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Capital Punishment: A Legal Overview Including the Supreme Court Decisions of the 2004-2005 Term

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Summary

Executions declined through the 1950s and 1960s and ceased after 1967, pending definitive Supreme Court decisions. This interval ended only after States altered their laws in response to the 1972 Supreme Court decision in *Furman v. Georgia*, a 5-4 decision deciding that the death penalty, as imposed under existing law, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the U.S. Constitution. In *Furman*, the Court ruled that the death penalty was arbitrarily and capriciously applied under existing law based on the unlimited discretion accorded to sentencing authorities in capital trials. In response, States began to revise their statutes to modify the discretion given to sentencing authorities. These statutes went untested until the Court decided *Gregg v. Georgia* in 1976 in which it found in a 7-2 decision, that the death penalty did not per se violate the Eighth Amendment. The *Gregg* decision allowed States to establish the death penalty under guidelines that excluded the arbitrariness of sentencing in capital cases. As a result, statutory safeguards were developed to make sentencing more just and fair. Some of the changes included (1) in death penalty cases, the determination of guilt or innocence must be decided separately from hearings in which sentences of life imprisonment or death are decided; (2) the court must consider aggravating and mitigating circumstances in relationship to the crime and the defendant; and (3) the death sentence must be subject to review by the highest State court of appeals to make sure that the penalty is in proportion to the seriousness or gravity of the offense and is imposed even-handedly under State law. Like the statutory safeguards, the capital cases decided by the Court in the 2004-5 term also reflect its sentiment that if there is going to be a death penalty, the process must be fair.

The Supreme Court abolished the practice of executing mentally retarded persons in *Atkins v. Virginia* and juveniles who commit a capital crime while under the age of 18 in *Roper v. Simmons*. The Court ruled that these executions were prohibited on Eighth Amendment "cruel and unusual punishment" grounds. The Court expanded its doctrine on the "ineffective assistance of counsel" in setting aside the death sentence for the petitioner in *Rompilla v. Beard* because his lawyers failed to search files on his past convictions for mitigating evidence in spite of their conscientious efforts which led them to believe that it would be a waste of time. However, the Court determined in *Bell v. Thompson* that the scheduling of an execution was reasonable and the actions of the Court of Appeals were an abuse of discretion, although the case was remanded for an ineffective assistance of counsel hearing by the Court of Appeals while acting upon an honest belief that its previous ruling had been decided erroneously. Also, the Court's decision in *Miller-El v. Dretke* reflected an affirmation of its condemnation of racial discrimination in the use of peremptory challenges.

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Constitutionality of the Death Penalty

Is the death penalty consistent with the Eighth Amendment's prohibition against the imposition of cruel and unusual punishments? The Supreme Court considered various applications of the death penalty in the 1930s, 40s and 50s.[1] In each case, it upheld the state's action without addressing the broader issue of the constitutionality of the death penalty.

In a 5-4 decision in 1972, *Furman v. Georgia*,[2] the Supreme Court invalidated federal and state capital punishment laws which permitted wide discretion in the application of the death penalty. With one Justice characterizing the death penalty laws as "capricious," [3] the majority ruled that they constituted cruel and unusual punishment in violation of the Eighth Amendment and the due process guarantees of

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[1] *Powell v. Alabama,* 287 U.S. 45 (1932); *Palko v. Connecticut,* 302 U.S. 319 (1937); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459 (1947); *Trop v. Dulles,* 356 U.S. 86, 99-101 (1958) (Chief Justice Earl Warren delivered the opinion of the Court: "The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. *Weems v. United States,* 217 U.S. 349. The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.")

[2] 408 U.S. 238 (1972). The Court's decision in Furman was a *per curiam* opinion in which five justices filed separate opinions supporting the decision and four justices filed separate dissenting opinions.

[3] 408 U.S. at 309 (Stewart, J., concurring).

the Fourteenth Amendment based upon the inherent arbitrariness of their application particularly in the case of racial minorities and the poor.[4]

The hundreds of inmates on death row who had been sentenced to die between 1967 and 1972 had their death sentences commuted as a result of *Furman*,[5] but those numbers began to change again as states enacted revised legislation tailored to satisfy the Supreme Court's objections to arbitrary and capricious decisions which permitted the application of the death sentence. On July 2, 1976, the Supreme Court reviewed the post-*Furman* capital punishment statutes of five states[6] in a series of five cases. The revised laws were of two major types: The first type provided for guided discretion which was upheld by the Supreme Court in three cases.[7] The second type consisted of those statutes which provided for a mandatory death sentence for

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[4] *Id.* at 289-40; Justice Marshall candidly observed that, "studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination. . . . There is also overwhelming evidence that the death penalty is employed against men and not women . . . It also is evident that the burden of capital punishment falls upon the poor, the ignorant and the underprivileged members of society. *Id*. at 364-66 (Marshall, J, concurring); see also, *id.* at 256-57 (Douglas, J., concurring)("these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination"); *id*. at 305 (Brennan, J. concurring)("the punishment of death is inconsistent with all four principles [by which a punishment is measured to determine if it is 'cruel and unusual']: Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment"); *id*. at 310 (Stewart, J., concurring)("my concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race"); *id.* at 313 (White, J., concurring)("the conclusion . . . is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not").

[5] *Id.* at 315 (Marshal, J., concurring).

[6] Georgia, Florida, Texas, North Carolina, and Louisiana.

[7] *Gregg v. Georgia,* 428 U.S. 153 (1976) (the Court decided in a 7-2 decision, that the death penalty did not violate the Eighth Amendment per se but allowed States to establish the death penalty under guidelines that eliminated the arbitrariness of sentencing in capital cases); *Jurek v. Texas,* 428 U.S. 262 (1976); and *Proffitt v. Florida,* 428 U.S. 242 (1976). Ratified by the Supreme Court, the Georgia, Texas, and Florida statutes afforded sentencing courts the discretion to impose death sentences for specified crimes and provided for bifurcated trials, involving in the first stage the determination of a defendant's guilt or innocence and, in the second, the determination of the sentence after the consideration of the aggravating and mitigating circumstances. In Georgia and Texas, the final sentencing decision was decided by the jury, and in Florida by the judge. These state statutes suggest that the following safeguards would eliminate arbitrariness and make capital sentencing more equitable: (a) the determination of guilt or innocence will be decided separately from hearings in which sentences of life imprisonment or death are decided; (b) the court will consider aggravating and mitigating circumstances in relationship to both the crime and the defendant/offender; and (c) the death sentence will be subject to review by the state's highest court of appeals to ensure that the penalty is in proportion to the gravity of the offense.

specific crimes, and allowed no judicial or jury discretion beyond the determination of guilt. These statutes were held to be unconstitutional.[8] In sum, what may be gleaned from these five cases suggest that while the sentencing authority may possess some discretion, it cannot be the unbridled discretion which was found impermissible in *Furman*. The discretion must be limited and directed in order to minimize the potential for arbitrary and capricious actions.

Aggravating and Mitigating Factors

Capital punishment may only be imposed under procedures that provide sentencers with those aggravating factors which will support imposition of the penalty and that require sentencers to take into account any evidence offered in mitigation for the defendant.

Aggravating factors, established either as elements of the capital offense or as statutory factors to be found by the sentencing judge or jury, must be sufficiently clear and restricting. According to the Supreme Court's decision in *Zant v. Stephens*, "To avoid capricious and arbitrary decisions, states that use aggravating circumstances to impose the death penalty. . . must reasonably justify the imposition of a more severe sentence for the defendant compared to others found guilty of murder."[9]

The aggravating factors may not be so vague as to invite a return to the arbitrary infliction of the penalty that the Court saw in *Furman*. In *Maynard v. Carwright*,[10] the Court made clear that not every murder could fall under the "specially heinous, atrocious or cruel" aggravating circumstance and that the state must construe such an aggravating circumstance so that there would be some principled way to distinguish the few cases in which the aggravating circumstance applies from the many cases in which it does not. The test for whether a particular aggravating factor passes constitutional muster is whether "the statutory language is itself too vague to provide any guidance to the sentencer. If so [the question becomes] whether the . . . courts have further defined the vague terms. . . [so as] to provide some guidance to the sentencer."[11]

In *Lockett v. Ohio*,[12] the Supreme Court required many states to revise their death penalty statutes by ruling that the sentencing authority in capital cases must consider every possible mitigating factor to the crime rather than limiting the

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[8] *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

[9] 462 U.S. 862, 1983); see also, *Arave v. Creech*, 507 U.S. 463, 474 (1993)("if the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm").

[10] 486 U.S. 356, 363 (1988).

[11] *Bell v. Cone*, 125 S.Ct. 847, 851-52 (2005), citing with approval, *Walton v. Arizona*, 497 U.S. 639, 654 (1990).

[12] 438 U.S. 586 (1978).

mitigating factors that could be considered to a specific list.[13] In *Smith v. Texas*,[14] the Court recently confirmed the principle when it overturned Smith's death sentence based upon previous Court precedents requiring judges to include in their jury instructions that proper and meaningful consideration be given to all mitigating evidence. Smith argued that jurors weren't allowed to consider evidence including that he was 19 at the time of the robbery during which the murder occurred, that he had a troubled home life, and that he had a low IQ and learning disability; the Texas court erroneously rejected the claim, saying that it wasn't relevant because there was no link between murder and his diminished capacity.

Juvenile Offenders

In 1982, the Supreme Court was asked to decide whether the execution of a juvenile offender was permissible under the Constitution. *Eddings v. Oklahoma*[15] was the first case the Court agreed to hear based on the age of the offender who was 16 at the time he murdered a police officer. Without deciding on the constitutionality of the juvenile death penalty, the Court vacated the juvenile's death sentence on the basis that the trial had failed to consider additional mitigating circumstances.[16] However, the case was significant because the Court decided that the chronological age of a minor is a relevant mitigating factor that must be considered at sentencing.[17] Writing for the majority, Justice Powell stated: "... youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults."[18]

In 1988, the Supreme Court did consider this particular issue in *Thompson v. Oklahoma*.[19] In a 5-3 decision, the Court vacated the death sentence of the defendant who at age 15 participated in the brutal murder of his former brother-in-law. Four justices agreed that the execution of a 15-year-old would be cruel and unusual

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[13] 438 U.S. 586, 604 (1977)("[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"). See also, *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (there are no restrictions on the number of mitigating factor that the defense may introduce for consideration by the judge or jury); *Boyde v. California*, 494 U.S. 370 (1980).

[14] 125 S.Ct. 1432 (2005).

[15] 455 U.S. 104 (1982).

[16] *Id.* at 113-116.

[17] *Id.* at 115-116.

[18] *Id.*

[19] 487 U.S. 815 (1988).

punishment per se (in, or by itself).[20] Applying the test of Eighth Amendment analysis, Justices Stevens, Brennan, Marshall, and Blackmun were of the opinion that the execution would constitute cruel and unusual punishment because it was "inconsistent with our respect for the dignity of men" and it failed to contribute to the two principal social purposes of the death penalty: retribution and deterrence.[21] Justice O'Connor concurred, but noted that Oklahoma's death penalty statute set no minimum age at which the death penalty could be imposed.[22] Sentencing a 15-year-old under the Oklahoma statute was inconsistent with the standard for special care and deliberation required in death penalty cases.[23]

In 1989, in *Stanford v. Kentucky*[24] and *Wilkins v. Missouri*[25] the Supreme Court held in a 5-4 decision that the Eighth Amendment does not prohibit the death penalty for crimes committed at age 16 (Wilkins) or 17 (Stanford). While the *Thompson* plurality used the three-part analysis to determine if sentencing a juvenile to death constituted cruel and unusual punishment, the *Stanford* plurality did not. The *Thompson v. Oklahoma's* standard Eighth Amendment analysis consisted of an evaluation of: (a) evolving standards of decency; (b) the behavior of juries and legislators to determine what is abhorrent to the conscience of the community; and (c) because of the juvenile's reduced culpability, the punishment is disproportionate to the severity of the crime and the application of the death penalty to this class of offenders does not measurably contribute to the purposes underlying the penalty. The *Stanford* plurality decision rejected the third element of the three part analysis, to wit, that the punishment is disproportionate to the severity of the crime and makes no measurable contribution to its deterrence.[26]

In *Stanford v. Kentucky*, the Supreme Court considered the evolving standards of decency in society as reflected in historical, judicial, and legislative precedents; current legislation; juries' and prosecutors' views; and public, and professional opinions.[27] However, the Court based its determination of evolving standards of decency on legislative authorization of capital punishment for an individual who murders at 16 or 17 years of age and it does not, said the Court, offend the Eighth Amendment's prohibition against cruel and unusual punishment.[28] The Court referred to contemporary standards of decency in this country and concluded that the Eighth and Fourteenth Amendments did not proscribe the execution of a juvenile over 15 but

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[20] *Id.* at 832-833.

[21] *Id.* at 836.

[22] *Id.* at 857-858.

[23] *Id.* at 856.

[24] 492 U.S. 361 (1989).

[25] 492 U.S. 361 (1989) (*Stanford v. Kentucky* and *Wilkins v. Missouri* were consolidated).

[26] *Thompson v. Oklahoma*, 487 U.S. at 833-838.

[27] 492 U.S. at 370-380.

[28] *Id.* at 380.

under 18.[29] The Court noted that those states that permitted the death penalty for 16 and 17-year-old offenders indicate that there was no national consensus which was "sufficient to label a particular punishment cruel and unusual."[30] A plurality of the Court rejected the suggestion that it (the Court) should bring its own judgment to bear on the desirability of permitting the death penalty for juveniles.[31] The Court also found that public opinion polls and professional associations were "uncertain foundations" on which to base constitutional law.[32]

The dissenting judges argued that the record of state and federal legislation protecting juveniles because of their inherent immaturity was not relevant in formulating a national consensus.[33]

In 1997, Christopher Simmons was tried, convicted, and sentenced to death for first degree murder for a crime that he committed at age 17. He appealed to the Missouri Supreme Court, which affirmed the conviction and the sentence.[34] On his initial appeal, Simmons could not argue that his youth prohibited his execution because the U.S. Supreme Court held in 1989 in *Stanford v. Kentucky* that there was no national consensus against the execution of young adults who were 16 or 17-years-of-age at the time of their crimes and, as a result, executing juveniles was not considered "cruel and unusual" punishment under the Eighth Amendment.[35] Hence, the Missouri Supreme Court affirmed the Circuit Court of Jefferson County Missouri on the death sentence.[36]

In 2002, the U.S. Supreme Court in *Atkins v. Virginia* reversed *Penry v. Lynaugh*[37], which held that a national consensus did not exist against the execution of the mentally retarded.[38] In *Atkins v. Virginia*, the Supreme Court decided that a consensus had developed in the thirteen years since *Penry* was decided and that executing the mentally retarded violates the Eighth Amendment.[39] Assuming that the U.S. Supreme Court's ruling in *Atkins* may correspondingly cause a shift in the Court's view toward the execution of juvenile offenders, Simmons, in 2003, filed a writ of *habeas corpus*, arguing that a national consensus opposing the execution of 16 and 17-year-old offenders had developed since the Court's decision in *Stanford v.*

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[29] *Id.* at 372-373.

[30] *Id.* at 370-371.

[31] *Id.* at 378.

[32] *Id.* at 377.

[33] *Id.* at 393-403.

[34] *State v. Simmons*, 944 S.W.2d 165, 169 (Mo. 1997).

[35] See *Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. 2003)(en banc) (discussing *Stanford v. Kentucky*, 492 U.S. 361 (1989).

[36] *Id.*

[37] 492 U.S. 302 (1989).

[38] *Atkins v. Virginia*, 536 U.S. 304 (2002).

[39] *Id.* at 321.

Kentucky.[40] The Missouri Supreme Court agreed, reasoning that the Supreme Court would today hold that such executions are prohibited by the Eighth Amendment as applied to the States through the Fourteenth Amendment.[41]

The U.S. Supreme Court accepted the *Roper v. Simmons*[42] case for review in order to decide two issues: (a) whether a lower court may contradict a previous ruling by the U.S. Supreme Court. Particularly, whether it was permissible for the Missouri Supreme Court to conclude that the penalty of death for juvenile offenders is a "cruel and unusual punishment" which violates the Eighth Amendment, and in contradiction of the Court's decision in *Stanford v. Kentucky* and (b) whether a national consensus now opposes the execution of juvenile offenders younger than 18-years-of-age and therefore, whether the punishment now violates the Eighth Amendment's prohibition against cruel and unusual punishment.

In a 5-4 opinion written by Justice Kennedy, the Court affirmed the holding of the Missouri Supreme Court that imposition of the juvenile death penalty had "become truly unusual over the last decade"[43] and therefore violates the Constitution.

Similarly to reconsidering the permissibility of executing the retarded in *Atkins*, it also reconsidered the permissibility of executing juvenile offenders under the age of 18 in *Roper*, looking for guidance to the enactments of the legislatures that had considered the issue since its holding in *Stanford.* Up to the time of the decision in *Roper*, 20 states did not specifically prohibit the execution of a juvenile offender;[44] 12 states had rejected the death penalty altogether;[45] and 18, by legislation had set the minimum age at 18.[46] In the 15 years between the *Stanford v. Kentucky* and *Roper v. Simmons* decisions, 5 states either by legislation or case law raised or established the minimum age at 18.[47] As a starting point in its decision, the Court considered these changes in the law, as well as the limited use of the death penalty in those states where the death penalty still was available for juveniles.[48]

The Court observed that the trend toward abolishing the death penalty for juveniles was evidence that society's current views regarding juveniles as "categorically less culpable than the average criminal."[49] The Court found three differences between juveniles and adults that prohibit the classification of juveniles among the worst offenders: (a) juveniles show a lack of maturity and an undeveloped

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[40] 112 S.W.3d at 399.

[41] *Id.* at 400.

[42] 125 S. Ct.1183 (2005).

[43] *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. 2003).

[44] 125 S. Ct. at 1200.

[45] *Id.* at 1201.

[46] *Id.*

[47] *Id.* at 1189.

[48] *Id.* at 1190.

[49] *Id.* at 1185 (536 U.S. at 316 [the words *Atkins* used respecting the mentally retarded]).

sense of responsibility as compared to adults;[50] (b) juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;[51] and (c) the character of juveniles is not as well formed as that of adults, and the personality traits of juveniles are more transitory.[52]

Stating in *Gregg v. Georgia*[53] that the two distinct purposes served by the death penalty are "...retribution and deterrence of capital crimes by prospective offenders," the Court noted that neither of these justifications have proven to be adequate for imposing the penalty on juveniles.[54]

The Court included another reason for its elimination of the death penalty for juvenile offenders: "Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[55] The Supreme Court acknowledged that the interpretation of the Eighth Amendment was its responsibility, but it could also look to the laws of other countries and international authorities for direction and instruction for that interpretation.[56] The Court did look to the laws of other countries and found "overwhelming weight of international opinion against the juvenile death penalty...."[57]

Mentally Retarded Offenders

In 1986, the Supreme Court in *Ford v. Wainwright*[58] held that it was unlawful to execute the mentally insane. However, the Court did not set out or propose any guidelines or standards for the state legislative bodies to adopt or follow for the determination of whether one should be adjudged insane. As a result, problems

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[50] *Id.* at 1195.

[51] *Id.*

[52] *Id.*

[53] 428 U.S. 153 (1976).

[54] 125 S. Ct. at 1186 ("Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and maturity. As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles..."). *Id.* at 1196.

[55] *Id.* at 1198.

[56] *Id.*

[57] *Id.* at 1200. The *Roper v. Simmons* decision defines for the first time in this country the current limits of capital punishment for juveniles by abolishing the practice of executing those who commit a capital crime while under the age of 18.

[58] 477 U.S. 399 (1986).

developed because there was no implementation of a uniform measure to protect the insane from the death penalty.

On the same day the Court decided *Stanford v. Kentucky* [59] it also decided *Penry v. Lynaugh*,[60] a case in which the petitioner, Johnny Penry, had sought to exclude the mentally insane from the death penalty. The Court decided in *Penry* that the Eighth Amendment's ban on cruel and unusual punishment did not categorically prohibit the execution of mentally retarded individuals who committed capital offenses.[61] However, writing for the majority, Justice O'Connor stated that the Eighth Amendment does more than just bar the practices that were condemned by the common law at the time the Bill of Rights was adopted.[62] It also bars punishment that would offend our society's "evolving standards of decency that mark the progress of a maturing society" as expressed by "the legislation enacted by the country's legislatures" and "the actions of sentencing juries."[63]

When *Stanford* and *Penry* were decided in 1989, there was only one state, Georgia, that banned the execution of mentally retarded individuals, one state, Maryland, that had enacted similar legislation but it was scheduled to take effect on a later date, and a federal statute[64] that contained a similar prohibition.[65] Therefore, said Justice O'Connor, "[w]hile a national consensus against execution of the mentally retarded may someday emerge...there is insufficient evidence of such a consensus today."[66] In the meantime, the Court noted that counsel for the defendant should be able to present, for the court's consideration, the mental state of the defendant as mitigating evidence at sentencing for the court to determine whether death is the appropriate punishment.[67]

In 2002, the Supreme Court decided the case of *Atkins v. Virginia*[68] and overturned *Penry* by ruling that the application of the death penalty to defendants with mental retardation violated the Eighth Amendment's prohibition against "cruel and unusual" punishment.[69] The evidence found to be sufficient for the purpose of identifying the "evolving standards" became a key issue in the case. The evidence before the Supreme Court in *Atkins*, thirteen years later, revealed that 16 of the 38

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[59] 492 U.S. 361 (1989) (Held that the Eighth Amendment did not prohibit the death penalty for crimes committed by 16 or 17-year-old juveniles).

[60] 492 U.S. 302 (1989).

[61] *Id.* at 335.

[62] *Id.* at 330.

[63] *Id.* at 330-331.

[64] Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(l) (1988).

[65] 492 U.S. at 334.

[66] *Id.* at 340.

[67] *Id.* at 337-338.

[68] 536 U.S. 304 (2002).

[69] *Id.* at 306-307, 321.

states with capital punishment had joined Georgia and Maryland in enacting laws to exempt the mentally retarded.[70] Examining state statutes, the opinions of professional organizations, and a proportionality analysis, the Court concluded that the evolving standards of decency, as well as their own considered judgments, forced the conclusion that the execution of mentally retarded defendants was unconstitutional.[71]

The Court also decided against executing the mentally retarded based on the theory that they are disadvantaged at trial because of their mental impairments.[72] Calling attention to false confessions, a lowered ability to make a persuasive showing of mitigating factors, the possibility that they may be less able to assist their counsel at trial, the fact that they are generally poor witnesses, and a demeanor that may create the impression of lack of remorse, the Court's majority concluded that mentally retarded defendants face a special risk of wrongful execution—particularly when there is a likelihood for the jury to decide that their retardation enhances the risk of "future dangerousness".[73]

Recognizing that there was no consensus on which offenders are in fact considered retarded, the majority felt that the task for deciding or making this determination should be left to the States.[74]

The minority disagreed with any conclusion that sources other than state legislatures should be relevant to the consideration of the issue. Chief Justice Rehnquist wrote a separate dissent "...to call attention to the defects in the Court's decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion."[75] Believing that the legislatures are more suited than the courts at deciding the moral consideration of the people, he also questioned the use of opinion polls, and religious organizations as things that "...elected representatives of a State's populace have not deemed...persuasive enough to prompt legislative action."[76] Justice Scalia supported the Chief Justice's conclusion by stating that "...the Prize for the Court's Most Feeble Effort to fabricate [a] `national consensus' must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional, ... religious organizations, members of the so-called `world community,' and ... opinion polls."[77]

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[70] 536 U.S. at 314-315 (Arizona, Arkansas, Colorado, Connecticut, Florida, Indiana, Kansas, Kentucky, Missouri, Nebraska, New Mexico, New York, North Carolina, South Dakota, Tennessee, and Washington).

[71] *See generally, id.* at 306-321.

[72] *Id.* at 320-321.

[73] *Id.*

[74] *Id.* at 317.

[75] *Id.* at 322.

[76] *Id.* at 326.

[77] *Id.* at 347.

Rape Offenders

Prior to *Furman v. Georgia*[78] and *Gregg v. Georgia*[79], there does not appear to be any cases regarding the Supreme Court review of the constitutionality of the imposition of capital punishment for the crime of rape. In 1953, in *Rudolph v. Alabama*[80] the Court denied a writ of *certiorari* involving the appeal of a sentence of death for the rape of the prosecutrix.[81] Justices Goldberg, Douglas, and Brennan dissented on the theory that there was an issue as to whether the Eighth and Fourteenth Amendments to the Constitution permitted "the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life."[82] The dissent noted the trend in this country and throughout the world against punishing rape by death.[83] The dissent noted the "evolving standards of decency that mark the progress of our maturing society" and questioned whether a less severe penalty for the crime of rape would more likely achieve the goals of punishment.[84] The dissent also questioned whether the constitutional proscription against disproportionate punishment permitted "... the taking of human life to protect a value other than human life ...."[85]

It was not until 1977, that the Supreme Court in *Coker v. Georgia*[86] decided the issue of whether it was constitutional to impose the death penalty for the offense of rape. Applying the proportionality test, the Court decided that the death penalty is a grossly disproportionate and excessive punishment for the crime of rape of an adult woman and, therefore, is forbidden by the Eighth Amendment as cruel and unusual punishment.[87] In order to ascertain whether the capital rape statute met this test, the Court looked to objective evidence which was based upon public sentiment.[88] This

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[78] 408 U.S. 238 (1972).

[79] 428 U.S. 153 (1976).

[80] 152 So.2d 662 (Ala. 1963), *cert. denied*, 375 U.S. 889 (1963).

[81] 375 U.S. 889.

[82] *Id.* at 889.

[83] *Id.*

[84] *Id.* at 890-891.

[85] *Id.* at 891.

[86] 433 U.S. 584 (1977).

[87] *Id.* at 598-599. (Coker escaped from a Georgia prison where he was serving time for murder, rape, kidnaping, and aggravated assault. During the course of his escape, Coker committed armed robbery, raped a 16-year- woman in the presence of her husband, among other offenses. Albeit a violent felon, the Court limited its review of Coker's case to the fact that the death penalty for rape, regardless of the circumstances under which it was committed [the instant crime being punished is a rape not involving the taking of life], is a violation of the Eighth Amendment).

[88] *Id.* at 592. (The Court applied the proportionality test set out in *Gregg v. Georgia*, 428 U.S. 153 (1976), by stating that "Under *Gregg*, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of

(continued...)

evidence was based upon the history of legislative attitudes and jury responses as an objective approach in the process of determining the "country's present judgment regarding the acceptability of death as a penalty for rape of an adult woman."[89]

While considering the history, the Court noted that "At no time in the last 50 years [has] a majority of the States authorized death as a punishment for rape."[90] Although the Court noted that after its decision in *Furman,* "thirty-five States reinstituted the death penalty for at least limited kinds of crimes"[91], these actions were an indication of the acceptance of the death penalty for murder; however, when you view the legislative responses to *Furman* in regard to capital rape statutes, a different view is presented.[92] The Court held that these actions by the state legislatures reflect a rejection of capital punishment for rape which confirmed their finding that death is a disproportionate penalty for the rape of an adult woman.[93]

The Court did not just consider public sentiment based upon state legislatures and sentencing juries but concluded that it must also analyze for itself the question of the acceptability of the death penalty for the crime of rape under the Eighth

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[88] (...continued)
punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.").

[89] *Id.* at 593.

[90] *Id.* The Court noted that "In 1925, 18 States, the District of Columbia and the Federal Government authorized death as a punishment for rape of an adult female. By 1971 just prior to the decision in *Furman v. Georgia,* that number declined, but not substantially, to 16 States plus the Federal Government. *Furman* then invalidated most of the capital punishment statutes in this country, including the rape statutes, because, among other reasons, of the manner in which the death penalty was imposed and utilized under those laws." *Id.*

[91] *Id.* at 593-594.

[92] *Id.* at 594. The Court stated: "...if the most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*,...it should also be a telling datum that the public judgment with respect to rape, as reflected in the statutes providing the punishment for that crime, has been dramatically different. In reviving death penalty laws to satisfy *Furman's* mandate, none of the States that had not previously authorized death for rape chose to include rape among capital felonies. Of the 16 States in which rape had been a capital offense, only three provided the death penalty for rape of an adult woman in their revised statutes [which included] Georgia, North Carolina, and Louisiana. In the latter two States, the death penalty was mandatory for those found guilty...." *Id.* The Court stated that two of these three states (Louisiana and North Carolina) had to revise their statutes because they called for mandatory death sentences and death penalties could not be mandatory [pursuant to *Woodson v. North Carolina,*428 U.S. 280 (1976) and *Roberts v. (Stanislaus) v. Louisiana,* 428 U.S. 325 (1976)]. *Id.* When North Carolina and Louisiana revised their statutes a second time, the legislature authorized the death penalty for murder, but excluded rape. *Id.* The Court also noted that Florida, Mississippi, and Tennessee "authorized the death penalty in some rape cases, but only where the victim was a child and the rapist an adult." *Id.* at 595.

[93] *Id.* at 597.

Amendment because its judgment is contemplated by the Constitution.[94] Neither did the Court deny that rape was a serious crime, acknowledging that "[s]hort of homicide" rape "is the ultimate violation of self."[95] Nonetheless, the Court found that "in terms of moral depravity and the injury to the person and to the public [rape] does not compare with murder" because it "by definition does not include the death of or even the serious injury to another person."[96] "The murderer kills; the rapist, if no more than that, does not."[97] Notwithstanding the fact that Coker was found to have committed rape under two aggravating circumstances, the Court said it did not change its holding that the death sentence is a disproportionate punishment for rape and, consequently, a violation of the Eighth Amendment.[98]

Death Penalty For One Who Does Not Kill

Since 1982, the Supreme Court has addressed the "law of parties"[99] and its applicability in capital cases on four occasions. In *Enmund v. Florida*[100], the Court decided in 1982 that Enmund's agreement to act as a getaway driver in a robbery that ended in murder was insufficient to warrant death. Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed. The Court wrote, " We have concluded that imposition of the death penalty in these circumstances is inconsistent with the Eighth and Fourteenth Amendments."[101] The Court ruled that in order to be eligible for the death penalty, a defendant either had to kill, attempt to kill, or intend to kill.[102]

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[94] *Id.*

[95] *Id.*

[96] *Id.* at 598.

[97] *Id.*

[98] *Id.* at 599.

[99] Generally defined as a state statutory procedure that allows the assignment of cause and guilt to be transferred to secondary parties in a crime. See Texas Penal Code § 7.02 and Texas Code of Criminal Procedures Article 37.071(b)(2).

[100] 458 U.S. 782 (1982).

[101] *Id.* at 788.

[102] *Id.* at 797. See also *Cabana v. Bullock*, 474 U.S. 376 (1986) (Death sentence reversed for absence of sufficient factual findings on the nature of the offender's involvement in the homicide; the instructions to the jury require finding an intent to commit murder–they should reflect whether the defendant/respondent killed, attempted to kill, or intended to kill); citing *Enmund v. Florida*, 458 U.S. 782 (1982), the Supreme Court in *Solem v. Helm*, 463 U.S. 277, 288 (1983) said it has applied the principle of proportionality to hold capital punishment excessive in certain circumstances "...when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used."

In 1987, the Supreme Court reconsidered *Enmund* when it accepted *Tison v. Arizona*[103] for review. In *Tison*, two brothers were sentenced to death for a quadruple homicide their father committed after the brothers helped him escape from prison. Although the brothers did not intend to kill, the Court was of the opinion that their involvement in the prison break was substantial, and the supply of weapons they took along suggested that they were ready to kill if necessary. "[T]he reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural...lethal result"[104] the Court concluded. "We will not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty....Rather, we simply hold that major participation in the felony...combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.[105]

Eluding the Court in *Bradshaw v. Stumpf*,[106] was the issue of whether the death penalty may be imposed when the prosecution argues in successive trials that each of two accomplices personally killed the victim who had been murdered with a single shot. Stumpf, among other things, pled guilty, and was sentenced to death for a crime for which the state later sought the death penalty for his accomplice.[107] The state knew one of the two juries would have to be in error if in separate trials they found first Stumpf and then his accomplice subject to the death penalty as the lone shooter.

The Sixth Circuit reversed Stumpf's conviction, finding that the state secured convictions of both Stumpf and his accomplice for the same crime, using inconsistent theories and also because his guilty plea was not knowing and voluntary because he was not aware that specific intent was an element of the crime to which he plead guilty. While Stumpf admitted to wounding the husband, he denied ever having shot the man's wife. Despite this, the jury found Stumpf to be the principal shooter and sentenced him to death. The U.S. Supreme Court granted *certiorari* on two issues—one of which was: does the Due Process Clause require vacating a defendant's guilty plea when the state subsequently prosecutes another person in connection with the crime and allegedly presents evidence at the second defendant's trial that is inconsistent with the first defendant's guilt?[108] During the penalty phase of his trial (he had previously entered a guilty plea), he turned around and argued that a co-defendant was the shooter at the co-defendant's trial which version was

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[103] 481 U.S. 137 (1987).

[104] *Id.* at 157-158.

[105] *Id.* at 158.

[106] 125 S. Ct. 2398 (2005).

[107] After Stumpf's aggravated murder conviction, premised on his role as the shooter, the state convicted his accomplice in a separate trial, alleging, inconsistently, that the accomplice was the triggerman.

[108] The other issue, upon which the case was ultimately decided was: whether representation on the record from defendant's counsel and/or the defendant that defense counsel has explained the elements of the charge to the defendant, sufficient to show the voluntariness of the guilty plea under *Henderson v. Morgan*,426 U.S. 637, 647 (1976)?

supported by the testimony of the third co-defendant. Because this issue was not properly presented to the Court (the defendant instead argued that his guilty plea was involuntary, which the Court rejected), the case was remanded to the Sixth Circuit for it to consider the effect of the prosecutor's inconsistent theories on the death sentences.[109] However, the Court decided that Stumpf was informed of the specific intent element of the aggravated murder charge and the prosecutorial inconsistencies between the two trials did not warrant voiding his guilty plea.[110]

Counsel–Effectiveness Under The Sixth Amendment

Although it has been established that criminal defendants have the right to assistance of counsel, it was not until 1970 that the Supreme Court defined this right as "...the right to the effective assistance of counsel."[111] Except for the Court's decision regarding the issue of counsel having a conflict of interest[112] the Court did not define "effective" until it decided the case of *Strickland v. Washington*,[113] whereby the Court articulated a general test for ineffective assistance of counsel in criminal trials and in capital sentencing proceedings.[114] In *Burger v. Kemp*, 483 U.S. 776, 794-795 (1987), the Court held that because the defense counsel's decision not to develop and present any mitigating evidence at a capital sentencing proceeding was supported by his "reasonable professional judgment", the defendant was not denied effective assistance of counsel. Relying on the guidelines contained in *Strickland*, the Court found no deficiency leading to a breakdown in the adversarial process. In *Darden v. Wainwright*, 477 U.S. 168 (1986), the Court said there was no merit to the petitioner's

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[109] 125 S. Ct. 2398 at 2407-08 (2005).

[110] *Id.* at 2406.

[111] *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970).

[112] See *Cuyler v. Sullivan*,446 U.S. 335 (1980).

[113] 466 U.S. 668 (1980).

[114] *Strickland* involved capital sentencing but the Court left open the issue of what standard would apply in general sentencing, where there is a great deal of discretion which is not present in capital sentencing, or in the guilt or innocence phase of a capital trial. 466 U.S. at 686. In this case, defense counsel located four witnesses who were willing and able to testify on behalf of the petitioner at the penalty phase of the trial. The witnesses were his brother, two nieces, and his Canadian parole officer. The petitioner, however, was flatly opposed to their providing any testimony, the only exception being that he would allow his brother to provide a testimonial foundation for admitting the petitioner's wood carvings into evidence. After discussion with the petitioner, defense counsel agreed to abide by his wishes and informed the court of their decision. The trial court closely questioned petitioner personally on the matter to ensure that this was the course he wanted to follow. Petitioner now claims he was denied effective assistance of counsel because the defense counsel failed to present any mitigating evidence. To establish ineffective assistance of counsel, two independent showings must be made: first, that counsel's performance was deficient, and second, the deficiency prejudiced the defense. This test applies to both the penalty and guilt phases of the trial.

claim of ineffective assistance of counsel at the sentencing phase of the trial because the petitioner failed to satisfy the first part of the two-part *Strickland* test; the record shows several reasons why counsel reasonably could have chosen to rely on a simple plea for mercy from petitioner himself, rather than to attempt to introduce mitigating evidence; a defendant must overcome the presumption that, under the circumstances, the challenged action of counsel might be considered sound trial strategy. *Id.* at 184-187.

In *Lockhart v. Fretwell*[115] the Court refined the *Strickland* test to require that not only would a different trial result be probable because of attorney performance, but that the trial result which did occur was fundamentally unfair or unreliable.[116]

In 1999, the Court granted *certiorari* in *Williams v. Taylor*[117] on the question of the standard to be applied by federal courts in granting a habeas petition following the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)[118], and on the Fourth Circuit's application of the *Strickland* standard in a capital case.[119] Finding that the Virginia Supreme Court's decision rejecting Williams' ineffective assistance claim was both "contrary to" and an "unreasonable application of" doctrine well-established in *Strickland*, the Court believed that Williams was eligible for habeas relief.

Generally, when "...a defendant alleg[es] a Sixth Amendment violation, [he/she] must demonstrate `a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.'"[120] It reaffirmed the two-pronged *Strickland* test, holding that the Virginia Supreme Court's "...decision turned on its erroneous view that a 'mere' difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel."[121] The Court explained in *Strickland* the two components on which the petitioner, Williams, relies: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[122]

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[115] 506 U.S. 364 (1992).

[116] *Id.* at 369.

[117] 526 U.S. 1050 (1999).

[118] Pub. L. No. 104-132, 110 Stat. 1218, 1219 (codified as amended at 28 U.S.C. 2254(d)(1)-(2)) (Limits appeals for individuals on death row in a number of ways).

[119] See *William v. Taylor,* 529 U.S. 362 (2000).

[120] *Id* at 391. *Mickens v. Taylor,* 535 U.S. 162 , 166 (2002) (quoting *Strickland v. Washington,*466 U.S. 668, 694 (1984)).

[121] *Id.* at 397

[122] *Id.* at 390.

There is an exception to this general rule that the defendant must show probable effect upon the outcome where the assistance of counsel has been denied entirely or during a critical stage of the proceeding; such effect will simply be presumed.[123] But only in "circumstances of that magnitude" will the defendant be relieved of the burden to show that counsel's inadequate performance undermined the reliability of the verdict.[124] The Court has also held in several cases that "'circumstances of that magnitude' may also arise when the defendant's attorney actively represented conflicting interests."[125] However, according to the decision in *Mickens v. Taylor,*[126] an analysis of a conflict of interest will require the same analysis and demonstration of prejudice that is required under *Strickland* as opposed to the presumption of prejudice and the resulting automatic reversal.[127]

In *Florida v. Nixon,*[128] the Supreme Court through Justice Ginsburg, provided an analysis of strategies for capital counsel including concession of guilt. The Court in *Nixon* held that Counsel's concession that his client committed murder, made without the defendant's express consent, does not automatically rank as prejudicial ineffective assistance of counsel under *United States v. Cronic*[129]; the counsel's performance must be evaluated under the *Strickland* [130] test rather than under the *Cronic* test. The Court recognized that some decisions concerning "basic trial rights" must be made by the defendant and require that "...an attorney must both consult with the defendant and obtain consent to the recommended course of action."[131] These basic trial rights include the "'ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal'".[132] For other matters, "[a]n attorney undoubtedly has a duty to consult with the client regarding 'important

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[123] *Id.* at 166.

[124] *Id.* (quoting *United States v. Cronic,* 466 U.S. 648, 659, n.26 (1984)).

[125] *Id.*

[126] 535 U.S. 162 (2002). In *Mickens,* the defendant had been convicted of capital murder and sentenced to death. He sought a writ of *habeas corpus* on the ground that his Sixth Amendment right to the assistance of counsel had been violated, because one of his trial attorneys had previously represented the murder victim and the trial court failed to inquire into the potential conflict. He contended that this failure to inquire required an automatic reversal of his conviction. The Court disagreed, holding that automatic reversal is only required where defense counsel is forced to represent codefendants over counsel's timely objection, unless the trial court has determined that there is no conflict.

[127] *Id.* at 168.

[128] 125 S. Ct. 551 (2004).

[129] 466 U.S. 648, 659 (1984)(under *Cronic,* the defendant must demonstrate that there was a complete denial of counsel at a critical stage of the trial whereby counsel fails entirely to subject the prosecution's case to meaningful adversarial testing thereby resulting in a denial of Sixth Amendment rights that makes the adversary process presumptively unreliable).

[130] 466 U.S. 668, 694 (1984) (under *Strickland,* the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.")

[131] *Florida v. Nixon,* 125 S. Ct. 551, 560 (2004).

[132] *Id.* at 560.

decisions', including questions of overarching defense strategy [but this] obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision'...(an attorney has authority to manage most aspects of the defense without obtaining his client's approval)."[133] Regarding capital cases, the Court recognized that:

> ...the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear.
> Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous[134]....In such cases, 'avoiding execution [may be] the best and only realistic result possible'" ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.1, Commentary (rev. ed. 2003), reprinted in 31 *Hofstra L. Rev.* 913, 1040 (2003).[135]

In circumstances where guilt is clear "...counsel must strive at the guilt phase to avoid a counterproductive course" such as presenting "logically inconsistent" strategies in the guilt-phase defense and sentencing phase.[136]

To summarize, in capital cases:

> [C]ounsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed. When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.[137]

In the most recent Supreme Court decision on the issue of "ineffective assistance of counsel", the Court in *Rompilla v. Beard*,[138] followed a series of rulings, including *Wiggins v. Smith*[139] which faulted lawyers for failing to investigate defendants' records for mitigating evidence which "was the result of inattention, not reasoned strategic judgment," and may have made the difference between a life or death

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[133] *Id.*

[134] *Id.* at 554.

[135] *Id.* at 562.

[136] *Id.* at 563 (citing, *inter alia*, Sundby, *The Capital Jury and Absolution*: *The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1589-1591 (1998)).

[137] *Id.*

[138] 125 S.Ct. 2456 (2005).

[139] 539 U.S. 510, 534 (2003).

sentence.[140] In *Wiggins v. Smith* the Court ruled that attorneys in capital cases must diligently investigate the background of their clients in order to find possible mitigating evidence that could sway a jury's or a judge's sentencing decisions. The case became significant when the Court concluded that Wiggins' trial lawyers had failed to do the work necessary to represent their client effectively. The Court's decision made it clear that defense counsel representing a client facing a death sentence must thoroughly investigate all reasonable avenues of defense, and cannot excuse inadequate performance merely by claiming they made a "tactical" decision not to pursue an uninvestigated line of defense.[141]

Racial Discrimination

In 1972, the death penalty was held in *Furman v. Georgia*[142] to be unconstitutional due to the arbitrariness and discriminatory impact it had on racial minorities and the poor. Four years later, new capital punishment laws, which were suppose to prevent arbitrariness and discrimination, were upheld by the Supreme Court in 1976.[143]

Nonetheless, the Supreme Court continued to face questions concerning the application of the death penalty to racial minorities. In *McClesky v. Kemp*,[144] a challenge was based on a study that showed Black murderers of White victims were far more likely to be sentenced to death than Black murderers of Black victims, which the Court concluded was insufficient to establish evidence of discrimination either in general or in McClesky's case.

In *Batson v. Kentucky*,[145] the Supreme Court required courts to give genuine attention to cleansing the criminal justice process of the taint of racial discrimination in jury selection. *Batson* requires trial judges to assess the district attorney's reasons for excluding African-Americans from jury service in order to determine whether the prosecutors intended to discriminate.[146]

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[140] 125 S. Ct. at 2471("[the lawyers'] conduct fell below constitutionally required standards....[`S]trategic choices made after less than complete investigation are reasonable' only to the extent that `reasonable professional judgments support the limitations on investigations'").

[141] See also, *Cone v. Bell*,243 F.3d 961, 975 (6th Cir. 2001)(Cone 1), rev,d, *Bell v. Cone*, 535 U.S. 685 (2002), on remand, 359 F.3d 785, 799 (6th Cir. 2004)(Cone 2), rev'd *per curiam*, *Bell v. Cone*, 125 S. Ct. 847 (2005)

[142] 408 U.S. 238 (1972).

[143] *Gregg v. Georgia*, 428 U.S. 153 (1976); *Profitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

[144] 481 U.S. 279, 286-287 (1987).

[145] 476 U.S. 79 (1986).

[146] *Id.* at 98.

In 2002, Thomas Miller-El asked the Supreme Court to enforce the rule of *Batson* prohibiting racial discrimination in the exercise of peremptory challenges in jury selection. In 2003, the Court held that reasonable jurists could differ on whether Miller-El had appealable issues and ordered the U.S. Court of Appeals for the Fifth Circuit to grant a certificate of appealability to further review the case.[147] The Court, in an 8-1 opinion, criticized the Fifth Circuit's "dismissive and strained interpretation" of critical facts, ruled that the lower court's refusal to consider Miller-El's *Batson* claim was based upon a standard of review that was too demanding, and remanded the case for further consideration.[148] On remand, the Fifth Circuit again found that prosecutors had not intentionally excluded African Americans from Miller-El's capital jury.[149] On June 28, 2004, the Supreme Court granted *certiorari* a second time, in order to address whether the Fifth Circuit again erred in reviewing Miller-El's claim that the prosecution purposefully excluded African-Americans from his capital jury in violation of *Batson v. Kentucky*.

On June 13, 2005, the Supreme Court in *Miller-El v. Dretke*[150] overturned Miller-El's death conviction because of the racial bias that tainted the selection of the jury in the use of peremptory challenges in his murder trial. In both *Miller-El* and *Johnson v. California*[151] the Court cited its 1986 ruling in *Batson v. Kentucky* which barred the practice of the racial discriminatory use of peremptories.

Justice Souter reviewed the tactics used by the Dallas County prosecutors to ensure that no African-Americans were on the jury that determined Miller-El's fate, who is African-American.[152] Prosecutors "shuffled" the jury pool members when too many African-Americans appeared in the front of the panel and they asked different questions of White and Black potential jurors, Justice Souter said.[153] When asking the Black jurors about their views on the death penalty, the prosecutors used a far more graphic description of executions, apparently to make it more likely they would express disapproval and disqualify themselves.[154]

In the *Johnson* case, Justice Stevens wrote for the majority in deciding that the California Supreme Court had made it too difficult for defendants to make out a prima facie claim of bias in jury selection.[155] Johnson, who is African-American, was accused of murdering a White child. The prosecutor used three of his 12 peremptory challenges to strike African-Americans from the jury pool thus causing Johnson's jury

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[147] 537 U.S. 322 (2003).

[148] *Id.* at 344.

[149] 361 F.3d 849 (5th Cir. 2004).

[150] 125 S. Ct. 2317 (2005).

[151] 125 S. Ct. 2410 (2005).

[152] 125 S. Ct. at 2325.

[153] *Id.* at 2321.

[154] *Id.* at 2419.

[155] 125 S. Ct. at 2419.

to be all White.[156] On appeal, Johnson raised the *Batson* claims and his conviction was set aside. The conviction was later reinstated by the California Supreme Court, which said Johnson was required to provide "strong evidence" that racial factors were "more likely than not" the reasons for the challenges in order to begin a *Batson* inquiry.[157] The California Supreme Court also said that *Batson* gave states the right to set their own standards for evaluating claims of jury selection bias.[158] Justice Stevens said the "overriding interest in eradicating discrimination" requires state courts to adopt standards that make it easier for *Batson* claims to be tested–rather than being excluded at the outset.[159]

Jury's Role in Capital Sentencing

The Supreme Court has considered cases addressing the issue of juror bias in capital cases and the defendant's right to a fair trial guaranteed by the Sixth and Fourteenth Amendments. These cases have focused on either the juror's attitude regarding the death penalty, i.e. whether they are strongly opposed or in favor of the death penalty, or racially biased.

In *Witherspoon v. Illinois*,[160] the Court held "...that a sentence of death cannot be imposed or recommended if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[161] The Court noted that even someone opposed to the death penalty "...can make the discretionary judgment entrusted to him by the state and can thus obey the oath...."[162] However, a state may exclude those jurors whose attitudes about the death penalty would affect their decision regarding the defendant's guilt.[163]

Later, the Court qualified *Witherspoon* by stating that it did not hold that the state could exclude only those jurors who would automatically vote against capital punishment.[164] In *Wainwright*, the Court held that the standard for excluding a juror because of his/her in opposition to the death penalty "...is whether the juror's views would `prevent or substantially impair the performance of his duties as a juror in

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[156] *Id.* at 2414.

[157] *Id.* at 2416.

[158] *Id.* at 2415.

[159] *Id.* at 2418.

[160] 391 U.S. 510 (1968).

[161] *Id.* at 522.

[162] *Id.* at 519.

[163] *Id.* at 522, n. 21.

[164] *Wainwright v. Witt*, 469 U.S. 412 (1985).

accordance with his instructions and his oath.'"[165] The Court viewed the question of jurors' beliefs with regard to the death penalty as simply a routine inquiry into juror bias governed by Sixth Amendment standards applicable to all cases rather than the Eighth Amendment's prohibition against cruel and unusual punishment.[166] Here as well as elsewhere, the Court said "the quest is for jurors who will conscientiously apply the law and find the facts."[167]

The Court also indicated that trial judges have historically been charged with determining whether a prospective juror harbors any bias.[168] If the trial judge, who is in a position to evaluate a juror's credibility, receives a definite impression that the juror would be unable to faithfully and impartially apply the law, the judge can remove the juror for cause.[169]

While it appears that jurors are selected or rejected based on their views of the death penalty, the Court recognized that jurors who vote to convict may nevertheless entertain "residual doubts" about the defendant's guilt that would "bend them to decide against the death penalty."[170] Nonetheless, if a prospective juror could reasonably determine guilt or innocence but could not impose the death penalty, that person may be excluded from the jury.[171] Whereas, if the prospective juror could reasonably determine guilt or innocence and impose the death sentence, according to *Lockhart v. McCree*, they could meet the qualifications for the jury.[172]

The Supreme Court has held that juries should be informed about the alternatives to a death sentence. In *Simmons v. South Carolina*,[173] the Court held that when a defendant's "future dangerousness" is at issue, the jury must be accurately informed whether there is any possibility of parole under the alternative lifetime sentence.[174] In *Shafer v. South Carolina*,[175] the Court reaffirmed its *Simmons* due process rule but indicated that it is limited.[176] If the prosecution does not present evidence about the

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[165] *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

[166] *Id.* at 423.

[167] *Id.*

[168] *Id.* at 428.

[169] *Id.* at 425-426.

[170] *Lockhart v. McCree*, 476 U.S. 162, 181 (1986) (quoting *Grigsby v. Mabry*, 758 F.2d 226, 248 (8th Cir. 1985)).

[171] See, *Lockhart* , 476 U.S. 162 (1986)

[172] *Id.* at 183.

[173] 512 U.S. 154 (1994).

[174] *Id.* at 169.

[175] 532 U.S. 36 (2001).

[176] *Id.* at 51.

defendant's future dangerousness, the trial court may bar the jury from considering whether there would be any chance of parole while serving a life sentence.[177]

The Constitution bars prosecutors and trial judges from misleading juries[178] or from unfairly influencing their decision on capital punishment. Thus in *Dawson v. Delaware*,[179] the Court vacated Dawson's death sentence because the state introduced evidence of his association with the Aryan Brotherhood against him during the punishment phase of his capital murder trial. Whether such evidence is relevant must be determined by a context sensitive balancing test. The Court said that the evidence in *Dawson* left the belief that the state had introduced the evidence not because of its relevance to the proceedings, but rather simply "because the jury would find these beliefs morally reprehensible."[180] For the same reason, it initially concluded that victim impact statements were unconstitutional and in violation of the Eighth Amendment,[181] a view it adjusted shortly thereafter when it held that victim impact evidence violates the Constitution only if it is so unduly prejudicial that it renders the proceedings fundamentally unfair.[182] And the same sentiment prevailed when the Court reversed the death sentence of a convicted murderer who was shackled in leg irons and handcuffed to a chain around his waist when he faced a Missouri jury during his sentencing hearing.[183] Justice Breyer, writing for the majority, stated that shackling almost always implies that authorities consider the offender a danger to the community, a factor juries weigh in considering whether to impose the death penalty.[184]

In addition the Court has made clear that a defendant has a constitutional right to a jury determination of any facts critical to a finding of guilt or to imposition of the death penalty. In *Walton v. Arizona*,[185] Walton challenged Arizona's death penalty statute claiming that Arizona's sentencing scheme violated the Sixth Amendment right to a jury trial. Under Arizona law, the judge was allowed without a jury, to find aggravating factors necessary to sentence the defendant to death instead of life

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[177] *Id.* In *Rompilla v. Beard*, 125 S. Ct. 961 (2005), the Supreme Court granted *certiorari* in the case of a Pennsylvania death row inmate who, *inter alia*, argued that jurors should have been instructed that life without parole was an option in his sentence. Rompilla cited *Simmons* as support for his argument in his brief. The U.S. Court of Appeals for the Third Circuit ruled against him. On appeal to the Supreme Court, the Court said: " [b]ecause we reverse on ineffective-assistance grounds, we have no occasion to consider Rompilla's...claim, under *Simmons v. South Carolina*, 512 U.S. 154 (1994)....It is enough to say that any retrial of [his] sentence will be governed by the *Simmons* line of cases." *Rompilla v. Beard*, 125 S. Ct. 2456, 2461, n.1 (2005).

[178] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

[179] 503 U.S. 159, 165-67 (1992).

[180] *Id.* at 167.

[181] *Booth v. Maryland*, 482 U.S. 496, 508-9 (1987).

[182] *Payne v. Tennessee*, 501 U.S. 808, 824-26 (1991).

[183] *Deck v. Missouri*, 125 S.Ct. 2007 (2005).

[184] *Id.* at 2014.

[185] 497 U.S. 639 (1990).

imprisonment. The Supreme Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment right to a jury trial in capital cases because aggravating factors were sentencing considerations and not elements of the crime.[186]

However, in a non-death penalty case in *Apprendi v. New Jersey*,[187] Apprendi challenged his enhanced sentence for possession of a firearm because the sentencing judge, and not a jury, found that his crime had been motivated by racial hatred—an element of the crime. The Supreme Court held that if a defendant's sentence can be increased based on a finding of fact (including an aggravating factor), that fact must be found by a jury, beyond a reasonable doubt, in order to be consistent with the Sixth Amendment.[188]

In *Ring v. Arizona*,[189] the Court addressed the conflict between the *Walton* and *Apprendi* decisions. In *Ring*, the Court decided that it was unconstitutional for a judge to find additional facts that would increase a defendant's sentence when those facts

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[186] *Id.* at 648-649. See also, *Lockett v. Ohio,* 438 U.S. 586 (1977) (Sentencing authorities must have the discretion to consider every possible mitigating factor, rather than being limited to a specific list of factors to consider). See also *Bell v. Ohio,* 438 U.S. 637 (1978); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (sent back for retrial several cases on grounds of too broad and vague an application of the provision stipulating the death penalty if the offense was "outrageously or wantonly vile, horrible, or inhumane, in that it involved torture, depravity of mind, or an aggravated battery to the victim"); *Beck v. Alabama*, 447 U.S. 625 (1980) (struck a portion of Alabama's death penalty statute that blocked juries convicting defendants of an included lesser offense rather than the capital crime itself; juries were required to either convict a defendant of the capital crime or to acquit him); *Adam v. Texas*, 448 U.S. 38 (1980) (prospective jurors cannot be excluded from jury service in capital trials because they would be "affected" by the possibility of a capital sentence); *Hopper v. Evans*, 456 U.S. 605 (1982) (upheld the death sentence of a defendant convicted under the Alabama statute which was partially struck down in *Beck v. Alabama;* the Court held that, since a lesser offense was not an issue, the law's failure to allow for it did not prejudice the case; i.e., the conviction of a capital prisoner tried under a partially flawed statute need not be reversed unless it was actually touched by the imperfection); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) (mandatory imposition of the death sentence if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances or aggravating circumstances outweigh the mitigating circumstances); *Harris v. Alabama*, 513 U.S. 504 (1995) (judge may impose death sentence over jury recommendation of life imprisonment)*; Loving v. United States*,517 U.S. 748 (1996) (aggravating factors are necessary under the Eighth Amendment for validity of the military capital punishment scheme; based upon being found guilty of three aggravating factors by the military court, Loving's sentence of death was lawful and the judgment of the Court of Appeals of the Armed Forces was affirmed); *Summer v. Shuman*, 517 U.S. 748 (1987) (held categorically that mandatory death sentences are unconstitutional; a sentencer cannot make a judgment based on the facts of the particular case without all of the relevant mitigating evidence).

[187] 530 U.S. 466 (2000).

[188] *Id.* at 476.

[189] 536 U.S. 584 (2002).

include elements of the crime.[190] The Court said that a defendant is entitled to a jury determination of any fact on which the law conditions an increase in his/her maximum punishment, overruling *Walton* in relevant part.[191]

Habeas Corpus Procedures in Capital Cases

The writ of *habeas corpus* is the procedure by which a federal court inquires into the illegal detention and, potentially, issues an order directing state authorities to release the petitioner.[192] The Supreme Court has described the function of the writ as a process "[T]o provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."[193]

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[194] Title I of the AEDPA makes significant changes in the statutes governing federal *habeas corpus* practice for state prisoners and enacts a new set of statutes to govern federal *habeas corpus* practice in capital cases.[195] The Court summarized the effect of Title I of the AEDPA as follows:

> Title I of the act stands more or less independent of the act's other titles in providing for the revision of federal habeas practice and does two main things. First, in §§ 101-106, it amends § 2244 and §§2253-2255 of chapter 153 of Title 28 of the United States Code, governing all habeas corpus proceedings in the federal courts. 110 Stat. 1217-1221. Then, for habeas proceedings against a State in capital cases, § 107 creates an entirely new chapter 154 with special rules favorable to the state party, but applicable only if the State meets certain conditions, including provisions for appointment of post-conviction counsel in state proceedings. 110 Stat. 1221-1226. In § 107(c), the act provides that "Chapter 154...shall apply to cases pending on or after the date of enactment of this act." 110 Stat. 1226.[196]

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[190] *Id.* at 608-609.

[191] *Id.*

[192] J. Liebman & R. Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.2 at 15 (3d ed. 1998). A habeas-like procedure is available to federal prisoners under 28 U.S.C. §2255.

[193] *Fay v. Noia*, 372 U.S. 391, 401-402 (1963).

[194] Pub. L. 104-132, 110 Stat. 1214 (1996).

[195] 28 U.S.C. §§2244-2266.

[196] *Lindh v. Murphy*, 521 U.S. 320, 326-327 (1997) (holding that the AEDPA does not apply to habeas petitions pending at the time of enactment).

Shortly after passage of the AEDPA, it was challenged and upheld in *Felker v. Turpin*[197] in several key provisions. Among the most significant reforms in the act are new tighter filing deadlines, limitations on successive petitions, restrictions on evidentiary hearings, heightened exhaustion and deference standards and specific capital case standards.[198] Since apparently no state has opted to take advantage of AEDPA's special capital procedures (28 U.S.C. ch. 154),[199] the AEDPA general habeas provisions apply to both capital and noncapital cases.

In a case driven by the AEDPA's statute of limitations, the Court in *Bell v. Thompson*[200] decided that a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit erred by withdrawing its decision in a *habeas* case months after its original ruling was considered final by the issuance of its original mandate. Initially, a three-judge panel issued a split decision denying Thompson's Sixth Amendment ineffective assistance of counsel claim. The same three judges later unanimously announced their decision to consider whether this prior ruling was mistaken in view of available evidence that Thompson was suffering from schizophrenia at the time of the offense. After reconsidering the case, the Sixth Circuit corrected its earlier decision and remanded the case to the district court for further proceedings, concluding that trial counsel had failed to conduct a reasonable investigation of

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[197] 518 U.S. 651 (1996) (barriers to federal relief on successive petitions placed on state prisoners by the AEDPA do not violate constitutional rights or improperly infringe on the jurisdiction of the Supreme Court; the Court retains jurisdiction under 28 U.S.C.§§ 2241 and 2254 to hear habeas petitions filed as original matters).

[198] *Nelson v. Campbell*, 541 U.S. 637 (2004) (42 U.S.C. §1983 was the appropriate vehicle for petitioner's Eighth Amendment claim seeking a temporary stay of execution and permanent injunction against use of a procedure wherein a 2-inch incision would be made into his arm or leg in order to give access to his veins for lethal injection; the claim was not the functional equivalent of a "second successive" habeas petition subject to the limitations imposed by the AEDPA); *Rhines v. Weber*, 125 S. Ct. 1528 (2005) (Although the AEDPA requires that habeas claims be "exhausted" in order to be considered by a federal court, the U.S. Supreme Court held that the district court had the discretion to stay the petition to allow Rhines to present his unexhausted claims to the state court and then return to federal court for review if the petitioner has good cause for his failure to exhaust his potentially meritorious claims); *Brown v. Payton*, 125 S. Ct. 1432 (2005) (the Court reversed the U.S. Court of Appeals for the Ninth Circuit that the AEDPA required the Ninth Circuit to uphold Payton's death sentence; the California Supreme Court had ruled that the jury deciding upon a possible death sentence need not be told explicitly that it must consider favorable post-crime evidence as a mitigating factor; the Ninth Circuit had set aside Payton's death sentence on the basis of the judge's instructions, holding that the California Supreme Court's ruling to the contrary was an unreasonable application of established law; however, the U.S. Supreme Court ruled that California's ruling was not an unreasonable application of established law and therefore the AEDPA dictated that it's decision must stand).

[199] Newton, *A Primer on Post-Conviction Habeas Corpus Review*, 29 CHAMPION 16, 19 (June, 2005). See also 28 U.S.C. ch. 154 - Special Habeas Corpus Procedures in Capital Cases regarding appointment of Counsel, limits on stays of execution, time requirements and tolling rules, State review procedures and limitation periods for determinimg motions. For a summary of the AEDPA, see CRS Report #96-499A "Antiterrorism and Effective Death Penalty Act of 1996," Summary by (name redacted), Senior Specialist.

[200] 125 S. Ct. 2825 (2005).

Thompson's social history, failed to present powerful, readily available mitigating evidence, and failed to pursue known leads that might have helped in preparing the case for purposes of mitigation. The State of Tennessee challenged the Sixth Circuit's power to withdraw its prior decision, especially since Thompson's case had progressed to the extent that it had in reliance on the Sixth Circuit's first opinion. What is at issue is the authority of a federal appeals court, on the basis of newly discovered evidence that is favorable to the defense, to change its earlier decision and order a case reopened as the State is preparing to carry out a death sentence.

The Supreme Court, divided (5-4), did not touch Thompson's death sentence but decided that the Sixth Circuit's decision remanding the case for an ineffective assistance of counsel hearing was an abuse of discretion. Writing for the majority, Justice Kennedy concluded that the scheduling of Thompson's execution was reasonable and the Sixth Circuit's actions were an extraordinary departure from standard procedure. While it was recognized that the Sixth Circuit panel was acting on honest intentions, the State maintained that, legally, the court was not allowed to change its mind. The Court noted that with the policies embodied in the Antiterrorism and Effective Death Penalty Act of 1996 in cases arising from federal *habeas corpus* review of a state conviction, the court's discretion under Rule 41 must be exercised "in a way that is consistent with the 'State's interest in the finality of convictions that have survived direct review within the state court system'"[201]

Retroactive Applications

The "...threshold question in every habeas case...." is whether the petitioner's claim is defeated by the nonretroactivity of the rule he/she seeks to apply to his/her petition.[202] For federal courts, this question is governed by the rule of *Teague v. Lane*.[203]

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[201] *Id.* at 2837 (quoting *Brecht v. Abrahamson,* 507 U.S. 619, 635 (1993)).

[202] *Caspari v. Bohlen,* 510 U.S. 383, 389 (1994).

[203] 489 U.S. 288 (1989) (In *Teague*, the Supreme Court held, "In general,...a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government....To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* at 301. *Teague* allows for retroactivity for two types of new rules as exceptions to the bar: "(1) new rules that place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, and (2) rules that define procedure implicit in the concept of ordered liberty." *Id.* at 307. A new rule qualifies for the latter exception (and applies retroactively) if it is a watershed rule that implicates the fundamental fairness and accuracy of the criminal proceeding. *Id.* at 311-312.

The Supreme Court addressed the rule of retroactivity in a capital sentencing context in *Beard v. Banks*.[204] In *Mills v. Maryland*,[205] the Court held invalid a capital sentencing scheme that required juries to disregard mitigating factors that they had not found unanimously. In *Beard*, the Court held that the *Mills* rule does not apply retroactively. In its analysis, the Court considered whether the rule was dictated by existing precedent relative to whether the unlawfulness of Mills' sentence would be apparent to "all reasonable jurist." After tracing the jurisprudential roots of the *Mills* decision, the Court concluded that reasonable jurists could have differed as to whether the prior cases compelled the results in *Mills*. As confirmation, the Court noted that the *Mills* case (and a later released case) had dissents.

The *Beard* Court also provided guidance on the two *Teague* exceptions. The first exception is reserved for "primary, individual conduct beyond the power of the criminal law-making authority to proscribe."[206] This, *Beard* observes as would *Schriro v. Summerlin*[207] thereafter, is matter appropriately considered retroactive by its substantive nature rather than an exception to the procedural *Teague* rule.[208] Elsewhere, the Court has suggested that this exception covers things like "the execution of mentally retarded...regardless of the procedure followed."[209] "In providing guidance as to what might fall within [the watershed] exception," the Court has repeatedly referred to the rule of *Gideon v. Wainwright*,[210] and only to this rule.[211] In contrast to *Gideon's* solitary standing, the Court has identified more than a few decisions concerning procedural rights that may not claim "watershed" status for *Teague* purposes.[212]

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[204] 124 S. Ct. 2504 (2004). Although Teague was not a capital case, its principles apply in capital cases, *Penry v. Lynaugh,* 492 U.S. 302, 314 (1989).

[205] 486 U.S. 367 (1988).

[206] *Teague v. Lane,* 488 U.S. at 307.

[207] 124 S. Ct. 2519 (2004).

[208] *Beard v. Banks,* 124 S. Ct. at 2513, n.7; *Summerlin,* 124 S. Ct. at 2522, n.4.

[209] *Penry v. Lynaugh,* 492 U.S. 302, 330 (1989).

[210] 372 U.S. 335 (1963) (right to counsel).

[211] *Beard v. Banks,* 124 S. Ct. at 2514, citing *Saffle v. Parks,* 494 U.S. 484, 495 (1990). *See also, Gray v. Netherland,* 518 U.S. 152, 171 (1996).

[212] *Beard v. Banks,* 124 S. Ct. at 2515 ("However laudable the *Mills* rule [relating to capital punishment schemes precluding jury consideration of mitigating factors not found unanimously] might be, it has none of the primacy and centrality of the rule adopted in *Gideon.* The *Mills* rule applies fairly narrowly and works no fundamental shift in our understanding of the bedrock procedural elements essential to fundamental fairness"); *Schriro v. Summerlin,* 124 S. Ct. at 2524 (the *Ring* rule relating to the right to jury determination of facts required for the imposing of capital punishment is not a watershed rule); *O'Dell v. Netherland,* 521 U.S. at 167 (decision recognizing capital defendant's right to inform the jury of a life without parole sentencing alternative is not a watershed decision); *Lambrix v. Singletary,* 520 U.S. 518, 539-540 (1997) (decision precluding either capital judge or jury from considering invalid aggravating factors is not a watershed decision); *Saffle v. Parks,* 494 U.S. at 495 (proposed rule making invalid any anti-sympathy jury (continued...)

One of the hallmarks of new Supreme Court decisions is that until their announcement many of the lower courts are likely to have ruled erroneously on the issue. The question becomes when may defendants convicted or sentenced on the basis of these errors claim the benefit of the new decision and have their convictions or sentences overturned.[213] Generally new decisions of the Supreme Court will apply "retroactively"[214] to defendants currently on trial or on direct appeal.[215] Also, a defendant may take advantage, of a new Court rule in a few other limited situations, for example, decisions which construe a criminal statute to exclude certain acts or conduct.[216] New decisions of the Court sometimes apply "retroactively" to those on collateral review, and rarely apply "retroactively" to those petitioners on second or successive collateral reviews.[217]

International Law Considerations

The Supreme Court granted *certiorari* in *Medellin v. Dretke* to determine what effect U.S. Courts should give to a ruling by the International Court of Justice at the Hague (ICJ). On May 23, 2005, the Court dismissed its writ of *certiorari* as injudiciously granted primarily because President Bush intervened and ordered state courts to abide by the ICJ ruling.[218] The Court noted that there was a likelihood that Medellin would be back before the Supreme Court once the case runs its course in the

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[212] (...continued)
instruction would not be a watershed rule).

[213] For a general overview, see CRS Report RL32613, *Standards For Retroactive Application Based Upon Groundbreaking Supreme Court Decisions in Criminal Law*, September 28, 2004.

[214] Retroactivity deals with new decisions, or changes in the law. Occasionally, a court will issue a decision which overrules a number of other decisions. Sometimes, these decisions may provide relief for a defendant who has already been convicted. Generally, the courts have held that new rules of *procedure* will not be applied retroactively. Hence, unless the case is on direct appeal at the time of the decision is rendered, the defendant cannot take advantage of it.

[215] In a direct appeal, the court is limited to reviewing the record from the trial court. It will not consider evidence which was not submitted. In *habeas corpus* the same limitations are not present, and the court may consider additional evidence. In direct appeal, almost any violation of the law may be addressed. This can include violations of statutes and rules. In contrast, *habeas corpus* is generally limited to constitutional claims. As a result, the violation of statutes or rules cannot generally be a basis for relief in a *habeas* proceeding.

[216] *Bousley v. United States,* 523 U.S. 614, 620-21 (1998).

[217] *Schriro v. Summerlin,* 124 S. Ct. 2519, 2522 (2004).

[218] 125 S. Ct. 2088 (2005) (the World Court [the International Court of Justice] ordered new hearings in U.S. courts for Ernesto Medellin and 50 other Mexican nationals because, at the time of their arrests, local police had not informed them of their rights to seek help from Mexican consulates, in violation of the Vienna Convention on Consular Relations. Medellin was sentenced to death for participating in the murder and rape of two girls in 1993).

Texas court and the losing party appeals.[219] The case is significant because of its implications for the World Court and U.S. foreign relations and the ongoing Supreme Court debate over the relevance and effect of international law on the Court's decisions.

[219] *Id.* at 2090 n.1.