CASE STUDY:
WILLIAM NEAL MOORE

William Neal Moore was indicted by a grand jury in Jefferson County, Georgia, for the April 2, 1974 malice murder and armed robbery of Fredger Stapleton, an elderly black man and the uncle of an acquaintance of Mr. Moore. At a hearing conducted before Judge Walter C. McMillan, Jr. in the Superior Court of Jefferson County on June 4, 1974, Mr. Moore waived trial by jury with respect to both guilt and sentence and entered a plea of guilty to all charges. Sentencing was postponed until July 17, 1974. At that time, Judge McMillan imposed the death penalty.

The Supreme Court of Georgia affirmed the conviction and sentence. Moore filed a state habeas corpus petition, which was rejected by the Georgia courts. He filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Georgia on November 22, 1978. His petition contained four of the six claims he had asserted in his state habeas petition. On March 6, 1979, Moore filed a *pro se* motion to amend his petition to add two claims not pertinent to this appeal. The attorney who had represented Moore in the state habeas court, thereafter requested and received leave to withdraw. Representation was then provided by H. Diana Hicks, who immediately moved the court for leave to amend Moore's petition, to present a claim that neither Moore nor his counsel was afforded adequate opportunity to review the presentence report prior to the sentencing proceeding, in violation of *Gardner v. Florida*, 430 U.S. 349 (1977). The district court handed down rulings in Moore's case and the cases of two other condemned men in 1981. The Appendix which follows the decision applies to all three cases.

Joseph James BLAKE, Petitioner,
v.
Walter ZANT, Warden

Christopher A. BURGER, Petitioner,
v.
Walter B. ZANT, Warden

William Neal MOORE, Petitioner,
v.
Charles BALKCOM, Warden

United States District Court,
S. D. Georgia
513 F.Supp. 772 (1981)

B. AVANT EDENFIELD, District Judge.

The Court this date enters the attached Orders in these habeas corpus capital punishment actions.
* * *

* * * [T]he Court attaches, as an appendix to these Orders, certain broad comments on the problems and, in this Court's view, likely outcome of this on-going process of judicial and legislative development [regarding capital punishment].

[*The court found that Blake and Stevens were entitled to habeas corpus relief, before turning to William Neal Moore's case. The orders in both Stevens and Moore were reversed. Stevens has been executed. Blake is now serving a life sentence.*]

* * *

Facts

At the time of the homicide in question here, petitioner was an enlisted man in the United States Army, where he had served in several capacities, including as a military policeman. In connection with his military service, Mr. Moore met George Curtis, who was a nephew of the victim Fredger Stapleton. Curtis told the petitioner that Mr. Stapleton kept a large sum of money at his home. * * *

* * * [L]ate in the evening of April 2, 1974, Mr. Moore []entered the Stapleton home through a bedroom window. Petitioner was armed with a

.38 caliber pistol which he had taken out of the car especially to use in the event he encountered opposition. After gaining entrance, he was surprised by Stapleton, who came out of his bedroom and fired a shotgun at petitioner. Mr. Moore was not struck by the blast, though he was hit by the barrel of the gun itself. He then fired four or five shots at Stapleton, who was hit and killed by two bullets which struck him in the chest.

After the shooting, petitioner removed two billfolds from the victim's pockets and took the shotgun. He exited Stapleton's home through the front door and left the area in his car, which was parked nearby. The money taken from Stapleton totaled about $5,700. All was surrendered to police at the time of petitioner's arrest as was the shotgun and other evidence. In fact, Mr. Moore generally cooperated with police and made no attempt to conceal his guilt.

Questions Presented

In his initial petition, Mr. Moore alleged the following constitutional violations: * * * (2) petitioner was not informed that malice-murder required intent and, thus, his plea was not knowingly and intelligently made, nor did it include any admission of intent; (3) petitioner was not informed of his right to withdraw his plea prior to filing of sentence because of ineffective assistance of counsel; (4) the Georgia Supreme Court failed to carry out an adequate review of the propriety of a death sentence given the nature of the crime and the criminal.

By an amendment filed *pro se* on March 6, 1979, Mr. Moore added several other allegations of error. In particular, Mr. Moore claimed ineffective assistance of counsel in his attorney's alleged failure to (1) investigate and challenge the composition of the grand jury which indicted him; (2) inform petitioner that the grand jury could be challenged; (3) investigate local prejudice and seek a change of venue; and (4) have closing arguments transcribed. Mr. Moore also alleged error by the Georgia Supreme Court through use of an improper sample of cases in assessing the proportionality of his sentence.

* * * [At oral argument on the petition, Moore's lawyer] informed the Court that only the four issues stated in the initial petition for habeas corpus were before it, and that these issues probably would not require an evidentiary hearing. * * *

* * *

Analysis

(1)

Petitioner attacks his conviction upon two grounds. It is alleged first that this plea was not intelligently and knowingly made. * * * Petitioner points out that, at the time of the sentencing hearing, in his description of the circumstances of the crime, Mr. Moore stated that he "didn't have no intention of killing him (Stapleton)." The indictment charged that Mr. Moore "unlawfully and with malice aforethought kill one Fredger Stapleton...." This language is derived from [the Georgia Code] which defines the crime of malice murder. *** * *** Thus, petitioner contends that he was denied effective assistance of counsel in that he was not informed that the crime of malice murder required an intention to kill the victim. Petitioner contends further that he did not intend to kill Mr. Stapleton and, far from admitting this, he specifically denied such intent. Accordingly, he did not admit, or at least did not knowingly and intelligently admit, all the elements of the crime.

* * * Respondent points out in particular that at the June 4, 1974 hearing when the guilty plea was received, it was established by direct inquiry of the trial court that petitioner had been apprised of the possible sentences to which his plea exposed him. * * *

In short, while it is true that the particular elements of the crimes charged were not individually addressed by the Court and the defendant, there appears to be no basis in the June record for concluding that petitioner was unaware of the nature of the crimes charged or equivocal in his acknowledgment of guilt as to those charges. Furthermore, no basis for such doubts can be found in the detailed testimony which was received from [defense counsel] at the state habeas corpus hearing. At that proceeding, [defense counsel] indicated that he was "still on Billy's side in this thing and I'm not trying to hurt

him in any way." Nonetheless, he was unwilling to support petitioner's contention. Quite the opposite, [defense counsel] stated as follows:

> Well, of course, I explained the elements of the crime to him, and I explained what would be necessary for the death penalty to be, to be imposed insofar as aggravating circumstances were concurred. I told him he had a right to a trial by jury. Id., at 46. I explained to him everything I could think to explain to him, what his rights were, what the procedure would be or could be, and I can't think of anything I did not tell him, now.

Mr. Moore disputed this characterization of the extent of the advise and information he was afforded. But, nonetheless, it appears from both his answers to questions posed in open court and testimony from his attorney that he did in fact well know the nature of the charges against him. This conclusion is also supported by consideration of petitioner's background. He was a high school graduate with experience in law enforcement as a military policeman. * * *

* * *

* * * Moore contends that he was never made aware of his right under Georgia law to withdraw his plea at any time before filing of the sentence imposed by the trial court. [At the time of Moore's plea, Georgia law allowed a defendant to withdraw his plea after hearing the sentence, but before the filing of the sentencing order. This practice is no longer permitted in Georgia; and has never been permitted in most jurisdictions.] Thus, petitioner argues that, had he been informed of this right, he would in fact have withdrawn his plea because he did not intend to kill Stapleton and he certainly did not wish to accept a sentence of death.

Examination of the evidence on this question provides even less support for petitioner than in the case of his prior argument. The transcript of the June 4, 1974 hearing clearly shows that Mr. Moore was informed of his right to withdraw his plea at that time and receive a jury trial.

* * *

(2)

* * *

Before considering the question of whether petitioner's sentence was adequately reviewed, it will be useful to describe in some detail the reasoning through which it was apparently arrived at. Judge McMillan began his discussion of sentence by specific reference to the formal requirements of Georgia law. He found in particular that petitioner had committed a capital offense, malice murder, while in the commission of another capital crime, armed robbery. This finding was, of course, sufficient to support capital punishment under the Georgia requirement that at least one aggravating factor be present.

However, Judge McMillan did not stop here. After this determination and imposition of the death penalty ostensibly based up it, the court made several comments which do much to illuminate the logic of its decision. Judge McMillan first described his impression of petitioner's conduct with respect to the crime:

> You, in my opinion, did everything that a man could do after you were caught and do an honorable thing insofar as your true statements made, your cooperation with the officials, pleading guilty to the mercy of the Court, and placing an awesome responsibility on me.

Judge McMillan then went on to discuss his role in the sentencing process. In particular, the judge indicated that he viewed the problem of insuring that petitioner's sentence was proper as exclusively the task of the Georgia Supreme Court:

> [T]hey will take cases that have taken place in Georgia over a period of years and they will apply the facts to the case to the facts of other cases that have happened in Georgia, and then they will apply "evenhanded justice" to your case with other similar cases that have happened in Georgia. As to whether or not that actually applies in your case is for them to decide.

After this discussion and a further reference to mitigating circumstances which he found

insufficient to "wipe out the aggravating statutory circumstances," Judge McMillan stated the specific basis of his conclusion:

> * * * People in their homes the most precious place a man can have is his home; and to be in a home, and probably this man was asleep, I don't know, or for any person to be, not this man, but any person, to be asleep in his home, to be invaded by an intruder, that's armed with weapons, that's necessarily to kill (or otherwise the weapon wouldn't be there in the hands of the intruder), is probably an invasion of the highest injustice that another can do. * * * So, I feel like that if the Court ever does require mandatory punishment that is when they specify by law what offenses will have to be suffered by the electric chair that one of these statutory offenses probably will be that when a person is robbed and killed in his home, that mandatory, as contrasted to discretionary, statutory aggravated circumstances will probably warrant the electric chair without life imprisonment. That justifies me in making the finding that I made.

In summary, Judge McMillan nominally based his sentence upon a finding of one aggravating factor, as provided for under Georgia law. However, the court's remarks went considerably farther in specifying the logic behind this authorized but nonetheless highly discretionary judgment.[6] Judge McMillan specifically stated that the petitioner's conduct subsequent to his capture had been "everything that a man could do." Judge McMillan's comments are also notable for their silence on the subject of conduct prior to the murder which suggested that the petitioner was in some way more dangerous or reprehensible than the specific circumstances of the crime itself indicated. In short, Judge McMillan gave no indication whatever that there was anything special in the "character and propensities of the offender," which would permit identifying him as one of "the few cases in which it (death) is imposed."

It is apparent from Judge McMillan's remarks that the determining factor in his decision, the one fact that could not be "wiped out" was that Stapleton was "asleep in his home." * * *

Judge McMillan's analysis does not merely specify the determining factor in the imposition of the death penalty. It also describes the court's notion of its role in the sentencing process. Judge McMillan indicates directly that his focus was entirely limited to the case at hand and his personal "philosophy" with respect to the facts of the crime. The court indicates directly that there has been no attempt whatever at "even handed justice." The court has only applied its own personal view of the overwhelming severity of the offense, while, of course, observing the necessity that statutory authorization for these preferences be invoked. Thus, Judge McMillan left it entirely up to the Supreme Court of Georgia to determine whether his personal view of the severity of the crime was the general view of judges and juries considering similar cases or merely "the whim of one man."

* * *

* * * The Georgia [Supreme] court, in pertinent part, is mandated to determine whether petitioner's sentence is appropriate to his crime by considering "the penalty imposed in similar cases, considering both the crime and the defendant." However, determining what constitutes an appropriate sample of "similar cases" need not be any simple task. To a degree perhaps unequaled in any other area of law, capital cases appear to implicate the perspectives and attitudes of the individual reflecting upon them. Thus, even in the basic statement of a case, enormous differences may appear in the way observers characterize relevant facts and circumstances. These differences can surely have much significance for, how and against what other "similar cases" a particular crime and criminal are considered.

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6. This Court has conducted a rough analysis of murder cases reported in the most recent complete volume of the Georgia Supreme Court Reporter. Wide variations in the factual detail reported makes firm statistics impossible, but it appears that of the approximately forty cases, which were subjected to initial review, at least fourteen appeared to involve statutory aggravating circumstances. The death penalty had in fact been authorized in only six.

However, in the present case, it is unnecessary to speculate on what factors are to be considered in sentencing review. Because Judge McMillan specifically outlined the basis of his judgment, the Georgia Supreme Court was provided with a clear basis for determining what cases could be considered "similar" for purposes of their comparison.

The fact that petitioner was sentenced to death despite affirmative indication that his conduct after the crime had been exemplary as well as at least the implied conclusion that his background was also a factor in mitigation, clearly demanded that the Georgia Supreme Court closely test Judge McMillan's view that intrusion into a private home was ipso facto sufficient to demand capital punishment when the resident was killed. * * * It was particularly incumbent upon that court to insure that Judge McMillan's view was not the arbitrary judgment of one individual. * * *

Examination of the cases cited by the Georgia Supreme Court in its sentencing review clearly demonstrates that it did not in fact consider "similar cases." In the Appendix to its ruling, the Georgia court lists twenty-three cases which were considered on the basis of "similarity" to the petitioner's crime. In fact, it appears that only three of these cases involved victims who were attacked in their homes. * * * Furthermore, only one involved imposition of the death penalty, which is hardly suggestive of any particular sentencing pattern.

Examination of even the most basic facts of these cases reveals little, if any similarity to petitioner's crime. [One] involved the torture and murder of two doctors who were also husband and wife. The defendant along with two others waited outside the home of the two victims. When the first emerged from the door to go to his car, he was attacked and shot . . . He was then beaten about the head, carried out into the driveway and shot again. The second victim attempted to come to his aid. She fired at the attackers, but she was eventually seized by them, shot through each arm, taunted, and finally killed with a gunshot from another of the assailants as she lay face down on her own patio. Despite four prior felony convictions and his being over forty years old, this defendant received only a life term for his crimes.

[Another case] involved a crime spree during which the defendant had first stolen a car and then obtained two pistols in separate burglaries committed while he drove north from Atlanta toward Greenville, S.C. While still on this route, the defendant broke into a third home. This time the residents, an elderly couple, were present. They were awakened by [the defendant] when he fired a shot to blow off the lock on the rear door. Defendant shot and killed both when they came to investigate. He then ransacked their home before continuing on his way. After at least one other crime, the theft of a second car, he was apprehended and confessed. Despite being forty-two years old and having a lengthy history of prior offenses, including several felonies, [he] was sentenced to life imprisonment.

Pass [v. State] is the only case where a death sentence was in fact imposed. There the defendant broke into a home and ransacked it, stealing a variety of items. The defendant was surprised by the residents in the midst of his crime. Both the victims, husband and wife, were found shot through the head. The husband's head was lacerated, apparently as a result of having been beaten with a baseball bat which was found nearby. There was no evidence of prior convictions, but defendant repudiated his confession and offered an alibi defense at trial. The only evidence of mitigating circumstances was a defense claim that the defendant was mentally retarded.

Distasteful as this exhibition of horrors certainly is, it nonetheless establishes beyond serious doubt that the virtual per se rule which Judge McMillan declared as his rationale in the present case has not been followed in Georgia with respect to crimes which were in many significant ways vastly more reprehensible than petitioner's. This Court would attempt no logical distinction between the results reached in [the three cases], if in fact any real differences can be noted at all. But, it appears entirely obvious that all three are far different from the present case with respect to both crimes and defendant. In no way do they support the result reached by Judge McMillan. Quite the opposite, they compel the

conclusion that petitioner's sentence is not appropriate.

Thus, this Court concludes that, in reviewing petitioner's sentence, the Georgia Supreme Court did not confine itself to "similar cases" as required by statute. Twenty of the twenty-three cases which were considered did not resemble the present facts sufficiently to provide any useful comparison to the sentence imposed here. Of the remaining three, only one resulted in a death sentence despite the fact that all were substantially more reprehensible than the present case when considered from the point of view of both the crime and the defendant. These three cases clearly suggest that Judge McMillan's "philosophy" with respect to the sanctity of the home is not reflected in Georgia sentencing policy generally. It appears to be merely an arbitrary factor which cannot effectively "distinguish this case in which the death penalty was imposed, from the many cases in which it was not."

An extensive search for other cases which might support the determination of the Georgia Supreme Court lends further support to th[is] conclusion * * *

Other cases might be cited where murders committed in the course of burglary of a home produced the death penalty, but only under circumstances far more extreme than are present here. * * * The Court is aware also of one case where less severe circumstances produced only a life sentence. But, in no wise, has this Court been able to locate a single "residential murder" involving substantial mitigating circumstances and no aggravating factors in the manner of the crime, where the defendant received a death sentence.* * *

* * *

Conclusion

* * * The Court * * * determines that petitioner's sentence of death cannot be sustained in light of any proper sentencing review and the holding of the United States Supreme Court in *Furman*. Petitioner's sentence is therefore vacated. * * *

APPENDIX

* * * [I]t appears to this Court that the procedures mandated by *Furman* do not now and in fact never will achieve the standard set out in that opinion and succeeding cases. It is apparent from even the brief review undertaken here that the Georgia statute in particular falls well short of the monumental intellectual breakthrough which has eluded draftsmen through most of Anglo-Saxon political history. Far from guiding juries to rational choices, the statute merely catalogues a laundry list of considerations which would be obvious to any jury considering an appropriate case, but provide little, if any, real basis for their determination. Moreover, even were these factors adequately developed, there is little reason to conclude that any rational pattern might be divined given the enormous variety of factual patterns in homicide cases and the impossibility of determining which supported the jury's verdict. Finally, of course, there is simply no reason for believing that any such patterns exist or could exist, at least so long as the Supreme Court continues to sanction "arbitrary and capricious" decisions not to impose the death penalty.

V

This discussion is certainly general and preliminary. But, I believe it sufficient to support several broad comments. In the first place, one can appreciate the profound difficulty facing state legislatures and judiciaries in developing and applying capital sentencing statutes. As *McGautha* [*v. California*] demonstrates, centuries of effort in innumerable different social and political contexts have failed to devise any system which separates homicides worthy of capital punishment from those meriting a lesser penalty. In fact, if juries are to be regarded as the "conscience of the community" in these determinations, it appears that no statute can be drawn narrowly enough to divine the very unusual circumstances where death is to be considered appropriate. The modern requirement that statutes further narrow even this limited range of cases seems if anything less feasible than prior efforts.

Against this broad historical backdrop, the Georgia law cannot be seen as a legislative failure, so much as still another reflection of the

impossibility of the task. Similarly, the failings of the Georgia Supreme Court as outlined here in *Moore*, * * *, would appear to be inevitable. The state judiciary can hardly be faulted for not following patterns which do not now exist and never have. Nor can the state courts be faulted for failing to properly characterize particular cases or types of cases, when such questions of definition are, in overwhelming part, subjective matters which admit no legal solution.

* * *

If, as this Court suspects, it is becoming obvious that the states cannot meet the requirements of *Furman* no matter how careful their efforts,[6] federal tribunals will be forced into wholesale second-guessing of verdicts which were arrived at in good faith, upon competent evidence, and at no little cost in public and private resources, to say nothing of the strain placed upon conscientious jurors in their "awesome determination." Moreover, such developments would also bring enormous "friction" to the federal system as well as between the courts and the general public, "friction" which is itself grossly disproportionate to the wretched, demented lives that often hang in the balance. Obviously, if the Constitution does mandate the impossible, the public should be informed so that their laws or the Constitution can be adjusted accordingly. If, upon further reflection, it appears that the Constitution does not mandate all the requirements of *Furman*, this, too, must be made clear. The resources of the federal judiciary are far too limited and the stature of the judicial branch far too hard-earned and too fragile to be dissipated in futile demands that the states somehow achieve the impossible.

6. Considering the very significant similarity between the crimes in Furman and Moore, it would seem that, if Georgia is following its statute properly, the exercise may be largely meaningless in any event.

VI

Among the more extraordinary results of *Furman* and its progeny is to bring unity to the views of two of the Supreme Court's most ideologically distant members. Thus, in *Woodson v. North Carolina*, Justice Rehnquist concludes in dissent that it is not at all apparent that appellate review of death sentences, through a process of comparing the facts of one case in which a death sentence was imposed with the facts of another in which such a sentence was imposed, will afford any meaningful protection against whatever arbitrariness results from jury discretion. All that such review of death sentences can provide is a comparison of fact situations which must in their nature be highly particularized if not unique, and the only relief which it can afford is to single out the occasional death sentence which in the view of the reviewing court does not conform to the standards established by the legislation. As for the efficacy of those standards, Justice Rehnquist echoes the logic of *McGautha* that development of meaningful standards lies "beyond present human ability."

Five years later, concurring in *Godfrey v. Georgia*, Justice Marshall, while adhering to his view that the Constitution forbids "arbitrary" infliction of the death penalty, nonetheless concluded that "the Court in *McGautha* was substantially correct in concluding that the task of selecting in some objective way those persons who should be condemned to die is one that remains beyond the capacities of the criminal justice system." Furthermore, Justice Marshall concludes, based on a variety of factors, that appellate courts are probably "incapable of guaranteeing the objectivity and evenhandedness that the Court contemplated and hoped for in *Gregg*."

Of course, this agreement on the current state of the law certainly does not extend to a common prescription of the solution. But, it does perhaps signal the possibility of some change. Other facts also point to the likelihood, if not the necessity, for a serious reassessment of the *Furman* approach. * * * In *Gregg*, the Supreme Court cites *Moore v. State* for the proposition that mitigating factors ("his youth, the extent of his cooperation with the police, his emotional state at the time of

the crime," are to be considered. In fact, Moore displayed all these mitigating factors and others as well. Yet, the death penalty was sustained.

* * *

I will not attempt to specify here by notion of the ultimate or proper outcome of a reevaluation of *Furman*. However, several points are clear from *Blake*, *Burger*, and *Moore*. First, it does not seem possible to completely eliminate proportionality review. *Moore* demonstrates that some judicial role is essential, if only so that the judiciary may correct its own mistakes. Extreme cases like *Moore* do indeed "shock the conscience." Moreover, because specific factual findings can be available, this review need not be perfunctory or unguided. Similarly, this Court believes that an occasional jury determination may be the proper subject for appellate reversal where no rational basis for the sentence of death can be divined. Thus, the major contribution of *Furman* may in retrospect be the conclusion that evolving standards of society now limit capital punishment to "a small number of extreme cases." * * * A defendant may be due the benefit of this development, and reviewing courts may perhaps properly decline to sanction a death sentence where no rational trier of fact could place the crime or the criminal at this extreme. * * *

To be sure, this standard is vague. But, nonetheless, it is a judicial standard and a judicial approach. At the least, it spares other reviewing courts the extraordinary role of connoisseur of blood and dementia which necessarily accompanies the comparative analysis approved in *Gregg* and conducted here in *Moore*. Of course, visions of comparing "similar cases" and discovering "patterns" of sentencing have the seductive appeal of science and mathematics. But, as Justice Harlan observed, this appeal is illusory. There is no objective way to describe "the case" at hand. There are no "similar cases," and there is no constitutional sentencing "pattern." On the other hand, applied with due care and circumspection, a limited judicial standard offers the opportunity for meeting the occasional, exceptional situation where imposition of the death penalty might amount to an error of constitutional dimensions. This limited role is not merely all that an appellate or habeas court should play; it is the only role these courts can play. "Such is the human condition."

This is only a brief excerpt from the Appendix, which appears at 513 F. Supp. at 818. On appeal, the Court of Appeals held that Moore's death sentence was constitutionally defective, but on different grounds. The Court concluded that the trial court had committed constitutional error in imposing the death sentence on the basis of nonstatutory aggravating circumstances. Moore v. Balkcom, *709 F.2d 1353, 1361-67 (11th Cir.1983). However, the Court reheard the case to consider the Supreme Court's opinion in* Zant v. Stephens, *462 U.S. 862 (1983). By that time, Moore was represented by counsel from the NAACP Legal Defense & Educational Fund, John Charles Boger, and a professor from Northeastern Law School, Daniel Givelber. The Court of Appeals vacated its earlier opinion and rendered the following opinion:*

William Neal MOORE
v.
Charles BALKCOM, Warden

U.S. Court of Appeals for the Eleventh Circuit.
716 F.2d 1511 (1983)

JAMES C. HILL, Circuit Judge.

* * *

We hold that the district court erred in conducting its own proportionality review. A federal habeas court should not undertake a review of the state supreme court's proportionality review and, in effect, "get out the record" to see if the state court's findings of fact, their conclusion based on a review of similar cases, was supported by the "evidence" in the similar cases. * * *

The Georgia Supreme Court's proportionality review in this case provided an adequate safeguard against the freakish imposition of capital punishment. * * * While we may have reached a different conclusion regarding the proportionality of the sentence had we conducted

a case-by-case comparison, we cannot conclude that the Georgia Supreme Court's review or the result it reached shocked the conscience.

C. Judge McMillan's Imposition of the Death Sentence

* * * [I]n *Zant v. Stephens*. In that case, the Court squarely held that a death sentence imposed under the Georgia capital punishment scheme is not invalid when imposed partly on the basis of nonstatutory aggravating factors, provided that at least one valid statutory aggravating factor supports the sentence and that the invalid factor itself is not "constitutionally impermissible or totally irrelevant to the sentencing process." Judge McMillan based his sentencing decision partly on the valid statutory aggravating factor of murder committed in the course of another capital felony. * * * We therefore focus on the nature of the nonstatutory aggravating factor considered by Judge McMillan in imposing the death sentence.

* * *

Since consideration of a nonstatutory aggravating factor does not automatically invalidate a death sentence, * * * we must determine whether the factor applied in this case violated the constitution. *Moore* asserts that Judge McMillan viewed the location of the murder, the victim's home, as precluding, as a matter of law, consideration of any relevant mitigating circumstances.

* * *

One could interpret Judge McMillan's language that capital punishment would likely become mandatory in cases involving murder and robbery in the victim's home as a nonstatutory aggravating factor which precluded consideration of mitigating factors. A fair examination of the entire sentencing proceeding, however, does not support this interpretation. The record indicates that Judge McMillan viewed the statutory aggravating circumstances and the location of the murder and robbery as so aggravating the crime as to outweigh all mitigating circumstances involved in the case. Such an evaluation comports with the constitutional requirement of an individualized sentencing decision. * * * We therefore hold that the sentencing judge did not commit constitutional error in imposing petitioner's sentence.

The Supreme Court denied certiorari. 465 U.S. 1084 (1984). Moore then filed a second state habeas corpus petition, which was denied, and a second federal petition. The district court denied all nine grounds asserted in the federal petition, finding "abuse of the writ" for not having presented them in the first petition. A divided panel of the Eleventh Circuit affirmed and adopted the district court opinion. Moore v. Zant, *734 F.2d 585 (11th Cir.1984). The full court granted* en banc *review which resulted in the following opinion:*

William Neal MOORE, Petitioner-Appellant,
v.
Ralph KEMP, Respondent-Appellee.

U.S. Court of Appeals for the Eleventh Circuit
824 F.2d 847 (1987)

GODBOLD, Circuit Judge:

* * *

Five issues are pressed before the en banc court: (1) The state failed to advise Moore of his right to remain silent or of his right to counsel prior to or during a presentence interview conducted by a probation officer after conviction and before sentencing. (2) The state denied Moore the right to confront and cross-examine witnesses whose hearsay testimony was considered in the presentence report. (3) Neither Moore nor his counsel was afforded adequate opportunity to review the presentence report prior to the sentencing proceeding, in violation of *Gardner v. Florida*, 430 U.S. 349 (1977). (4) Ineffectiveness of trial counsel at sentencing phase. (5) Racially discriminatory application of the death penalty in the State of Georgia.

I. The *Estelle v. Smith* claim

* * *

This claim was based on *Estelle v. Smith*, which was not decided until three weeks after Moore's first federal petition was decided by the district

court. * * *

* * * We hold that the Smith claim in the second petition was not properly dismissed * * * and remand for reconsideration of this issue on the merits.

* * *

II. *Proffitt v. Wainwright* claim

In Moore's second habeas petition he raised another "new law" claim. He alleged that the state denied him the right to confront and cross-examine witnesses whose hearsay testimony was considered in the presentence report. This claim is based on *Proffitt v. Wainwright*, which was decided by the Eleventh Circuit on September 10, 1982, five months after the district court decided the first federal petition. In *Proffitt* this court recognized the specific constitutional right accorded a capital defendant to cross-examine a psychiatrist whose report of a presentence examination of the defendant was considered by the trial court in its sentencing decision. Moore seeks to apply this case to witnesses whose statements were included in his presentence report.

* * * As with the *Smith* claim, we cannot charge Moore with the knowledge of the legal basis of this claim at the time of his first petition and we hold that his conduct in omitting the claim was not an abuse of the writ.

III. The *Gardner v. Florida* claim

The second federal petition alleged that neither Moore nor his counsel had been given a meaningful opportunity to review, correct, or supplement the presentence report, in violation of *Gardner v. Florida*. *Gardner* was decided in 1977; therefore this is not a claim based on alleged "new law" declared since the first federal petition.

This claim comes to us with an unusual procedural history. It was originally raised in Moore's first state habeas corpus petition in 1978. The first federal petition, filed in the fall of 1978, did not include this claim. Moore sought to raise the claim by amendment to the petition in October 1980, just after he retained new counsel. The district court refused to grant leave to amend the petition, and the Eleventh Circuit affirmed. * * *

Moore raised the issue again in his second federal petition, and the district court denied the claim as an abuse of the writ.

* * *

We cannot say that the district court, in ruling on Moore's second petition, erred in finding that the failure to include this claim in the first petition was an abuse of the writ.* * *

Even where abuse is found, however, a federal court should not dismiss * * * a claim in a successive petition if the "ends of justice" require consideration of the claim on the merits. * * *

* * *

* * * [W]e are faced with a fundamental inconsistency in the decision of the district court. The court found that the ends of justice did not require consideration of the *Gardner* claim on the merits. Yet its own statements arguably require the opposite finding. The court stated that if there had been a *Gardner* violation, "then sufficient likelihood would exist for finding that a wrongful sentence was imposed based on inadequate information." The court also found that "it is arguable that the corrected information 'would [not] barely have altered the sentencing profile presented to the sentencing judge,' " that is, that corrected information would have materially altered the profile before the judge. Under these circumstances we vacate the denial of the *Gardner* claim and remand in order that the district court can give fresh consideration to whether the ends of justice require it to consider the merits of this claim.

IV. Ineffectiveness of trial counsel

* * *

In the second federal petition Moore alleged ineffective counsel at sentencing, on numerous grounds. Moore urges that he did not withhold the issue, stating that it was omitted from the first federal petition because of differences between him and his counsel. The ineffectiveness issue,

including the performance of counsel at the sentencing phase, had been examined in detail in the order denying the first state petition. Ineffectiveness at sentencing was not asserted in petitioner's pro se amendment or in the [subsequent counsel's] amendment. The court did not err in finding that it was barred under abuse of the writ principles.

V. Racially discriminatory application of death penalty in Georgia

* * * We do not examine this in detail because the Baldus study was rejected in *McCleskey v. Kemp*.

AFFIRMED in part, REVERSED in part and REMANDED.

TJOFLAT, Circuit Judge, concurring in part and dissenting in part, in which VANCE, Circuit Judge, joins:

* * * The majority holds that Moore's failure to present his claims based on *Estelle v. Smith*, and *Proffitt v. Wainwright*, did not constitute an abuse of the writ, because *Estelle v. Smith* and *Proffitt* are "new law." I respectfully dissent from these conclusions because a reasonably competent habeas attorney should have anticipated the holdings of *Estelle v. Smith* and *Proffitt*. I also dissent from the majority's disposition of petitioner's claim under *Gardner v. Florida*, because Moore had a sufficient opportunity to present this claim in his first petition and because it is patently without merit. Finally, I concur in the majority's analysis and disposition of petitioner's remaining claims.

* * *

HILL, Circuit Judge, dissenting, in which FAY and EDMONDSON, Circuit Judges, join:

"When the right point of view is discovered, the problem is more than half solved." * * *

The right point of view of the issues in this case is this: successive petitions for habeas corpus create a genuine and necessary tension between the institutional desirability of finality of judgment on the one hand and, on the other, society's abhorrence of confinement or other punishment of one who is known to be innocent.

* * *

In the administration of justice, finality achieved reasonably promptly is important. * * * No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved. * * *

* * *

The petitioner in this case makes no claim of innocence; he long ago and promptly confessed to murder accompanied by statutory aggravating circumstances. For the reasons stated above, therefore, * * * I would affirm the district court's judgment dismissing the petition.

The state petitioned for certiorari. The Supreme Court granted certiorari and heard oral argument. The Court vacated the decision of the en banc Eleventh Circuit and remanded the case "for further consideration in light of Teague v. Lane, *489 U.S. 288 (1989)."* Zant v. Moore, *489 U.S. 836 (1989).*

In Teague, *the Supreme Court restricted significantly the retroactive application of new constitutional new constitutional decision to cases that became final before those decisions were announced. In that case, an African American was convicted by an all-white Illinois jury of attempted murder and other offenses. During jury selection for petitioner's trial, the prosecutor used all ten of his peremptory challenges to exclude blacks. The defendant's counsel moved for a mistrial, arguing that the prosecutor's use of peremptory challenges to strike blacks denied him the right to be tried by a jury that was representative of the community. He was denied relief in the state and lower federal courts.*

The Supreme Court granted certiorari *but refused to hear Teague's argument that the prosecutor's use of strikes to remove African Americans violated his rights under the fair-cross*

section provisions of the Sixth Amendment because he was asking for a "new rule" of constitutional law. The Court held that it would not consider whether to adopt such a new rule in Teague's case because he was presenting the claim in federal habeas corpus proceedings and new rules would not be adopted or applied in such cases, subject to a couple of exceptions not applicable to Teague. (While the Supreme Court's decision in Batson v. Kentucky *would apply in Teague's case, the Court ruled that it was procedurally barred because Teague had not asserted an equal protection claim at trial, relying instead on the fair-cross section provision of the Sixth Amendment as the legal basis for this challenge to the prosecutor's use of his strikes.)*

By the time that Moore's case returned for yet another argument before the Eleventh Circuit, the composition of the Court had changed significantly due to several judges leaving and new appointments.

William Neal MOORE, Petitioner-Appellant,
v.
Walter ZANT, Respondent-Appellee.

U.S. Court of Appeals for the Eleventh Circuit
885 F.2d 1497 (1993)

COX, Circuit Judge:

* * *

B. Scope of Review on Remand

* * * At oral argument, Moore strenuously asserted that by vacating this court's earlier en banc opinion and remanding this case expressly "for further consideration in light of *Teague v. Lane*," the Supreme Court did not permit reconsideration of the abuse of the writ issues. * * * The State, in contrast, maintains that the Supreme Court, by issuing the remand order, did not intend to preclude this court from considering all of the issues in the case, including retroactivity, if appropriate, and abuse of writ. * * *

* * * [W]conclude that the Supreme Court's remand order does not preclude our revisitation of the abuse of the writ issues. Although the Supreme Court granted *certiorari* in this case, it vacated our earlier en banc decision, leaving in existence no appellate level disposition of the abuse of the writ issues, offered no comment on the correctness of that earlier decision, and remanded the case to this court with the general instruction that we further consider the case in light of *Teague*. * * *

II.

Initially, we should decide whether Moore abused the writ by raising in his second federal habeas petition certain claims which he failed to present in his first federal petition. Because of our disposition of the abuse of the writ issues, we find it unnecessary to address [the applicability of *Teague v. Lane* to those issues].

A. Claims Presented

Moore contends that the district court abused its discretion in dismissing, as an abuse of the writ, his *Estelle*, *Proffitt*, and *Gardner* claims. * * *

* * *

D. Discussion

1. *Estelle v. Smith* claim.

Moore presents two "new law" claims in his current federal habeas petition. The first claim, based on *Estelle v. Smith*, is that the state failed to inform him of his right to remain silent and of his right to consult with counsel prior to the probation officer's presentence interview of him, in violation of the Fifth, Sixth, and Fourteenth amendments.

* * *

In light of the Supreme Court's clear recognition, by 1978, that some of the constitutional protections afforded to capital defendants during their merits trials applied as well to sentencing proceedings, a reasonably competent attorney reasonably could have anticipated the eventual application of the protections established in *Miranda* to capital sentencing proceedings. Moore's failure to make an *Estelle*-type claim in his first federal habeas petition, therefore, is inexcusable.

* * *

For the same reasons we concluded Moore abused the writ by failing to raise his *Estelle* claim in his first petition, we conclude that his failure to raise his *Proffitt* claim in that petition is inexcusable. Presaging *Proffitt* was a long line of cases in which Sixth Amendment protections were extended in a variety of circumstances and another line which addressed the special safeguards that are constitutionally mandated in capital proceedings. * * * Moreover, the Court repeatedly has recognized that the right to cross-examine adverse witnesses, like the right to counsel, is a fundamental requirement for a fair trial and for ensuring due process of law. * * *

* * *

We need not determine whether Moore's attempt to amend his earlier petition excused his omission of the *Gardner* claim, because we conclude that the claim is meritless. * * * [T]he record developed in the state habeas proceedings demonstrates that Moore's counsel was presented with a copy of the presentence investigation report prior to his sentencing hearing; that his counsel requested and was given a recess to review the report; and that, upon reconvening, neither Moore nor his counsel voiced any objection to the contents of the report. * * *

* * *

[Concurring opinion of Chief Justice Roney omitted.]

KRAVITCH, Circuit Judge, dissenting.

* * *

The abuse of the writ issue decided by the court today was decided before by this court en banc; it was, however, decided the other way. This reversal of our previous decision is, at best, unseemly as there has been no intervening factual or legal development to explain or excuse reconsideration of the abuse of the writ issue. The Supreme Court vacated our prior en banc decision for reconsideration in light of *Teague*. It did not give us carte blanche to reexamine the entire case.

* * *

JOHNSON, Circuit Judge, dissenting, in which HATCHETT, Circuit Judge joins and KRAVITCH, ANDERSON and CLARK, Circuit Judges, join in part.

* * *

* * * Neither Congress, nor the Supreme Court, nor this Court have altered the standards used to judge abuse of the writ claims since this Court's 1987 opinion. No new facts have been put before this Court since its 1987 opinion issued. Petitioner is, in fact, in precisely the same position before this Court today as he was at the time of the 1987 opinion. Moreover, the merits of this Court's 1987 opinion have not been rebriefed or reargued. No principled reason exists for the 1989 version of the Eleventh Circuit to rule differently from the 1987 version of this Court. * * *

* * * [T]he plurality applies the same law as did this Court in 1987 – yet with a completely different result. By operation of no principle of which I am aware can this Court reach a result contrary to that which it reached under identical law and facts two years ago. * * *

* * *

The Supreme Court, in *Gardner v. Florida*, held that capital defendants must have access to and an opportunity to explain or deny information which the state considers in sentencing. *Teague* provides for retroactive application of "accuracy-enhancing procedural rules" which implicate the "bedrock procedural elements" of a criminal conviction. The principle enunciated in *Gardner* is clearly such a rule. * * *

* * *

Moore is similarly entitled to retroactive application of *Proffitt v. Wainwright*. This Court in *Proffitt* held that a capital defendant had the right to confront psychiatric witnesses at his sentencing hearing. This right has its foundations

in "assur[ing] the 'accuracy of the truth-determining process.'" * * * The procedural right set forth in *Proffitt* is perhaps the paradigm example of the accuracy-enhancing exception set forth in *Teague*. There can be no doubt that Proffitt applies retroactively.

* * * [*Estelle v.*] *Smith* is not "new law" for retroactivity purposes. Yet this Court held in its 1987 opinion that *Smith* was new law for the purpose of excusing his failure to raise it in his prior petition. The interrelatedness and possible identity of these two conceptions of "new law" is what this Court should have addressed on remand. * * *

* * * The remand should have forced this Court to take a hard look at the relationship between its definitions of "new law."

* * *

I can neither understand nor accept what this Court does in this case. By repudiating its 1987 opinion concerning abuse of the writ and ignoring the Supreme Court's mandate, this Court provides ammunition to those who claim that the shifting composition of a court is more important than the rule of law in settling disputes. By deciding this case on grounds neither argued nor briefed on rehearing, this Court prevents the litigants from explaining positions taken more than five years ago. Most unconscionably of all, by foreclosing examination of the merits of petitioner's claims, this Court leaves standing unchallenged a death sentence almost certainly rendered on the basis of false information.

* * *

[Dissenting opinion of Judge Anderson omitted.]

The Supreme Court denied certiorari. Another execution date was set for Moore. On August 20, 1990, the Georgia Board of Pardons and Paroles commuted Moore's sentence to life imprisonment. On November 8, 1991, Moore was released on parole.