

Appendix D: Examples of Serious Error Warranting Federal Habeas Corpus Relief¹

1. *Amadeo v. Zant*, 486 U.S. 214 (1988) (**Georgia**) (prosecutor unconstitutionally instructed jury commissioner to under-represent African-Americans on the jury venire).
2. *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995) (**Oklahoma**) (prosecution suppressed evidence that at least three other men were previously arrested for the crime with which petitioner was charged, that two of them had been positively identified by eyewitnesses, and that the cell-mate of one of the previously arrested suspects claimed that THE suspect had confessed to the crime).
3. *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993), *cert denied*, 511 U.S. 1060 (1994) (**Idaho**) (death sentence premised in part on trial judge's distaste for petitioner's prior history of nonviolent “abnormal sexual relationships,” including homosexuality and relationships with women substantially younger and older than petitioner).
4. *Bowen v. Maynard*, 799 F.2d 593 (10th Cir.), *cert denied*, 479 U.S. 962 (1986) (**Oklahoma**) (prosecutors suppressed a sheaf of investigative reports that a suspect other than the capitally sentenced petitioner had murdered the victim and that an investigating officer with a grudge against the petitioner had maliciously framed him; Bowen was subsequently released from prison for lack of any evidence of his guilt).
5. *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986) (**Florida**) (state deliberately withheld fact that chief witness against Brown lied on the stand about not having been granted leniency in return for testifying against Brown; on retrial, Brown was released from prison after the charges against him were dropped).
6. *Buttrum v. Black*, 908 F.2d 965 (11th Cir. 1990) and 721 F. Supp. 1261 (N.D. Ga. 1989) (**Georgia**) (prosecutor unconstitutionally secured death sentence based on a plethora of errors, including (1) insisting on going to trial before a jury saturated with prejudicial pretrial publicity; (2) employing a private psychiatrist to testify against Buttrum but insisting that she be limited to the services of a psychiatrist employed by and beholden to the state, rather than the independent expert the Constitution requires; (3) blatantly and unconstitutionally inviting the jurors to use against Buttrum the fact that she had exercised her right not to testify; (4) urging the jury, whatever its qualms about a death sentence might be, to impose that punishment because the decision would later be reviewed by appellate courts that would bear the real responsibility for Buttrum’s fate; (5) urging the jury to ignore factors warranting mercy, notwithstanding that the Constitution makes those very factors the crux of the sentencing decision; (6) relying on a vague and overbroad aggravating circumstance as a basis for a death sentence)
7. *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (*en banc*), *cert. denied*, 118 S. Ct. 1827 (1998) (**Arizona**) (prosecutor failed to disclose information in state’s files showing that prosecution’s central witness—who later confessed to the murder he theretofore had successfully pinned on petitioner at trial—

¹For many other examples of “serious error” requiring judicial reversal of capital judgments, see cases collected in Appendix C, *supra*; *Report*, at notes 36, 44, 97-106, 140; Liebman & Hertz, *supra Report*, note 33, § 11.2c.

had a “long history” of prior crimes and assaultive acts and “of lying to the police and blaming others to cover up his own guilt”; Carriger subsequently pled guilty to a lesser offense in return for the state’s agreement that he be immediately released, *see generally* Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 L. & CONTEMP. PROB. 125, 139-40 (1998)(providing additional details on *Carriger* case)).

8. *Cervi v. Kemp*, 855 F.2d 702 (11th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989) (**Georgia**) (after Cervi informed the judge at an initial hearing that he wanted a lawyer, thus giving him a constitutional right to the assistance of counsel before and while being questioned by police—and during the very period when Cervi’s lawyer was in the police station repeatedly demanding to see his client, but was denied the opportunity—police interrogated Cervi until he confessed; Cervi was resentenced to life).
9. *Chambers v. Armontrout*, 907 F.2d 825 (8th Cir.), *cert. denied*, 498 U.S. 950 (1990) (**Missouri**) (counsel incompetently failed to interview and call witness who would have supported petitioner’s claim that he did not deserve the death penalty because he acted in self-defense).
10. *Clemons v. Bowersox*, 124 F.3d 944 (8th Cir. 1997) (**Missouri**) (on rehearing after relief initially had been denied, conviction and death sentence were overturned due to the state’s suppression of an eye-witness report identifying as the actual killer another man whom Clemons had all along claimed was the culprit; on retrial in February 2000, Clemons was acquitted)
11. *Christy v. Horn*, 28 F. Supp. 2d 307 (W.D. Pa. 1998) (**Pennsylvania**) (prosecutor violated due process by disparaging petitioner’s mental illness defense despite the prosecutor’s awareness of inadmissible evidence substantiating the defense and by implicitly encouraging the jury to believe, erroneously, that petitioner might be eligible for parole if sentenced to life imprisonment; in addition, the trial court unconstitutionally denied a defense request for an independent psychiatrist at guilt and penalty stages and instead limited the accused to a court-appointed psychiatrists who was not competent to marshal the necessary facts; in addition, Christy’s attorneys provided prejudicially incompetent representation at the penalty phase by “fail[ing] to investigate the mountain of mitigating evidence readily available to them,” failing to seek psychiatric testimony, failing to object to the prosecutor’s improper closing argument, and incorrectly advising the jury about Pennsylvania law in a manner that was highly prejudicial to Christy).
12. *United States ex rel. Collins v. Wellborn* and *United States ex rel. Bracy v. Gramley*, 79 F. Supp. 898 (N.D. Ill. 1999) (**Illinois**) (death sentences overturned based on proof that trial judge, who repeatedly took bribes to acquit in other cases, exhibited compensatory pro-prosecution bias against Collins and Bracy and other defendants who did not bribe him).
13. *Crivens v. Roth*, 172 F.3d 991 (7th Cir. 1999) (**Illinois**) (prosecutor failed to disclose that its key eyewitness had a criminal history and had used an alias in past, thereby “demonstrat[ing] a propensity to lie to police officers, prosecutors, and even judges”).
14. *Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994) (**Georgia**) (conviction and death sentence overturned due to blatant prosecutorial misrepresentations to the jury in the course of objections and closing argument: having successfully objected to Davis’ effort to inform the jury that another person had confessed to the killing for which Davis was

convicted and sentenced to die, and having known that Davis for months before trial had hinged his defense on his claim that the other person was the killer, the prosecutor repeatedly vouched to the jury that there was no evidence that the other person had committed the crime and that Davis had “fabricated” the defense at the last minute, during the course of the trial).

15. *Felder v. McCotter*, 765 F.2d 1245 (5th Cir. 1985), *cert. denied*, 484 U.S. 1077 (1986) (**Texas**) (after Felder was appointed counsel, giving him a constitutional right to have his lawyer present when the police questioned him, and after the appointed lawyer told the police he wanted to be present at any interrogation, the police proceeded to interrogate Felder (a man of low intelligence) outside the presence of counsel, using a variety of stratagems designed to make Felder believe the police knew he was guilty, until Felder confessed).
16. *Ford v. Norris*, 67 F.3d 162 (8th Cir. 1995) (**Arkansas**) (conviction and death sentence overturned because of “overwhelming record evidence . . . that the prosecutor routinely attempted to pervert the peremptory challenge system by using it to exclude black venirepersons for reasons wholly unrelated to the trial” and did so at Ford’s trial, striking every potential black juror, and giving an explanation in each case that was blatantly pretextual because it was either a false statement of the facts regarding the prospective juror or, if true, would have required the prosecutor to strike white jurors whom he left on the jury; district judge also found ineffective assistance of trial counsel at the sentencing phase).
10. *Francis v. Franklin*, 471 U.S. 307 (1985) (**Georgia**) (trial judge instructed jury to “presume” that defendant was guilty of murder unless defendant proved otherwise).
11. *Groseclose v. Bell*, 130 F.3d 1161 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1826 (1998) (**Tennessee**) (counsel failed to develop defense theory and “to conduct any meaningful adversarial challenge, as shown by his failure to cross-examine more than half of the prosecutions’ witnesses, to object to any evidence, to put on any defense witnesses, to make a closing argument, and, at sentencing, to put only any meaningful mitigation evidence”; instead, counsel abdicated client’s case to counsel for codefendant who presented a defense that was antagonistic to Groseclose).
17. *Guerra v. Johnson*, 916 F. Supp. 620 (S.D. Tex. 1995), *aff’d*, 90 F.3d 1075 (5th Cir. 1996) (**Texas**) (police and prosecutors, among other things, “intimidated” numerous eyewitnesses, who initially said that petitioner’s companion fired the fatal shots, into corroborating the prosecution’s theory that Guerra had fired the shots—in the process coercing witnesses into giving testimony and into signing affidavits that the police and witnesses knew were false; police told one witness that her common-law husband was at risk of parole revocation if she did not cooperate and told another witness that her infant daughter could be taken from her if she refused to cooperate; district judge concluded that the defendant would surely have been acquitted if he had received a fair trial; on retrial, the D.A. demanded that the state trial judge reconsider all of the federal courts’ findings about prosecutorial misconduct, which the trial judge did, concluding that the findings were accurate in all respects; in April 1997, the D.A. dropped all charges against Guerra, and he was released).
18. *Harris v. Wood*, 64 F.3d 1432 (9th Cir. 1995) (**Washington**) (counsel incompetently failed to interview a majority of the witnesses, advised the defendant to confess to the prosecutor without receiving any promise of reduced charges in return, and failed to file potentially meritorious suppression motions, to propose or object to improper jury instructions, and to raise and preserve meritorious issues for appeal).
19. *Houston v. Dutton*, 50 F.3d 381 (6th Cir.), *cert. denied*, 516 U.S. 905 (1995) (**Tennessee**) (capital conviction

overturned because—in a trial at which the single, decisive issue was whether the defendant deliberately killed the victim or whether the killing was an accident, and at which the state’s evidence on that decisive issue was so weak that it raised a substantial question whether it was even barely sufficient to avoid a directed verdict in favor of the defense—the trial judge instructed the jury that it was required to “presume” that the killing was intentional).

20. *Jones v. Thigpen*, 788 F.2d 1101 (5th Cir. 1986), *cert. denied*, 479 U.S. 1087 (1987) (**Mississippi**) (counsel conducted no investigation in mitigation of death penalty and did not realize, nor inform jury, that his client had an I.Q. below 41).
21. *Jurek v. Estelle*, 623 F.2d 929 (5th Cir. 1980) (*en banc*), *cert. denied*, 450 U.S. 1001 (1981) (**Texas**) (habeas decision overturning a capital conviction after police obtained two very different confessions from the mentally deficient petitioner during a 42-hour period of interrogation without counsel; the exculpatory version of the confession, not admitted at trial, appeared to be in the defendant’s words; the inculpatory version, used at trial, had prose beyond defendant’s ken).
22. *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990) (*en banc*), *cert. denied*, 499 U.S. 970 (1991) (**Kentucky**) (police obtained confession after (1) ignoring petitioner’s statements that he wanted the interrogation to stop, (2) threatening to arrest petitioner’s girlfriend (against whom they had no evidence) and (3) threatening to send petitioner to Ohio, where, police said, he could be held incommunicado and put through “an ordeal [he] may not forget for a long time,” then (4) suppressed the tape-recorded version of the confession and pieced together a written statement giving a far more inculpatory account than the actual confession).
23. *Kyles v. Whitley*, 514 U.S. 419 (1995) (**Louisiana**) (in investigating robbery-murder of supermarket customer in store’s parking lot, New Orleans police (1) accepted the word of a long-time criminal and police informant Beanie, whom police found in possession of the victim’s car, that Curtis Kyles had sold him the car, while suppressing a variety of statements by Beanie that (a) were inculpatory, self-contradictory and inconsistent with Beanie’s trial testimony, (b) suggested that Beanie (in his own words) had “set up” Kyles, and (c) revealed a course of dealings between Beanie and the police that strongly impugned the investigation, then (2) manipulated eyewitnesses into identifying Kyles at trial, inconsistently with their initial but thereafter suppressed descriptions that much more closely matched Beanie; a majority of jurors in three successive retrials voted to acquit Kyles, whom prosecutors finally released from custody).
24. *Martinez-Macias v. Collins*, 810 F. Supp. 782 (W.D. Tex. 1991), *aff’d*, 979 F.2d 1067 (5th Cir. 1992) (**Texas**) (conviction and death sentence overturned due to egregious, comprehensive, prejudicial incompetence by trial lawyer who (1) failed to call disinterested alibi witness who was available at time of trial and whose testimony would have established that Macias could not have committed the offense; (2) failed to impeach a crucial prosecution witness with her contradictory statements before trial to a private investigator and by calling witnesses who were with the witness at the critical time and did not see what she saw; (3) failed to investigate and present evidence from defendant’s family members regarding Macias’s good character traits, failed to prepare defendant’s wife for testimony, and failed to utilize records from a California rehabilitation center to demonstrate the defendant’s good behavior and attempts to rehabilitate while in custody; (4) failed to utilize an expert witness

to introduce important mitigating information—all of which, taken together, left the federal court of appeals “with the firm conviction that Macias was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question” and that the “state [having] paid defense counsel \$11.84 per hour[,] [u]nfortunately . . . got only what it paid for”; on remand, Macias was released after a grand jury determined that there was not even enough evidence of guilt to justify indicting him).

25. *United States ex rel. Maxwell v. Gilmore*, 37 F. Supp. 2d 1078 (N.D. Ill. 1999) (**Illinois**) (granting evidentiary hearing to capital sentenced habeas petitioner and denying presumption of correctness to state court’s voluntary-confession finding because the state suppression-hearing judge “did not have access to the voluminous [subsequently disclosed] information about the systematic . . . [physical] abuse [of suspects by the police unit that interrogated and secured a confession from Maxwell], . . . and Maxwell’s attorney never had the opportunity to use that information to cross-examine the officers who testified at the suppression hearing”). In regard to the police unit that took the confession in Maxwell’s case, see Sasha Abramsky, *Trial by Torture*, Mother Jones, March 3, 2000 (“Dozens of other prisoners [including 10 death row inmates] have come forward saying they were tortured into confessing by police officers from . . . Area Two” and presenting “hair-raising and remarkably consistent [claims] . . . of alligator clips attached to their ears, noses, mouths, penises, and testicles; of electric shocks to the genitals; of being burned atop radiators” and of “mock executions” and “bags put over their heads for minutes at a time, a technique known as the ‘Dry Submarino’”).
26. *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989) (**North Carolina**) (police withheld the fact that before petitioner’s arrest for the offense, the chief prosecution witness—who at trial identified petitioner, a dark-skinned African American man sentenced to die for the offense, as the assailant—had told police that the assailant was white).
27. *Miller and Jent v. Wainwright*, Nos. 86-98-Vic.-T-13 and 85-1910-Civ.-T-13 (M.D. Fla. Nov. 13, 1987) (**Florida**) (prosecutor exhibited “callous and deliberate disregard for . . . truth” by suppressing police reports identifying numerous witnesses who were fishing at the location where the victim’s body was found at the only time the two capital sentenced petitioners (who otherwise had an airtight alibi defense) could have deposited the victim’s body and who saw nothing amiss; Jent and Miller pled to a lesser offense and were immediately released on time served).
28. *Monroe v. Blackburn*, 748 F.2d 958 (5th Cir. 1984), *cert. denied*, 476 U.S. 1145 (1985) (**Louisiana**) (state failed to disclose that police obtained information after trial that someone other than petitioner may have committed the murder).
29. *Orndorff v. Lockhart*, 998 F.2d 1426 (8th Cir. 1993), *cert. denied*, 511 U.S. 1063 (1994) (**Arkansas**) (prosecutor failed to inform defense that key witness in favor of death penalty was hypnotized prior to trial, preventing fair cross-examination concerning discrepancies between witness’s prehypnotic and posthypnotic statements to police).
30. *Parker v. Bowersox*, 188 F.3d 923 (8th Cir. 1999) (**Missouri**) (defense counsel failed to respond to

state’s argument in aggravation—that defendant killed his girlfriend to eliminate her as a witness against him in a criminal proceeding—by presenting accessible evidence proving that petitioner knew for certain prior to the murder that the victim could and would not testify against him).

31. *Parker v. Dugger*, 498 U.S. 308 (1991) (**Florida**) and *Richmond v. Lewis*, 506 U.S. 40, 48 (1992) (**Arizona**) and *Stringer v. Black*, 503 U.S. 222 (1992) (**Mississippi**) (state appellate court struck down an aggravating circumstance on which a death sentence was based without determining whether a death sentence remained appropriate absent the faulty aggravating circumstance).
32. *Paxton v. Ward*, 199 F.3d 1197 (10th Cir. 1999) (**Oklahoma**) (overturning judgment because D.A. “clearly and deliberately made two critical misrepresentations to the jury” as an “an integral part of the deprivation of Mr. Paxton’s constitutional rights to present mitigating evidence, to rebut evidence and argument used against him, and to confront and cross-examine the state’s witnesses”)
33. *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1827 (1998) (**Tennessee**) (counsel’s “total failure to actively advocate his client’s cause” and “repeated expressions of contempt for his client for his alleged actions” had the effect of “provid[ing] [petitioner] not with a defense counsel, but with a second prosecutor”).
34. *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995) (**Wyoming**) (deputy sheriff’s listening in on and reporting to prosecutor substance of defense counsel’s jailhouse conversations with client violated Sixth Amendment right to counsel).
35. *Estelle v. Smith*, 451 U.S. 454 (1981) (**Texas**) (state-employed psychiatrist was permitted to testify at death penalty phase based on petitioner’s pretrial statements that were not freely and voluntarily given and that were made without counsel or waiver of counsel).
36. *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990) (**Montana**) (state unconstitutionally secured a death sentence against an indigent defendant with mental disorders when the trial judge (1) forced the defense to rely on the psychiatric evaluation of a doctor acting under the direction of the judge (who had previously sentenced Smith to die), rather than appointing the independent psychiatrist required by law in a case in which doing so would have generated substantial mitigating evidence; (2) refused to consider most of the mitigating circumstances that Smith did manage to present; and, (3) as to the limited set of mitigating factors the judge did take into consideration, he refused to assess their overall effect in mitigation, instead insisting that each individual factor be sufficient in itself to warrant a life sentence).
37. *Stockton v. Virginia*, 852 F.2d 740 (4th Cir. 1988), *cert. denied*, 489 U.S. 1071 (1989) (**Virginia**) (in lunch break during jury’s death sentencing deliberations, courtroom deputies allowed owner of restaurant in which jurors were eating to tell jurors “they ought to fry the son of a bitch”).
38. *Strickland v. Francis*, 738 F.2d 1542 (11th Cir. 1984) (**Georgia**) (state court violated Strickland’s due process rights by forcing him to trial despite mental disorders so severe and unequivocal that he had no idea what the proceedings were about and could not assist his attorney).

39. *Troedel v. Dugger*, 828 F.2d 670 (11th Cir. 1987), *aff'g* 667 F. Supp. 1426 (S.D. Fla. 1986) (**Florida**) (prosecutor suborned testimony of expert witness at separate trials of two codefendants that each codefendant had to have been sole triggerman in single killing with which both were charged and for which Troedel was sentenced to death).
40. *Turner v. Murray*, 476 U.S. 28 (1986) (**Virginia**) (trial court forbade capital defendant charged with interracial crime to question prospective jurors in order to discover possible racial biases)
41. *Wade v. Calderon*, 29 F.3d 1312 (9th Cir. 1994) (**California**) (sentence of death based on unconstitutionally vague special circumstance of torture-murder and based on prejudicially ineffective representation at penalty phase due to counsel's failure to present any significant evidence of defendant's child abuse and his argument to the jury that executing defendant would benefit him by freeing him of his mental illness).
42. *Wallace v. Kemp*, 757 F.2d 1102 (11th Cir. 1985) (**Georgia**) (capitally sentenced petitioner found to have been incompetent to assist attorney at trial; on retrial, after being restored to sanity, Wallace was acquitted).
43. *Wheat v. Thigpen*, 793 F.2d 621 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987) (**Mississippi**) (prosecutor encouraged jurors to exercise less than full responsibility for death sentence by telling jurors that any mistake they made in sentencing the defendant to die would be corrected by an appellate court).
44. *Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir. 1998), *cert. denied* 119 S. Ct. 852 (1999) (**Missouri**) (conviction and death sentence overturned because the trial court permitted the 16-year old defendant—who “from infancy through his teenage years [had] suffered severe physical and emotional abuse at the hands of his mother and other adults in his life,” who “began abusing drugs as a kindergartner on his way to school,” who was diagnosed at age 10 “as a severely depressed boy with homicidal and suicidal tendencies,” who “was transferred in and out of mental health facilities” between ages 10 and 16, and who court-appointed psychiatrists at trial, on direct appeal and during state post-conviction proceedings had unanimously and consistently concluded could not make voluntary, knowing and intelligent decisions about important matters in his case, and who was never advised by the court or counsel about “his possible defenses to the charges against him . . . or the full range of punishments that he might receive”— to fire his lawyer, represent himself at trial (as a 16-year-old), waive all his rights and plead guilty, and then waive his right to present any evidence in mitigation of the death penalty).
45. *Williams v. Taylor*, 120 S. Ct. 1495 (2000) (**Virginia**) (death sentence overturned due to incompetence of Williams' trial attorneys who “did not begin to prepare for [the penalty trial] until a week before” it took place, “failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records,” thereby kept “the jury [from] learn[ing] that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released

from prison, had been returned to his parents' custody"; concluding that "there existed 'a reasonable probability that the result of the sentencing phase would have been different' if the jury had heard that evidence").

46. *Williamson v. Ward*, 904 F. Supp. 1529 (E.D. Okla. 1995) (**Oklahoma**) (overturning capital conviction based on faulty hair analysis which was so "scientifically unreliable" that it should not have been permitted as evidence of guilt and based on claims that hairs found at the crime scene "matched" the defendant's, although hair analysis can never support that categorical a claim), *aff'd*, 110 F.3d 1508 (10th Cir. 1997) (affirming reversal of capital conviction on habeas because appointed counsel, who received no funding for expert or investigative services and was paid the statutory maximum of \$3200, failed to investigate a videotaped statement by another person confessing to the crime and extensive evidence of petitioner's mental illness and likely incompetence to stand trial) (DNA testing subsequently established that Williamson was innocent, and he was released from prison, *see* Bill Dedman, *DNA Evidence Frees Two in Murder Case*, Milwaukee J. Sentinel, Apr. 25, 1999, at 20; Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted* 126-27, 130-57, 251-54 (2000)).