts .....	362
c)	Why Equitable Tolling May Be Precluded Under AEDPA ..	364
2)	The Standard .....	364
3)	Burden .....	365
4)	Waiver .....	366
5)	Diligence .....	366
6)	Nexus Required Even If Extraordinary Circumstances Shown ..	369
7)	Fact-Dependent Inquiry .....	372
8)	Appellate Review .....	373
9)	Specific Circumstances Where Equitable Tolling Is Not Warranted .....	374
a)	Ordinary Negligence Or Incapacity Of Counsel .....	374
b)	Assistance By Fellow Inmates (“Jailhouse Lawyers”) .....	376
c)	Lack Of Counsel .....	377
d)	Pendency Of Unexhausted Federal Petition .....	377
e)	Near Miss .....	378
f)	Ignorance Of The Law; Lack Of Knowledge And Expertise	379
g)	Language Difficulties .....	380
h)	Conditions Unique To Prison Confinement .....	380

i)	Transcripts . . . . .	382
j)	Severity Of Sentence . . . . .	383
k)	Change In Controlling State Law . . . . .	384
l)	Uncertainty Concerning Tolling Principles . . . . .	385
10)	Specific Circumstances Where Equitable Tolling Is Warranted . .	386
a)	Withdraw Of Counsel . . . . .	386
b)	Deception By Counsel . . . . .	386
c)	Egregious Misconduct Of Counsel . . . . .	387
(1)	Counsel Fails To File A Timely Appeal Or Petition For Post-Conviction Relief . . . . .	387
(2)	Habeas Counsel Fails To Provide Petitioner With His Legal File . . . . .	391
d)	Petitioner's Mental Incompetency . . . . .	392
e)	Misconduct Or Delay By Government Officials . . . . .	396
f)	Lack Of Relevant Materials In Prison Library . . . . .	397
g)	Confiscation Or Lack Of Access To Legal Materials . . . . .	401
h)	Petitioner Misled By Court . . . . .	401
i)	Delay In Receiving Court Disposition . . . . .	404
j)	No Receipt Of Petition (Or Other Document) By The Court . . . . .	407
k)	Counsel's Failure To Notify Petitioner Of A Court Ruling . .	408
l)	District Court Error Resulting In Delay . . . . .	410
m)	Law Defining The Limitations Period Unclear . . . . .	410
n)	Prospective Tolling . . . . .	411
11)	Merits Of Underlying Claims Irrelevant . . . . .	411
7.	End Of The Statute . . . . .	411
a.	Only Application Seeking Merits Adjudication Stops The Clock . . . .	411
b.	Lodging Versus Filing . . . . .	412
c.	Absence Of Filing Fee Or IFP Application . . . . .	412
d.	Petition Filed In Wrong Federal Court . . . . .	413
e.	Non-Compliance With Filing Requirements . . . . .	414
f.	The Mailbox Rule . . . . .	414
g.	Protective Petitions . . . . .	415
8.	Calculations . . . . .	415
a.	Federal Rule Of Civil Procedure 6(a) . . . . .	415
1)	Calculating The First Day Of The Period . . . . .	416
2)	Calculating The Last Day Of The Period . . . . .	416
3)	Leap Years . . . . .	416
b.	The Mailbox Rule . . . . .	416
1)	Requirements Where Prison Has Legal Mail System . . . . .	417
2)	Declaration/Notarization Requirement . . . . .	418

a)	Where Prison Has A Legal Mail System .....	418
b)	Where Prison Does Not Have A Legal Mail System .....	419
c)	Enforcement Of The Declaration/Notarization Requirement .....	419
d)	Point In Time That The Declaration Or Notarization Statement Be Filed .....	420
e)	Consequence Of Inmate's Failure To Submit A Declaration Or Notarized Statement .....	420
3)	Mailbox Rule Not Limited To <i>Pro Se</i> Inmates .....	421
4)	Burdens .....	421
5)	State Filings .....	422
6)	Failure To Use Proper Address .....	423
7)	Filing Must Be Delivered To Prison Officials For Filing With The Court .....	423
8)	Petition Never Filed By The Court .....	424
c.	Deadlines Not Extended By Federal Rule Of Civil Procedure 6(d) ..	424
9.	Actual Innocence Exception .....	425
a.	Reasonable Diligence .....	425
b.	Requisite Showing .....	425
c.	Existence Of Exception .....	426
10.	Relation Back .....	428
a.	The Rule .....	428
b.	No Relation Back To Action That Was Previously Dismissed .....	429
1)	Petition, But Not Action, Dismissed .....	429
2)	Prior Judgment Set Aside .....	429
3)	Jurisdictional Interest Retained .....	430
c.	Application Of The Rule .....	430
1)	Relation Back Permitted: Specific Circumstances .....	432
a)	Amended Claim Merely Adds More Specific Facts .....	432
b)	Amended Claim A More Carefully Drafted Version Of Claim In Original Petition .....	432
2)	Relation Back Not Permitted: Specific Circumstances .....	434
a)	Newly-Exhausted Claims In Previously Dismissed Petition ..	434
b)	Different Types Of Ineffectiveness Alleged .....	434
c)	Amended Claim Different In Nature From Claims In Original Petition .....	437
d.	Appellate Review .....	438
11.	Procedures For Raising Defense .....	438
a.	Waiver .....	438
b.	Manner Of Asserting Defense .....	439
1)	Motion To Dismiss .....	439

2)	Answer .....	439
3)	<i>Sua Sponte</i> .....	440
4)	Appellate Court Review .....	440
12.	Laches .....	441
a.	The Rule .....	441
b.	Requisite Showing .....	442
B.	Procedural Default .....	444
1.	General Principles .....	444
a.	The Rule .....	444
b.	Purpose .....	445
c.	Effect Of AEDPA Generally .....	446
d.	Not Jurisdictional .....	447
e.	Procedural Default A Preliminary Issue .....	447
f.	Application Of Procedural Default Principles .....	447
1)	State Prisoners In Section 2254 Cases .....	448
2)	Federal Prisoners In Section 2255 Cases .....	448
g.	Treaty Violation Claims Subject To Procedural Default Principles ..	448
h.	Procedural Default Principles Apply Equally In Capital And Non-Capital Cases .....	449
i.	Procedural Bars Imposed After Claim Was Properly Exhausted Do Not Bar Federal Review .....	449
2.	The Petitioner Violated A State Procedural Rule .....	450
3.	Procedural Default Imposed .....	450
a.	Nature Of The Default .....	450
1)	Default Actually Imposed .....	450
2)	Unexhausted Claims Subject To Default .....	451
b.	Invocation Of The Procedural Bar By The State Court .....	452
1)	The “Plain Statement” Rule .....	452
a)	“Either/Or” State Court Decisions .....	459
b)	Alternative Merits Grounds .....	460
c)	Plain Statement Rule Not Applicable To Unexhausted, Yet Procedurally Barred Claims .....	460
2)	Unexplained State Court Decisions And The Look-Through Doctrine .....	461
3)	The Potential For Ambiguity Caused By Multiple Claims And Multiple Procedural Bars .....	462
4)	Unexplained Or Summary Orders .....	465
5)	The Last Reasoned State Court Decision Must Not Have Removed The Procedural Bar .....	466
c.	State’s Application Of Procedural Bar Not Subject To Review By The Federal Court .....	467

4.	State Procedural Rule Independent Of Federal Law .....	468
a.	State Court Decision Must Not Be Interwoven With Federal Law ..	468
b.	Independence Determined As Of The Date The Default Was Imposed .....	469
c.	Effect Of “Plain Error” Or “Fundamental Error” State Court Review .....	469
d.	Mandatory State Review In Capital Cases .....	477
5.	The State Procedural Rule Is Adequate .....	481
a.	The Rule Is Clear .....	481
b.	The Rule Is Firmly Established .....	483
c.	The Rule Is Regularly Applied .....	485
1)	Vast Majority Of Cases .....	487
2)	Manipulative Intent Unnecessary To Finding Irregularity .....	488
3)	Adequacy Limited To Particular Bar At Issue .....	488
4)	Discretion Not Necessarily Problematic .....	488
5)	Application Of An Established Exception .....	490
6)	No Re-litigation Of Regularity Once Decided .....	490
7)	Adequacy Generally Determined As Of The Date Of Default ..	491
8)	Consistency Determination Limited To Cases Where State Actually Advanced The Procedural Bar .....	491
9)	Consistency Determination Limited To Period Preceding The Date Default Occurred .....	491
10)	Is The Consistency Determination Limited To The Face Of The State Court Orders? .....	492
11)	Clarification Of Existing Rule Does Not Establish Inconsistent Application .....	493
12)	Use Of Unpublished State Court Decisions .....	494
d.	Other Limitations Imposed By The Adequacy Doctrine .....	494
1)	Exorbitant Application Of A Generally Sound Rule .....	494
2)	State Procedural Rules That Unduly Burden The Assertion Of Federal Rights .....	496
3)	State Procedural Rule Is Unconstitutional .....	498
4)	Ineffective State Court Waiver Of Collateral Review .....	499
5)	Mental Competency Claims .....	500
6)	Rule Requiring Ineffective Assistance Claims Be Raised On Direct Appeal .....	500
a)	Petitioner Represented By Same Attorney At Trial And On Appeal .....	500
b)	Insufficient Record On Appeal .....	501
c)	Federal Prisoner .....	501

6.	Avoidance Of A Procedural Default	502
a.	Cause	502
1)	Interference By Government Officials That Makes Compliance With The Procedural Rule Impractical	503
a)	Concealment Or Suppression Of Evidence	503
b)	Transcripts And Records	505
c)	Action Or Inaction By Prison Officials	506
d)	Conditions Associated With Incarceration; Lack Of Access To The Courts	507
e)	Errors By Courts Or Staff	509
f)	Coercion By Government Officials	509
g)	Reliance On Erroneous Precedent	509
2)	The Legal Basis Of The Claim Was Not Reasonably Available	510
3)	The Factual Basis Of The Claim Was Not Reasonably Available	521
4)	The Procedural Default Was The Result Of Counsel's Ineffectiveness	523
a)	Default Occurred At A Stage Of The State Court Proceeding At Which Petitioner Was Constitutionally Entitled To Counsel	523
b)	Counsel's Error Must Rise To The Level Of A Sixth Amendment Violation	527
c)	Ineffectiveness Of Counsel On Collateral Review Where Post-Conviction Forum Was The First Opportunity To Raise The Claim	527
d)	Cause Where Same Attorney Represented Petitioner At Trial And On Appeal Or Collateral Review	528
e)	Exhaustion Of Ineffectiveness Claim Constituting The Basis For "Cause"	529
f)	Conclusory Allegations Insufficient	530
5)	The Procedural Default Was The Result Of Counsel's Conflict Of Interest	530
6)	Mental Illness Of The Petitioner	531
7)	Reasonable And Diligent Investigation Requirement	532
8)	Miscellaneous Circumstances Not Constituting Cause	532
b.	Actual Prejudice	533
1)	<i>Brady</i> Suppression Of Evidence Claims	534
2)	Where Counsel's Ineffectiveness Constitutes The "Cause" For The Default	534
3)	Claims Involving Structural Error	535
c.	Miscarriage Of Justice	537
1)	Actually Innocent Of The Death Penalty	537

a)	Applicability	537
b)	The Standard	538
c)	Extension To Sentencing In Noncapital Cases	538
2)	Actually Innocent Of The Offense Of Conviction	539
a)	Applicability	539
b)	The Standard	539
c)	Lesser Degree Of Guilt	544
d)	Newly Discovered Evidence Requirement	546
e)	Due Diligence	546
f)	Not An Independent Substantive Claim	547
g)	Guilty Plea Context	548
h)	Effect Of AEDPA	550
3)	Possible Anomalous Results	550
4)	Order Of Consideration	551
7.	Waiver Of The Procedural Default Defense	551
a.	Defense Waived If Government Fails To Timely And Properly Assert	551
b.	Procedural Default Defense Must Generally Be Asserted In Government's First Responsive Pleading	552
c.	Argument That The Government Waived Its Procedural Default Defense May Itself Be Waived	553
d.	Judicial Estoppel	553
e.	Belated Assertion Of The Defense	554
f.	Court's Discretion To Raise Defense <i>Sua Sponte</i>	556
1)	Factors That Guide Discretion	557
2)	The Procedural Posture Of The Case And Its Relationship To <i>Sua Sponte</i> Invocation Of The Defense	558
3)	Discretion To Raise Defense <i>Sua Sponte</i> Extends To Section 2255 Proceedings	561
4)	Section 2254(b)(3) Inapplicable To A Procedural Default Defense	561
g.	Significance Of An Unexhausted Claim	561
1)	State Remedies Unavailable	562
2)	State Remedies Available When Petition Filed	562
8.	Application Of Procedural Bars In Federal Court	563
a.	Burden Of Asserting The Defense	563
1)	The State Must Affirmatively Raise	563
2)	The Federal Court May Raise Defense <i>Sua Sponte</i>	563
b.	Burden Of Placing Defense At Issue	564
c.	Ultimate Burden Of Demonstrating Adequacy	565
9.	Appellate Review	566

a.	Standard Of Review .....	566
b.	No Need For Government To File Cross-Appeal To Challenge Adverse Procedural Default Ruling .....	566
10.	A Case Study: Application Of Default Rules To California Procedural Rules .....	566
a.	Common State Procedural Bars .....	566
1)	Direct Appeal .....	566
a)	Untimely Petition For Review—Rule 28(e) Of The California Rules of Court .....	567
b)	Contemporaneous Objection Rule .....	567
c)	Invited Error .....	567
2)	Habeas Corpus .....	568
a)	Untimeliness .....	568
b)	Claim Should Have Been Raised On Appeal, But Was Not .	572
c)	Successive Petitions .....	573
d)	Claims That Were Raised On Direct Appeal To The California Court Of Appeal, But Not Timely Presented To The California Supreme Court .....	574
e)	Claims In State Habeas Where No Objection Was Made At Trial .....	574
b.	Identifying Procedural Rules By Citation .....	575
c.	Not All Procedural Bars Are Procedural Defaults .....	577
1)	Claim Previously Raised On Appeal .....	577
2)	Failure To Allege The Claim With Requisite Specificity .....	577
d.	Application Of The Independent Prong To Specific Procedural Bars .....	577
1)	Untimely Petition For Review .....	577
2)	Contemporaneous Objection Rule .....	578
3)	Timeliness .....	578
a)	Defaults Imposed Before August 2, 1998 - Not Independent .....	579
b)	Defaults Imposed As Of August 2, 1998 - Independent ....	579
4)	Should Have Raised Claim On Direct Appeal .....	579
a)	Defaults Imposed Before August 2, 1998 - Not Independent .....	579
b)	Defaults Imposed As Of August 2, 1998 - Independent ....	579
5)	Successive Petitions .....	580
a)	Defaults Imposed Before August 2, 1998 - Not Independent .....	580
b)	Defaults Imposed As Of August 2, 1998 - Independent ....	580
e.	Application Of The Adequacy Prong To Specific Procedural Bars ..	580

1)	Untimely Petition For Review .....	580
2)	Contemporaneous Objection Rule .....	581
3)	Timeliness .....	582
a)	Defaults That Occurred Prior To July 29, 1993 .....	582
b)	Defaults Imposed As Of July 29, 1993 .....	582
4)	Should Have Raised On Direct Appeal .....	586
a)	Defaults Imposed Prior To July 29, 1993 .....	586
b)	Defaults Imposed As Of July 29, 1993 .....	586
5)	Successive Petitions .....	587
a)	Defaults Imposed Before July 29, 1993 .....	587
b)	Defaults Imposed As Of July 29, 1993 .....	587
f.	Failure To Exhaust And California's Procedural Bars .....	588
C.	Exhaustion .....	589
1.	The Rule .....	589
a.	State Prisoners .....	589
1)	Section 2254 Petitions .....	589
2)	Section 2241 Petitions .....	589
b.	Federal Prisoners .....	590
2.	General Principles .....	591
a.	The Purpose Of The Exhaustion Rule .....	591
b.	Claim-By-Claim Approach Required .....	592
c.	Intervening Change In The Law .....	592
1)	Intervening Change In Federal Court's Interpretation Of Federal Law .....	592
2)	Intervening Change In State Court's Interpretation Of Federal Law .....	592
3)	Intervening Change In State Court's Interpretation Of State Substantive Law .....	592
4)	Intervening Change In State Court's Interpretation Of State Procedural Law .....	592
d.	When Exhaustion Is Determined .....	593
e.	No "Clear Constitutional Violation" Exception .....	593
f.	New Claims On Appeal .....	593
3.	Presentation Of Federal Claims To Which State Courts .....	593
a.	Lower State Courts .....	593
b.	Highest State Court .....	594
c.	United States Supreme Court .....	595
d.	Multiple Presentation Is Not Required .....	595
4.	Proper Presentation .....	595
a.	Claim Presented In Procedural Context Where Merits Considered In Exceptional Circumstances Only .....	595

1)	Motions To Recall The Mandate .....	595
2)	Writs Of Prohibition .....	596
b.	Fair Presentation To All Appropriate State Courts Required .....	596
c.	Ineffective Assistance Claims Raised On Direct Appeal .....	597
5.	Significance Of State Court's Disposition Of Federal Claim .....	597
a.	State Court Decided Claim On Its Merits .....	597
b.	State Court Denied The Claim As Procedurally Barred .....	597
c.	State Intermediate Court Of Appeal Denied Claim As Procedurally Deficient .....	598
d.	State's Highest Court Denied Claim As Procedurally Deficient ....	598
e.	State Court Failed To Decide Properly Presented Claim .....	598
f.	State Court Ruled On Claim, Even Though Not Adequately Pled Or Otherwise Properly Presented .....	599
g.	Mandatory Review And Automatic Appeal Statutes .....	599
6.	Degree Of Specificity Needed To Exhaust .....	600
a.	Factual Predicates .....	600
1)	Operative Facts Alleged .....	600
2)	Presentation Of New Or Additional Facts .....	601
b.	Legal Basis For Claim .....	605
1)	General Approaches To Defining The "Fair Presentation" Requirement .....	608
2)	Citation To State Cases .....	610
3)	The "Four Corners" Rule .....	611
4)	General Appeals To Broad Constitutional Principles .....	612
5)	Exhaustion Requires More Than Drive-By Citation .....	612
6)	Squarely Presented .....	612
7)	Where Controlling State And Federal Law Are Essentially The Same Or Identical .....	613
8)	Citation Of A Relevant Federal Constitutional Provision In Relation To Some Other Claim .....	614
9)	Incorporation By Reference .....	614
10)	Relevance Of <i>Pro Se</i> Status .....	615
11)	Demonstrated Ability To State A Federal Claim .....	615
12)	Illustrative Court Of Appeals Decisions .....	615
7.	Pending State Action .....	619
a.	Exception: Double Jeopardy .....	619
b.	Exception: Excessive Delay In The State Court Review Process ....	619
c.	Exception: Bifurcation Of Conviction And Sentence .....	621
8.	Absence Of State Remedies .....	622
a.	Absence Of Corrective Process .....	622
b.	Ineffective Corrective Process .....	623

1) Futility .....	623
2) Unreasonable State Court Delay .....	625
9. Claims Disregarded For Purposes Of The Exhaustion Determination ..	625
a. State Law Claims .....	625
b. Noncognizable Claims .....	625
c. Unintended Claims .....	626
d. Absence Of A Colorable Federal Claim .....	626
10. The Parties' Burdens .....	627
a. The Petitioner .....	627
b. The Government And Waiver .....	627
1) Court Not Required To Accept Waiver .....	627
2) Effect Of Waiver .....	628
a) Possible Loss Of AEDPA Deference .....	628
b) Possible Loss Of Procedural Defaults .....	628
11. The Government's Response .....	628
a. Motion To Dismiss .....	628
1) All Claims Unexhausted .....	628
a) Dismissal Required .....	629
b) Existence Of Exhausted Claims Not Alleged In The Petition Immaterial .....	629
c) Subsequent Exhausted Petition Not Second Or Successive .	630
2) Only Some Claims Unexhausted (Mixed Petition) .....	630
a) Required Admonitions .....	630
b) Stay Pending Exhaustion .....	631
c) Dismissal Of Unexhausted Claims .....	633
d) Vexatious Litigation Admonition .....	634
b. Answer .....	634
1) Preserve Exhaustion Defense And Seek Dismissal On The Merits .....	634
2) Waive Exhaustion .....	635
12. Standards Of Review .....	635

## CHAPTER TEN

### THE RULE OF LAW

A. Law Of The Case Doctrine .....	636
B. Stare Decisis .....	637
1. Supreme Court Decisions .....	637
a. Binding Effect - Generally .....	637

b.	Binding Effect - Dicta .....	637
c.	Binding Effect - Plurality Opinions .....	639
d.	Binding Effect - Equally Divided Court .....	639
e.	Binding Effect - Denial Of Petition For Certiorari .....	639
f.	Binding Effect - Alternative Holdings .....	639
g.	Effect Of Subsequent Supreme Court Or Legislative Action .....	639
2.	Lower Federal Court Decisions .....	640
a.	Court Of Appeals Decisions - Same Circuit .....	640
1)	Published .....	640
2)	Unpublished .....	642
3)	Distinguishing Precedential Holdings From Non-Binding Dicta .....	642
(a)	Generally .....	642
(b)	Alternative Holdings .....	646
4)	Effect Of Petition For Rehearing .....	646
5)	Effect Of Grant Of Petition For Rehearing En Banc .....	647
6)	Precedential Weight Of Decisions Reversed On Other Grounds .....	647
7)	Precedential Weight Of Decisions Vacated On Other Grounds .	647
8)	Effect Of Supreme Court Grant Of Certiorari .....	648
b.	Court Of Appeals Decisions - Other Circuits .....	648
3.	District Court Decisions .....	648
4.	State Court Decisions .....	649
a.	Interpreting Federal Law .....	649
b.	Interpreting State Law .....	649
1)	State Supreme Court Decisions .....	650
2)	Intermediate State Appellate Court Decisions .....	650
3)	Other Sources .....	651
4)	Certification .....	651

## CHAPTER ELEVEN

### SECOND OR SUCCESSIVE PETITIONS AND MOTIONS

A.	General Principles .....	653
1.	Pre-AEDPA: Abuse Of The Writ .....	653
2.	AEDPA: Generally .....	654
3.	Retroactivity .....	657
a.	Successive Petitions Filed Pre-AEDPA .....	657
b.	Successive Petitions Filed Post-AEDPA .....	657

1) Procedurally .....	657
2) Substantively .....	658
4. The Section 2244(b) And 2255, ¶ 8 Restrictions Are Jurisdictional .....	661
5. No Distinction Between § 2244(b) And § 2255, ¶ 8 .....	661
6. AEDPA Supercedes Rule 9 .....	662
7. Constitutionality .....	662
a. Suspension Clause .....	662
1) New-Claim Successive Petitions .....	662
2) Same-Claim Successive Petitions .....	662
b. Separation Of Powers Doctrine .....	663
c. Article III Grant Of Judicial Power .....	663
d. Supremacy Clause .....	663
e. Ex Post Facto .....	663
8. Availability Of Section 2241 As An Alternative To Section 2255 (Federal Prisoners) .....	663
a. Savings Clause .....	664
b. Application To Second Or Successive Petitions .....	664
c. District Court Procedures .....	668
d. Application Of Second Or Successive Petition Restrictions To § 2241 Petitions .....	669
B. Same Claim Petitions .....	669
1. The Rule .....	669
2. Determining Whether A Claim Was Previously Raised .....	669
3. “Prior Application” Defined .....	671
C. New Claim Petitions .....	672
1. The Rule .....	672
2. “Prior Application” Defined .....	672
3. The Exceptions .....	673
a. Newly Discovered Evidence .....	673
1) Due Diligence .....	674
2) Constitutional Error .....	676
3) Innocence .....	677
a) Sentencing Issues .....	677
b) Innocent Of The Death Penalty .....	678
4) “Previously” Defined .....	680
5) Remand For Further Factual Development? .....	680
b. New Rule .....	681
1) Only The Supreme Court Can Decide Whether A New Rule Applies Retroactively .....	681
2) Constitutional Rules Only .....	681
3) “Previously” Defined .....	682

D. Determining Whether The Petition Or Motion Is “Second or Successive” ..	683
1. The Reference Point For Determining Whether A Petition Is “Second Or Successive” .....	684
2. Whether Prior Action Must Have Concluded .....	684
3. Labels Not Determinative .....	684
4. Separate Judgments .....	686
a. Same Judgment .....	686
b. Not The Same Judgment .....	687
1) Different Offenses Or Different Trials .....	688
2) Successive Petition Challenging Conviction Or Sentence At Re-Trial .....	688
5. Applications That Do Not Challenge The Underlying Conviction Or Sentence Are Not Subject To The Second Or Successive Rule .....	689
a. Motion For New Trial (Rule 33 Motions) .....	689
b. Motion To Correct Or Reduce Sentence (Rule 35) .....	690
c. Motion To Alter Or Amend Judgment (Rule 59(e)) .....	690
d. Opposition To State’s Petition For Mandamus .....	690
e. Section 2241 Challenge .....	690
f. Pre-Judgment Motion To Amend .....	691
g. Section 1983 Civil Rights Action .....	691
h. Motions For Bail Or Similar Relief .....	691
i. Petitions Challenging The Administration Of A Sentence And Related Issues .....	691
j. Rule 60(b) Motions .....	692
1) Substantive Standards: Rule 60(b) Motions .....	692
2) Procedural Standards: Rule 60(b) Motions .....	697
a) District Court Procedures .....	697
b) Court Of Appeals Procedures .....	698
k. Motion To Modify Federal Sentence .....	700
l. Claim Involving Competency To Be Executed .....	700
6. Second Or Successive Petitions: Specific Circumstances .....	700
a. Initial Petition Adjudicated On The Merits .....	701
b. Initial Petition Dismissed As Untimely .....	701
c. Initial Petition Dismissed As Procedurally Defaulted .....	701
d. Initial Petition Dismissed As Uncognizable .....	702
e. Initial Petition Dismissed For Technical Or Procedural Deficiencies .....	702
1) Initial Petition As Unexhausted .....	702
2) Initial Petition Dismissed For Lack Of Jurisdiction .....	703
3) Initial Petition Dismissed For Failing To Pay Filing Fee .....	703
f. Initial Petition Voluntarily Dismissed .....	703

g.	Initial Petition Erroneously Dismissed	704
h.	Initial Petition Filed By Counsel Without Petitioner's Authorization	705
i.	Initial Motion Sought To Reinstate Right To Appeal	705
j.	Motion To Recall The Mandate	706
k.	Lackey Claims	706
7.	Recharacterization	707
a.	Explained	707
b.	Required Admonitions	707
c.	Effect Of Failure To Give Admonitions	707
d.	Admonitions Not Required If The Court Is Recharacterizing A Successive Petition	708
e.	Retroactivity	708
f.	Application To § 2241 Petitions	709
E.	Procedural Issues	709
1.	Court Of Appeals	709
a.	Filing Requirement	709
b.	Prima Facie Showing Required	709
1)	Prima Facie Showing Something Less Than Demonstrating Requirements Of Statute Are Met	710
2)	Prima Facie Requirement Applies To Both State And Federal Prisoners	712
3)	Prima Facie Requirement Applies To Petition As A Whole, Not Individual Claims	713
c.	No Filing Fee	713
d.	Three-Judge Panel	713
e.	30-Day Time Limit	714
1)	When Period Commences	714
2)	Time Period Not Mandatory	714
f.	No Appeal Or Rehearing Allowed	714
2.	District Court	715
a.	Filing In District Court Without Court Of Appeals' Approval	715
1)	No Authority To Rule On The Merits	715
2)	Transfer Or Dismissal	715
3)	Improper Dismissal An Appealable Final Order	716
b.	Filing In District Court After Court Of Appeals Approval	716
c.	File In Court Of Appeals Where There Is Doubt	718
3.	Supreme Court	718

## CHAPTER TWELVE

### POST-JUDGMENT PROCEEDINGS

A. Motions For Reconsideration .....	720
B. Rule 52 And 59 Motions .....	720
1. Rule 52(b) Motion To Amend Findings .....	720
2. Rule 59(a) New Trial Motions .....	721
3. Rule 59(e) Motion To Amend Or Alter Judgment .....	723
C. Rule 60 Motions .....	724
1. Grounds .....	724
a. Clerical Mistakes: Rule 60(a) .....	724
b. Mistake, Inadvertence, Surprise, Or Excusable Neglect: Rule 60(b)(1) .....	725
1) Mistakes .....	725
2) Excusable Neglect .....	726
c. Newly Discovered Evidence: Rule 60(b)(2) .....	727
d. Fraud, Misrepresentation, Or Other Misconduct: Rule 60(b)(3) ....	727
e. Void Judgments: Rule 60(b)(4) .....	728
f. Judgment Satisfied, Released, Or Discharged; Prior Judgment Vacated: Rule 60(b)(5) .....	729
g. “Catchall”: Rule 60(b)(6) .....	729
2. Procedures .....	731
a. Time Limits For Filing Motion .....	731
b. Court’s Authority To Grant Rule 60(b) Relief <i>Sua Sponte</i> .....	731
c. Effect Of Rule 60(b) Motion On Time To Appeal .....	732
d. Second And Successive Petition Rule .....	732
e. Certificate Of Appealability Requirement .....	733
D. Bail And Release .....	733
1. Detention Pending Review Of Decision Not To Release .....	734
2. Detention Pending Review Of Decision Ordering Release .....	734
a. Standard For Granting Release .....	734
b. Motion For Relief Directed To The District Court In The First Instance .....	736
c. Conditions Imposed On Release .....	736
d. Conditional Writs .....	737
e. Notice Of Appeal Does Not Operate As A Stay .....	737
3. Post-Appeal District Court Jurisdiction .....	738
E. Appeal Of District Court’s Order .....	738
1. Appealability Of Orders And Judgments .....	738
a. Final Orders .....	738

b.	Appealable Collateral Orders .....	740
c.	Interlocutory Appeals .....	741
d.	Certified Rule 54(b) Orders .....	743
e.	Writ Of Mandamus .....	744
2.	The Notice Of Appeal .....	745
3.	Notice Of Appeal Does Not Operate As A Stay .....	746
4.	Timeliness Of Appeal .....	747
a.	Timely Filing Of Notice Of Appeal Is Jurisdictional .....	747
b.	Filing Deadlines .....	747
c.	Filing Requirement .....	747
d.	Appeal Period Triggered By “Entry” Of Judgment Or Order .....	748
e.	Calculating Time To Appeal .....	748
1)	Computation .....	748
2)	No Extension For Service Of Judgment By Mail .....	748
3)	Notice Mistakenly Filed In The Court Of Appeals .....	749
f.	“Mailbox Rule” .....	749
1)	Requirements Where Prison Has Legal Mail System .....	750
2)	Declaration/Notarization Requirement .....	750
a)	Where Prison Has A Legal Mail System .....	750
b)	Where Prison Does Not Have A Legal Mail System .....	751
3)	Enforcement Of The Declaration/Notarization Requirement ..	751
4)	At What Point In Time Must The Declaration Or Notarized Statement Be Filed .....	752
5)	Consequence Of Inmate’s Failure To Submit A Declaration Or Notarized Statement .....	753
6)	Mailbox Rule Not Limited To <i>Pro Se</i> Inmates .....	753
7)	Burdens .....	754
8)	Failure To Use Proper Address .....	755
9)	Filing Must Be Delivered To Prison Officials For Filing With The Court .....	755
10)	Petition Never Filed By The Court .....	756
g.	Extensions Of Time .....	756
1)	“Excusable Neglect” Or “Good Cause” .....	756
2)	Defective Notice of Entry .....	757
3)	“Unique Circumstance” Doctrine .....	758
h.	Premature Filing Of Notice Of Appeal .....	758
i.	Effect Of Post-Judgment Motions On Appeal Time-Frame .....	758
5.	Procedures .....	759
a.	Place Of Filing .....	759
b.	Filing Fee .....	759
c.	<i>In Forma Pauperis</i> .....	759

d.	Consolidated And Related Cases .....	762
6.	Cross-Appeals .....	762
a.	Standing Limitation .....	762
b.	When Required .....	763
c.	Filing Deadline .....	763
d.	Procedure .....	764
7.	Certificate Of Appealability .....	764
a.	The Rule .....	764
b.	The Effective Date Of Certificate Of Appealability Requirement ...	765
c.	Certificate Of Appealability Requirement Only Applies To Prisoners .....	765
d.	Types Of Orders In Which A Certificate Of Appealability Is Requirement .....	765
1)	Final Orders .....	766
2)	Detention Complained Of Arises Out Of Process Issued By A State Court .....	768
3)	Section 2255 Proceedings .....	768
e.	Certificate Of Appealability Standard .....	769
1)	Substantial Showing Of The Denial Of A Constitutional Right .	769
2)	AEDPA Deference Incorporated Into COA Analysis .....	771
3)	Each Claim Individually Must Meet The “Substantial Showing” Standard .....	771
4)	Nonconstitutional Issues .....	771
a)	Nonconstitutional, Substantive Claims .....	772
b)	Nonconstitutional, Procedural Issues .....	772
f.	Procedure For Obtaining A COA .....	774
1)	The District Court .....	774
a)	District Judge And Magistrate Judge Authority To Rule On Requests For A COA .....	774
b)	Prisoner Should First Seek COA In The District Court ....	775
c)	Filing Of Notice Of Appeal Imposes Duty On District Court To Decided Whether COA Is Warranted .....	775
2)	Court Of Appeals .....	776
a)	Issuance Of The COA .....	776
b)	Review Of COAs Issued By District Courts .....	776
c)	Court Of Appeals Authority To Expand COAs .....	777
d)	Court Of Appeals Must Construe Notice Of Appeal As A Request For A COA If One Is Not Filed .....	777
e)	Obligation Of Prisoner To Seek Expansion Of COA Where COA Only Granted On Some Issues .....	778
f)	Rehearing Of Court Of Appeals’ Decision Denying COA ..	779

3)	The United States Supreme Court .....	779
8.	Rehearing/Rehearing En Banc .....	779
a.	Generally .....	779
b.	Procedures For Rehearing; Rehearing En Banc .....	780
1)	Time Deadlines .....	780
2)	Format, Filing, And Service Requirements .....	781
3)	Responses To Petitions For Rehearing .....	781
4)	Reply To Answers .....	781
5)	Affect On Issuance Of The Mandate .....	781
9.	The Mandate .....	781
a.	Issuance Of The Mandate .....	781
b.	Motion To Stay The Mandate .....	782
c.	Recall Of The Mandate .....	783
1)	Motion Made By A Party .....	783
2)	<i>Sua Sponte</i> Action By Court Of Appeals .....	784
F.	United States Supreme Court Review .....	786
1.	General Principles .....	787
a.	Cases Subject To Review .....	787
1)	State Court Judgments .....	787
2)	Decisions Of The Federal Courts Of Appeals .....	787
3)	Supreme Court Original Jurisdiction .....	787
4)	Certain Types Of Injunctive Relief .....	788
5)	Decisions Of The Supreme Court Of Puerto Rico .....	788
6)	Decisions Of The United States Courts Of Appeals For The Armed Forces .....	788
b.	Criteria Warranting Certiorari .....	788
c.	Certiorari Petition Does Not Stay Mandate .....	789
2.	Timing .....	789
a.	Entry Of Judgment .....	789
b.	Issuance Of Mandate Not Relevant .....	790
c.	Effect Of Petitions For Rehearing In The Court Of Appeals .....	790
d.	Calculations .....	790
1)	Filing Date .....	790
2)	Mailbox Rule .....	791
3)	Computation Of Time .....	791
e.	Extensions Of Time .....	791
3.	Service .....	792
a.	Manner Of Service .....	792
b.	Service Requirements For State And Federal Governments .....	792
1)	United States .....	792
2)	State Governments .....	793

c. Proof Of Service ..... 793