Order Code RS22224
August 17, 2005

Capital Punishment: Selected Opinions of Justice O'Connor

name redacted
Legislative Attorney
American Law Division

Summary

An examination of Justice O'Connor's opinions on capital punishment reveals a case-by-case approach showing a general support for the death penalty's constitutionality. However, the opinions also reveal a careful review of the administration of the death penalty by the States. Justice O'Connor's evolving skepticism about capital punishment has played a significant role in many key decisions regarding the death penalty throughout her twenty-four years on the United States Supreme Court. This report briefly surveys selected decisions of retiring Justice Sandra Day O'Connor in death penalty cases, an area where her opinions have frequently determined the outcome. This report will not be updated.

Justice O'Connor provided the swing vote in many key capital punishment cases, and her pending departure may have a significant impact on the Court's death penalty jurisprudence in the coming years. Justice O'Connor's skepticism about the States' imposition of capital punishment swayed the Court's 2002 vote prohibiting the execution of killers with mental retardation. She has also ruled in favor of defendants alleging ineffective assistance of counsel.

Categories of Killers Who Cannot Be Executed

In a series of cases, the U.S. Supreme Court has ruled that the Eighth Amendment bars execution of certain categories of offenders. The test is whether the death penalty in those categories is cruel and unusual punishment, measured against the "evolving standards of decency that mark the progress of a maturing society."[1] In *Penry v.*

[1] *Penry v. Lynaugh*, 492 U.S. 302, 3000-31 (1989). The Court considers whether there is a national consensus against executions in a particular category by looking at State legislation, public opinion polls, and the actions of sentencing juries. The Court also asks whether the death penalty applied to the particular category of offenders serves the goals of deterrence and retribution. In 2002, Justice O'Connor silently joined the opinion of the Court overruling *Lynaugh* and holding that a national consensus existed that the execution of the mentally retarded
(continued...)

Lynaugh,[2] Justice O'Connor, writing for the majority, found that no national consensus existed to justify preclusion of the execution of a moderately retarded person.[3] Arguably, this case shows Justice O'Connor's general support for the constitutionality of the death penalty. For example, she dissented from the majority's decision to establish "a categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense."[4]

However, Justice O'Connor did write and join some opinions that limited a State's ability to impose the death penalty on some types of defendants and through certain means. For example in *Nelson v. Campbell*,[5] writing for the majority, Justice O'Connor allowed a State prisoner to proceed with a Section 1983 challenge to the constitutionality of the State's lethal injection method. In *Penry v. Johnson*,[6] Justice O'Connor wrote the majority opinion that held that the Constitution requires a criminal jury in a capital case to be able to give effect to mitigating circumstances of mental retardation and childhood abuse. Conversely, Justice O'Connor dissented from a narrowly-divided Court's holding that the execution of criminals who merely aid and abet a felony resulting in murder by co-criminals (felony murder) but who do not intend or attempt to kill anyone was unconstitutional.[7]

The Court has also ruled, by a one-vote margin, that the Eighth Amendment bars the death penalty for crimes committed by persons under the age of sixteen because the death penalty provides little deterrence and is disproportionate to the criminal's guilt.[8] In 1988,

---

[1] (...continued)
was impermissible. *Atkins v. Virginia*, 536 U.S. 304 (2002).

[2] 492 U.S. 302 (1989).

[3] *See, Ford v. Wainwright*, 477 U.S. 399, 422 (1986)(banning execution of any prisoner who cannot comprehend, and is unaware of his or her impending execution and the reason for it)(Justice O'Connor dissenting).

[4] *Roper v. Simmons*, 125 S.Ct. 1183,1205 (2005).

[5] 541 U.S. 637 (2004).

[6] 532 U.S. 782 (2001).

[7] *Enmund v. Florida*, 458 U.S. 782 (1982)(5-4 vote, with Justice O'Connor dissenting)(ruling that in order to be eligible for the death penalty, a defendant either had to kill, attempt to kill, or intend to kill); *see also, Cabana v. Bullock*, 474 U.S. 376 (1986)(reversing death sentence 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); *but see, Tison v. Arizona*, 481 U.S. 137 (1987)(easing "intent to kill" qualification and allowing execution of a criminal for felony murder when he did not inflict the fatal wound and did not intend to kill but was recklessly indifferent.).

[8] Justice O'Connor concurred, but noted that Oklahoma's death penalty statute set no minimum age at which the death penalty could be imposed. She noted that sentencing a 15-year-old under the Oklahoma statute was inconsistent with the standard for special care and deliberation required in death penalty cases. 487 U.S. at 856-58.

a plurality held that the national consensus required that rule.[9] The following year, a 5-4 majority (including Justice O'Connor) upheld the death penalty for crimes committed at ages sixteen or seventeen.[10]

Habeas Corpus[11]

Justice O'Connor's case-by-case approach is also evident in her habeas-related opinions in capital cases. On occasion, she joined in opinions upholding the rights of habeas petitioners.[12] For example in *Tennard v. Dretke*,[13] writing for the majority, Justice O'Connor found that a habeas petitioner was entitled to a certificate of appealablity on his claim that the State's capital sentencing scheme did not give him constitutionally adequate means to present evidence of his low IQ during the penalty phase of the capital case. However, she also authored and joined several important decisions that, taken together, arguably, construed her *Teague v. Lane*[14] retroactivity rule in a way that benefits the State and disadvantages the habeas petitioner.[15]

---

[9] *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

[10] *Stanford v. Kentucky*, 492 U.S. 361 (1989). This case was subsequently overturned by *Roper v. Simmons*, 125 S.Ct. 1183 (2005) with Justice O'Connor dissenting.

[11] 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.

[12] *See e.g., Bradshaw v. Stumpf*, 125 S.Ct. 2398 (2005)(remanding case to the Sixth Circuit for it to consider the effect of the prosecutor's inconsistent theories on the death sentence.); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Nelson v. Campbell*, 541 U.S. 637 (2004)(finding that 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 two-inch incision would be made into his arm or leg 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 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)(Pub. L. 104-132, 110 Stat. 1214 (1996)).

[13] 542 U.S. 274 (2004).

[14] 489 U.S. 288 (1989)(holding that a novel interpretation of the Constitution (a "new rule") generally cannot be applied retroactively against the States during federal habeas review of State convictions since State courts could not be expected to defer to those rules not in existence when their consideration became final.). *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 311-12. Although *Teague* was not a capital case, its principles apply in capital cases. *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989)(extending the application of the *Teague* "new rule" principle to capital punishment cases).

[15] *See e.g., Shriro v. Summerlin*, 542 U.S. 348 (2004)(finding that the rule relating to the right to jury determination of facts required for the imposition of capital punishment is not a watershed rule and therefore need not be applied retroactively); *O'Dell v. Netherland*, 521 U.S. at 167 (recognizing capital defendant's right to inform the jury of a life without parole sentencing alternative is not a watershed decision); *Beard v. Banks*, 542 U.S. 406 (2004)(providing guidance on the two *Teague* exceptions); *Tyler v. Cain*, 533 U.S. 56 (2001); *Lockhart v. Fretwell*, 506 U.S.

(continued...)

Ineffective Assistance of Counsel

Justice O'Connor tended to take a skeptical approach to defendants' claims of ineffective assistance of counsel. She authored the Court's opinion in *Strickland v. Washington*,[16] which established the current standard for ineffective assistance of counsel. Writing for the majority, Justice O'Connor stated:

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgement of a criminal proceeding if the error had no effect on the judgement . . . Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after a conviction or adverse sentence, and it is all too easy for a court examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstance of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wise range of reasonable professional assistance; that is, the defendant must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy.[17]

When applying the *Strickland* standard to the facts of subsequent cases, Justice O'Connor did not find ineffective assistance of counsel as often as other Court members. For example, in *Coleman v. Thompson*,[18] Justice O'Connor wrote the Court's opinion not finding ineffective assistance of counsel in a case where the lawyer for a death-sentenced murderer missed the deadline for filing a state habeas appeal by a couple of days. The question facing the Justices was whether this error in State court should cost Coleman the right to present his constitutional claim in Federal Court. In the Court's opinion, because Coleman was not constitutionally entitled to a lawyer for his appeal in the first place, he also could not complain that the lawyer he had, in fact, retained was incompetent.[19] However, she did cast the deciding vote to uphold an ineffective assistance claim based

---

[15] (...continued)
364 (1993)(concurrence).

[16] 466 U.S. 668 (1984).

[17] *Id.* at 689-91.

[18] 501 U.S. 722 (1991).

[19] Justice O'Connor wrote: "This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus" claims. *Id.* at 726. This decision was based on an earlier ruling, *Murray v. Giarratano*, 492 U.S. 1 (1989) in which Justice O'Connor cast the decisive fifth vote. Justice O'Connor has also joined in additional decisions regarding ineffective assistance of counsel. *See also, Bell v. Thompson*, 125 S.Ct. 2825 (2005)(finding that failure to consult defendant's legal, military, medical and prison records for evidence of mental illness is not ineffective assistance of counsel); *Florida v. Nixon*, 125 S.Ct. 551 (2004)(finding that failure to obtain defendant's consent to pleading guilty at guilt phase of capital trial does not automatically render performance deficient); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000)(finding that failure to file notice of appeal is not ineffective assistance of counsel.).

on trial counsel's failure to examine records of the defendant's prior conviction for rape and assault at the sentencing phase of the defendant's capital murder trial.[20] In *Wiggins v. Smith*,[21] Justice O'Connor, writing for the Court remarked that "[a]ny reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice about possible defenses, particularly given the apparent absence of aggravating factors from Wiggins' background."[22] Because the trial attorney failed to conduct even a minimally adequate mitigation investigation into Wiggins' past, the jury was robbed of the opportunity to review Wiggins' social history. As such, the Court concluded that it was quite reasonable to assume that the jury would have reached a different sentence had they knew of such evidence.[23]

In *Rompilla v. Beard*,[24] the Court held that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, the defendant's counsel is still bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial. The Court found that the defense counsel's failure to examine the file on the defendant's prior conviction for rape and assault at the sentencing phase of a capital murder trial fell below the level of reasonable performance. In addition, the Court concluded that such failure was prejudicial to the defendant, warranting habeas relief on grounds of ineffective assistance of counsel.

Justice O'Connor wrote a separate concurrence in which she explained the three circumstances that made trial counsel's failure to examine Rompilla's prior conviction file unreasonable. The first circumstance was Rompilla's attorneys' knowledge "that their client's prior conviction would be at the very heart of the prosecution's case."[25] Second was the destructive impact that the prosecutor's planned use of the prior convictions threatened to have on "one of the defense's primary mitigation arguments."[26] The final circumstance was that "the attorneys' decision not to obtain Rompilla's prior conviction file was not the result of an informed tactical decision about how the lawyers' time would best be spent."[27]

Jury's Role in Capital Sentencing

In *Simmons v. South Carolina*,[28] Justice O'Connor, writing for the majority 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.

---

[20] *See, Wiggins v. Smith*, 539 U.S. 510 (2003).

[21] 539 U.S. 510 (2003).

[22] *Id.* at 511.

[23] *Id.* at 538.

[24] 125 S.Ct. 2456 (2005).

[25] *Id.* at 2470.

[26] *Id.*

[27] *Id.*

[28] 512 U.S. 154 (1994)

In addition, the 14th Amendment's Due Process Clause bars prosecutors and trial judges from misleading juries.[29] In a series of 5-4 decisions, Justice O'Connor joined the Court's more conservative bloc in refusing to extend the *Simmons* rule. For example, in *Calderon v. Coleman*,[30] the Court held that even if a jury instruction failed to meet constitutional standards, the defendant must carry the burden of proving that a properly informed jury would have voted for a life sentence instead of the death penalty. Also, in *Ramdass v. Angelone*,[31] the Court found that a jury need not be informed that the defendant probably would not be eligible for parole if he receives a life sentence.

---

[29] *Caldwell v. Mississippi*, 472 U.S. 320 (1985)(finding that it is constitutionally impermissible to mislead a jury as to its role in determining a death sentence).

[30] 525 U.S. 141 (1998).

[31] 530 U.S. 156 (2000).