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Capital Punishment: Summary of Supreme Court Decisions on the Death Penalty

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Summary

This report summarizes the death penalty decisions of the Supreme Court, with an emphasis upon the cases decided from 1987 through 1995. Several major themes emerge from this review: 1) the Court is more hospitable to state capital punishment procedures, finding they comport with constitutional requirements in two-thirds of the cases decided; 2) a solid majority of the Court is willing to place restrictions on federal habeas corpus relief, to enable those states that choose to impose the death penalty to do so without substantial delays; 3) application of aggravating and mitigating factors to achieve individualized capital sentencing remains a dominant theme of Eighth Amendment jurisprudence, with the Justices divided over the appropriate scope of federal review; and 4) the Due Process Clause and the right to a fair and impartial jury trial also received further elaboration in capital cases.

The changed composition of the Court had a significant impact on death penalty jurisprudence in the last 6 years. Three justices who believed the death penalty was unconstitutional departed the Court. Beginning with the noncapital *Teague v. Lane* case, 489 U.S. 288 (1989), whose ruling was applied to capital cases by *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court sharply reduced the scope of federal habeas corpus relief. Unless a case falls within one of two exceptions, the Court will not announce or apply new constitutional rules during habeas review.

The doctrine of abuse of the writ of habeas corpus was also expanded. Unless the case falls within the "fundamental miscarriage of justice" exception or the cause-and-prejudice standard applies to excuse earlier neglect, the federal courts may not reach the merits of 1) successive claims covering the ground of earlier petitions, 2) new claims which were not raised earlier through inexcusable neglect, or 3) procedurally defaulted claims in which petitioner failed to comply with state procedural rules. *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992).

The legislature prescribes the "aggravating factors" that narrow the death-eligible class. The sentencing authority must also consider any relevant "mitigating circumstances." A state, however, may constitutionally require that the defendant prove the existence of mitigating circumstances by the preponderance of the evidence. *Walton v. Arizona*, 497 U.S. 639 (1990).

The death penalty remains a divisive, intensely controversial subject. There are many five-four decisions. The dissenting justices deplore what they perceive is an "unjustifiable assault on the Great Writ." *McCleskey v. Zant*, 499 U.S. 467, 507 (1991). The majority responds that "without finality, the criminal law is deprived of much of its deterrent effect." 499 U.S. at 491. The changed direction of capital punishment jurisprudence is only now making itself felt in state criminal trials and appellate review of convictions and capital sentences.

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This report summarizes the death penalty decisions of the Supreme Court, with an emphasis upon the cases decided from 1987 through 1995. Several themes emerge from this review: the Court is more hospitable to state capital punishment procedures, finding they comport with constitutional requirements in two-thirds of the cases decided; a solid majority of the Court is willing to place restrictions on federal habeas corpus relief to enable those states that choose to impose capital punishment to do so without inordinate delays; application of aggravating and mitigating factors to achieve individualized sentencing in capital cases remains a dominant theme of Eighth Amendment jurisprudence, with the Justices divided over the appropriate scope of federal review; and the Due Process Clause of the Fifth Amendment and the Sixth Amendment right to a jury trial also received further elaboration in the capital punishment context.

Background

The Eighth Amendment's prohibition against "cruel and unusual punishments" has been interpreted in the light of "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 100-01 (1958) (plurality opinion). Originally, the Court was inclined to an historical style of interpretation, and looked to whether or not a punishment was "cruel and unusual" by the standards and practices in 1789. *Wilkerson v. Utah,* 99 U.S. 130 (1878); *In re Kemmler,* 136 U.S. 436 (1890). Then, in *Weems v. United States*, 217 U.S. 349 (1910), the Court concluded that the Framers had not merely intended to bar the cruel and unusual punishment techniques and practices condemned in 1789, but had intended to prevent new forms of unusual punishment. The Eighth Amendment was of an "expansive and vital character." *Id.* at 376-77.

Before 1972, the states generally allowed the jury, as the conscience of the community, or sometimes the judge, discretion whether or not to impose the death penalty. In *Furman v. Georgia,* 408 U.S. 238 (1972), while upholding the power of the states to impose the death penalty, the Court held that a statute allowing unbridled discretion in a jury or judge to determine whether to impose the death penalty amounted to cruel and unusual punishment in violation of the Eighth Amendment. The effect of *Furman* was to invalidate most of the existing state and federal death penalty provisions.

Within a few short years, approximately 37 states responded by enacting new death penalty statutes. New York reinstated the death penalty in 1994 increasing the number of death penalty states to 38. In the same year, the Congress legislated new

federal capital sentencing procedures to overcome constitutional infirmities and added substantially to the list of federal crimes subject to the death penalty.[1]

Of the two approaches taken by the states in an effort to comply with the *Furman* decision, the Court rejected one approach (mandatory death sentences for specified crimes, *Woodson v. North Carolina,* 428 U.S. 280 (1976) and *Roberts v. Louisiana,* 428 U.S. 325 (1976)) and validated the second (statutes guiding the sentencing authority by requiring a finding of one or more aggravating factors if the death penalty is imposed; see *Gregg v. Georgia,* 428 U.S. 153 (1976); *Proffitt v. Florida,* 428 U.S. 153 (1976); and *Jurek v. Texas,*428 U.S. 262 (1976)). From the *Gregg, Proffitt,* and *Jurek* cases emerged the principle that, although the death penalty is constitutional, sentencing procedures must be structured to reduce arbitrariness and capriciousness as much as possible. For example, in *Proffitt v. Florida* the Court found a death penalty statute valid even though the trial judge rather than the jury was directed to weigh statutory aggravating factors against statutory mitigating factors. In *Jurek v. Texas* the Court construed the statute before it as narrowing the death-eligible class and taking account of mitigating factors in considering future dangerousness.

The plurality in these cases approved procedures requiring (l) that the sentencing authority, jury or judge, be given standards to govern its exercise of discretion and be given the opportunity to evaluate both the circumstances of the offense and the character and propensities of the accused (that is, "individualized capital sentencing"), and (2) that special forms of appellate review be provided not only of the conviction but also of the sentence, to ascertain that the sentence was in fact fairly imposed. The desired result is a principled way to distinguish cases in which the death penalty is deemed warranted from other cases in which it is not.

In *Lockett v. Ohio,* 438 U.S. 586 (1978), a death penalty statute was held invalid because it failed to permit consideration in a capital case of any aspects of the defendant's character or record, or the circumstances of the offense, as mitigating factors. The plurality opinion in *Lockett* was later endorsed by a majority opinion in *Eddings v. Oklahoma,* 455 U.S. 104 (1982). Within 10 years after the *Furman* decision, the Court, having rejected mandatory imposition of the death penalty (which would result in its consistent application) placed once again in the sentencing authority a large measure of discretion. The legislature, however, must prescribe the aggravating factors and the appellate courts must be able to review capital sentences in light of the statutory factors for "measured, consistent application" of the death penalty.

The groundwork for the *Furman* decision was prepared in the early 1960's. Changes in the composition of the Supreme Court (the creation of the "Warren Court"), the impact of the civil rights movement, and opposition to the death penalty from civil liberties organizations coalesced in the de facto suspension of the death penalty during most of the 1960's and 1970's. In those states that seek to impose the

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[1] Violent Crime Control and Law Enforcement Act of 1994, Public Law No. 103-322, 108 Stat. 1976 (September 13, 1994). For a discussion and summary of these federal capital punishment provisions, *see,* Doyle, *Crime Control Act of 1994: Capital Punishment Provisions Summarized,* CRS Rep. No. 94-721 S.

death penalty, protracted appeals and pursuit of collateral remedies by death-row inmates have become commonplace.[2] Only within the last six years has a majority formed on the Court to restrict federal habeas corpus review of capital convictions and sentences, which has been the primary vehicle for federal review of state death penalty cases.

Federal Habeas Corpus

At common law, the writ of habeas corpus applied to secure release from prison of persons held without trial, without bail, or confined by order of a court without subject matter jurisdiction.[3] Persons convicted by a court with jurisdiction did not have recourse to the writ. Initially in the United States, the writ was used to obtain the release of federal officials held by the states without trial or bail. The federal writ was not otherwise available for prisoners held under state authority rather than federal authority. *Ex parte Dorr*, 44 U.S. (3 How.) 103 (1845).

Congress substantially increased the jurisdiction of the federal courts to issue the writ in 1867 by authorizing its issuance "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." 14 Stat. 385 (1867). This expanded jurisdiction, however, had only slight effect on access to federal habeas relief until the 1950's and 1960's. As Judge Friendly of the Second Circuit noted, the great expansion in federal habeas relief occurred as a consequence of two related developments: first, a series of Supreme Court decisions imposing for the first time on state criminal process the rules of the fourth, fifth, sixth, and eighth amendments by the due process clause of the 14th Amendment; and second, the tendency to construe these "Bill of Rights" rules with an ever increasing breadth as limitations on the power of States to convict and punish criminal offenders. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. CHI. L. REV. 142, 155-56 (1970). "The Bill of Rights . . . has become a detailed code of Criminal Procedures, to which a new chapter is added every year." *Id.*at 155.

The current majority on the Supreme Court seems committed to drastic limitations on the use of federal habeas relief to create and apply new rules of criminal procedure and punishment.

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[2] Between 1973 and 1992, a total of 4,704 persons were sentenced to death, but only 188 were executed. Between 1977 (the first post-*Furman* execution) and 1984, only 11 executions took place. During this period, the revised state capital sentencing schemes were subjected to intensive litigation. Nearly 40% of the death sentences were later reduced to a lesser penalty by judicial review or executive clemency. Nearly 10% of the prisoners had their underlying convictions overturned on appeal. Those executed in 1992 were on death-row an average of nine and a half years. Stewart, *Dealing with Death,* 80 ABA JOUR. 50 (1994). The total number of executions from 1977-1994 is 257, of which 100 (or nearly 40%) were carried out in 1992-1994. The number executed in 1995 is not available at this writing.

[3] For a detailed review of habeas corpus law, see C. Doyle, "Federal Habeas Corpus: Background and Issues," CRS Report 93-935A (Oct. 22, 1993).

Beginning with a noncapital case, *Teague v. Lane,* 489 U.S. 288 (1989), the Court held that a novel interpretation of the Constitution (a "new rule") generally cannot be applied retroactively against the states during federal habeas review of state convictions since state courts could only be expected to defer to those rules in existence when their consideration became final. A plurality of the Court also held that it therefore would not announce any new rules on habeas review unless the case falls within one of two exceptions: the new interpretation "places `certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" 489 U.S. at 307, or places "a certain category of punishment for a class of defendants because of their status or offense" beyond the power of the criminal law-making authority to proscribe, *Penry v. Lynaugh,* 492 U.S. 302, 329 (1989); or the new interpretation significantly implicates the fundamental fairness of the trial, with the result that, without application of the new rule, the likelihood that only the guilty are convicted is seriously diminished. *Teague v. Lane,* 489 U.S. 288, 3l2-l3.

In *Penry v. Lynaugh,* the Court extended the application of the *Teague* "new rule" principle to capital punishment cases. Penry argued that, as a mentally retarded person, application of the death penalty amounted to cruel and unusual punishment. The plurality examined the merits of this claim under the first exception to creation of new rules during habeas review, and held that the Eighth Amendment does not categorically prohibit execution of a mildly to moderately mentally retarded person who has been found competent to stand trial and whose insanity defense has been rejected by the jury. A different plurality remanded the case on a different point: in light of the prosecutor's argument on the jury's role and the inadequate instructions, the jury may not have considered and given effect to mental retardation as a mitigating factor in deciding to impose the death penalty. 492 U.S. at 328.

A case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final. *Teague v. Lane,* 489 U.S. 288, 301 (1989). A decision may involve a "new rule" for purposes of *Teague,* even if the Court states its decision is "dictated by precedent," as long as a split in the lower courts or some other source of authority provides a ground upon which a different outcome might reasonably have been anticipated. *Butler v. McKellar,* 494 U.S. 407, 415 (1990). This is because the *Teague* rule "serves to validate reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." 494 U.S. at 414; *see also Sawyer v. Smith,* 497 U.S. 227, 234 (1990) at 432.

Abuse of the Habeas Corpus Writ

In addition to placing procedural limitations on announcement and application of "new rules" during habeas review, the Court denied habeas relief by applying the abuse of the writ doctrine. In *McClesky v. Zant,* 499 U.S. 467 (1991), the Court clarified the standards for denying relief on the ground of abuse: the doctrine is not confined to instances of deliberate abandonment of claims not asserted; abuse occurs by failing to raise a claim through "inexcusable neglect"; and, only in the extraordinary instance when a constitutional violation probably has caused the

conviction of an innocent person should an exception be made to the "cause and prejudice" standard that governs inexcusable neglect.

Federal habeas review of federal claims is also ordinarily barred if the state court decision rests on an independent and adequate state law ground, whether that ground is substantive or procedural. *Coleman v. Thompson*, 111 S. Ct. 2546 (1991).

One year after the *McClesky* and *Coleman* decisions, the Court further restricted habeas review by narrowing the "fundamental miscarriage of justice-actual innocence" exception to the cause-and-prejudice standard. Under the holding of *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992), a petitioner who claims actual innocence of the crime which occasioned the death sentence must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law. The "clear and convincing" evidentiary standard replaced the former "probable cause" evidentiary standard for invoking the exception to the cause-and-prejudice standard. The Court subsequently restricted *Sawyer* to review of death sentences. It held in *Schlup v. Delo*, 115 S. Ct. 851 (1995) that the less onerous "more likely innocent than not" standard of *Murray v. Carrier*, 477 U.S. 478 (1986) applies to claims of innocence of the crime, accompanied by claim of constitutional error.

Unless the case falls within the miscarriage of justice exception or the showing required by the cause-and-prejudice standard can be made, a court may not reach the merits of (1) successive claims which raise grounds identical to grounds heard and decided on the merits in an earlier habeas petition, (2) new claims, not previously raised which constitute an abuse of the writ, or (3) procedurally defaulted claims in which the petitioner failed to follow applicable state procedural rules in raising the claims.

Individualized Capital Sentencing

During the last 10 years, the Supreme court has devoted more attention to individualized sentencing of capital defendants than any other death penalty issue. The justices remains divided over the proper scope of federal review. Majorities shift from case to case, but there is nevertheless a clear trend to uphold the death penalty in a greater number of cases.

The death penalty must be administered through guided, individualized sentencing procedures, which must be structured to reduce arbitrariness and capriciousness as much as possible. The legislature prescribes standards to govern the sentencer's discretion in evaluating both the circumstances of the offense and the character and propensities of the accused (i.e., the "aggravating factors" that narrow the death-eligible class of murderers).

Appellate review must be provided not only of the conviction but also of the sentence to ascertain that the death sentence was fairly imposed. *Gregg v. Georgia*, 428 U.S. 153 (1976).

The sentencing authority must consider any relevant "mitigating circumstances" offered by the defendant and supported by evidence in justification of a lesser sentence than the death penalty. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Walton v. Arizona*, 497 U.S. 639, 649 (1990).

In *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), the Court held the Eighth Amendment does not bar either the introduction of "victim impact" statements or prosecutorial argument about the victim's personal characteristics during the sentencing phase. *Payne* overruled the earlier decisions in *Booth v. Maryland*, 482 U.S. 496 (1987) (victim impact statement violates the Eighth Amendment since it creates a constitutionally unacceptable risk that the jury would impose the death penalty in an arbitrary and capricious manner) and *South Carolina v. Gathers*, 490 U.S. 805 (1989) (prosecutorial argument about victim's personal characteristics irrelevant to proper sentencing determination and violates Eighth Amendment).

A state appellate court's narrowed construction of an otherwise vague aggravating circumstance can satisfy constitutional requirements by giving consistency to the application of the standard. *Lewis v. Jeffers*, 497 U.S. 764 (1990); *Arave v. Creech*, 113 S. Ct. 1534 (1993).

Unless cured by a narrowing state appellate interpretation, the phrase "especially heinous, atrocious, and cruel" is an unconstitutionally vague standard for applying the death penalty. *Maynard v. Cartwright*, 486 U.S. 356 (1988). Those state appellate courts that engage in reweighing of the aggravating and mitigating factors, however, can cure an invalid aggravating circumstance (like the "especially heinous" standard). *Clemons v. Mississippi*, 494 U.S. 738 (1009); *Walton v. Arizona*, 497 U.S. 639 (1990). If the sentencer makes an Eighth Amendment error by considering an invalid aggravating circumstance (e.g., the "coldness" of the capital offender in committing the crime), the state appellate court can either reweigh the aggravating and mitigating circumstances without the invalid factor, or can determine that consideration of the invalid factor was harmless error. *Sochor v. Florida*, 112 S. Ct. 2114 (1992).

The Constitution does not require that a jury find the aggravating circumstances. A trial judge may make that finding and impose the death sentence. Even if the jury participates in the sentencing phase, capital sentencing is not a trial within the meaning of the Sixth Amendment. *Hildwin v. Florida*, 490 U.S. 638 (1989).

The general principle that the sentencing authority must consider and give effect to any relevant mitigating evidence has been tempered by the current majority on the court. In *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), the Court upheld a state statute that required imposition of the death penalty if the aggravating circumstances outweigh the mitigating circumstances, or if there are no mitigating circumstances. The Court now applies a "reasonable likelihood" standard to determine whether or not the jurors thought they were precluded from consideration of relevant mitigating evidence, *Boyde v. California*, 494 U.S. 379 (1990), in lieu of the "single hypothetical reasonable juror" standard. The *Walton* case also established that a state statute can constitutionally place on the defendant the burden of establishing by the preponderance of the evidence the existence of mitigating circumstances sufficient to call for leniency. 497 U.S. at 649.

The Court has not, however, applied the mitigating circumstances doctrine consistently. There are many five-four decisions. In a pre-*Boyde* case, *Mills v. Maryland*, 486 U.S. 367 (1988), the Court remanded for resentencing because a "single reasonable juror" might have incorrectly thought that a Maryland statute required juror unanimity on particular mitigating circumstances. In *McKoy v. North Carolina*, 494 U.S. 433 (1990), decided the same day as the *Boyde* case, the Court applied *Mills* to invalidate a North Carolina statute even though the jury could opt for life imprisonment where it lacked unanimity on the mitigating evidence, because one holdout juror could prevent the others from giving effect to the mitigating evidence.

The Constitution, however, does not require a jury instruction on mitigating circumstances in the absence of any supporting evidence. *Delo v. Lashley*, 113 S. Ct. 1222 (1993).

A juror who will automatically vote for the death penalty upon conviction of a capital crime should not be impaneled because he or she will fail in good faith to consider the evidence of aggravating and mitigating circumstances. If one such juror is impaneled, the death penalty cannot be carried out because the defendant has been deprived of due process. *Morgan v. Illinois*, 112 S. Ct. 2222 (1992).

Proportionality

In the context of capital punishment, proportionality analysis raises the question of the constitutionality of the death penalty in relation to the offense committed. The death penalty cannot be imposed on a rapist who does not kill his victim. *Coker v. Georgia*, 433 U.S. 584 (1977). Initially, in *Enmund v. Florida*, 458 U.S. 782 (1982), the Court held the death penalty unconstitutional for felony murder if the defendant did not kill, or attempt to take life, or intend that anyone be killed. The "intent to kill" qualification was subsequently eased in *Tison v. Arizona*, 481 U.S. 137 (1987). Under the new standard, "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." 481 U.S. at 158.

Proportionality analysis is also sometimes used to determine whether the death penalty is disproportionate to the age or capacity of the defendant. The Eighth Amendment does not prohibit capital punishment for persons who commit capital offenses at age 16 or 17. *Stanford v. Kentucky*, 492 U.S. 361 (1989). In an earlier case, a different majority did prevent imposition of the death penalty against a 15-year-old capital offender where the state statute set no minimum age for capital punishment. *Thompson v. Oklahoma*, 487 U.S. 815 (1988). The Eighth Amendment does not categorically prohibit execution of a mentally retarded person who has been found competent to stand trial and whose insanity defense has been rejected by the jury. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

Due Process Clause

While the bulk of the death penalty cases involve construction of the Eighth Amendment, a significant number of capital cases concern application of the Due Process Clause of the Fifth and Fourteenth Amendments. Due process issues include the reasonable doubt standard, notification of criminal procedures, and standing to prosecute.

The Court has upheld the constitutionality of two venerable formulations of jury instructions on the reasonable doubt standard, when taken as a whole. *Victor v. Nebraska,* 114 S. Ct. 1239 (1994). In a later case, the Court vacated a murder conviction and remanded for further consideration apparently to determine whether or not the jury instructions as a whole removed any ambiguity caused by explaining that reasonable doubt meant doubt beyond a "moral certainty." *North Carolina v. Bryant,* 114 S. Ct. 1365 (1994).

The Court found no due process violation in a trial that did not require jury unanimity on either the charge of premeditated murder or of felony murder in order to impose the death penalty for first-degree murder. *Schad, Jr. v. Arizona,* 111 S. Ct. 2491 (1991). Due process standards are violated, however, where the State does not seek the death penalty but the judge imposes a death sentence without adequate notice to defense counsel that the death penalty remains a possible sentence. *Lankford v. Idaho,* 500 U.S. 110 (1991). Also, the Sixth Amendment right to counsel requires that a state must provide defense counsel with notice before examining the defendant concerning "future dangerousness," if this is one of the criteria for imposing the death penalty. *Powell v. Texas,* 492 U.S. 680 (1989).

A United States district court has jurisdiction to try a foreign national for a capital crime even though the defendant is brought within the territory of the United States by abduction carried out by United States government officials. *United States v. Alvarez-Machain,* 112 S. Ct. 2188 (1992).

The same competency standard applies for purposes of the ability to undergo a trial, to enter a guilty plea, or for waiver of the Sixth Amendment right to counsel. *Godinez v. Moran,* 113 S. Ct. 2680 (1993). The waiver of counsel must be intelligent and voluntary, but is not otherwise subject to a heightened standard.

Fair and Impartial Jury Trial

The right to an impartial jury under the Sixth and Fourteenth Amendments prohibits the exclusion of a juror for cause relating to his or her capital punishment views unless those views would prevent or substantially impair the performance of duties as a juror. *Gray v. Mississippi,* 481 U.S. 648 (1987). The erroneous exclusion of a qualified juror because of a perceived hesitation but stated willingness to impose the death penalty constitutes reversible constitutional error. The right to an impartial jury is not abridged, however, if a juror who should have been excluded for cause, is removed by exercise of a peremptory challenge by the defendant. *Ross v. Oklahoma,* 487 U.S. 81 (1988).

The Court concluded in *McCleskey v. Kemp*, 481 U.S. 279 (1987), that statistical data allegedly showing racial disparity in capital sentencing did not by itself suffice to establish racial discrimination in any particular case. A unanimous court in *Amadeo v. Zant*, 486 U.S. 214 (1988), did find sufficient evidence of a pattern of discrimination in a Georgia county's manipulation of the master jury lists to overturn a murder conviction for violation of the right to a fair and impartial jury.

There is no constitutional requirement to examine prospective jurors about the extent and content of their exposure to newspaper and media accounts of the capital crime. Even substantial pre-trial publicity will not disqualify a juror who states he or she can be impartial if the trial court believes the juror has formed no opinion about the case. *Mu'Min v. Virginia*, 500 U.S. 415 (1991).

Conclusion

The changed composition of the Supreme Court has had a significant impact on death penalty jurisprudence during the last 6 years. Justices Brennan, Marshall, and Blackmun,[4] who were opposed to the imposition of the death penalty in any case, departed the Court.

The early trend of decisions post-*Furman v. Georgia*, 408 U.S. 238 (1972) was to create new procedural protections for capital defendants in carrying out the death penalty. This early trend has given way to an increasing impatience with the delays these procedural protections entail. A solid majority of the Court seems committed to paring back, or at least to halting the growth of, constitutionally required criminal procedures. The Court is more hospitable to State capital punishment procedures. In two-thirds of the cases decided in the last 6 years, the State criminal procedures were held to comport with constitutional requirements.

The death penalty before the Supreme Court remains a divisive, intensely controversial subject. Within the last 6 years, a majority has formed to restrict access to habeas corpus review, to curtail abuse of the writ of habeas corpus, and to pare back other procedural hurdles delaying or preventing imposition of the death penalty. This majority seems committed to a process of streamlining constitutionally required procedures so that those states that choose to impose the death penalty may do so without the delays that have characterized United States capital punishment procedures since the 1960's. There are still many five-four decisions. When they were on the Court, Justices Brennan and Marshall deplored what they perceived was an "unjustifiable assault on the Great Writ." *McCleskey v. Zant*, 499 U.S. 467, 507 (1991). The majority responded that "without finality, the criminal law is deprived of much of its deterrent effect." 499 U.S. at 491.

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[4] Mr. Justice Blackmun, however, announced his opposition to the death penalty only towards the end of his tenure. He had dissented in *Furman v. Georgia*, 408 U.S. 238 (1972) in his early days on the Court. After 20 years of attempts to apply the death penalty without arbitrariness and capriciousness, he became convinced that the task was impossible.

The changed direction of capital punishment jurisprudence is only now making itself felt in state criminal trials and appellate review of convictions and capital sentences.