Capital Punishment: Supreme Court Decisions of the 2005-2006 Term

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Summary

During the 2005-2006 Term, the Supreme Court gave favorable decisions to the defendants in three out of the six death penalty cases it announced. In *Hill v. McDonough*, the Court ruled unanimously that the method-of-lethal injection claims can be brought under 42 U.S.C. § 1983 rather than under the *habeas corpus* statute (28 U.S.C. §2254). In *House v. Bell*, a case involving a death row inmate who claimed that DNA evidence proved he did not commit the crime for which he was found guilty, the Court found in a 5 -3 ruling that the petitioner had satisfied the "gateway" standard for habeas review, but left open the question of whether the Constitution precludes execution of an "innocent" defendant found guilty and sentenced following a constitutionally adequate trial. In *Holmes v. South Carolina*, the Court unanimously held that a capital defendant cannot be denied the right to introduce evidence of third party guilt. The other cases, in which the Court upheld application of state death penalty statutes, appear to reveal a greater division among the justices over the fairness of capital punishment. The 5-4 decision in *Kansas v. Marsh* centered around a debate concerning capital punishment as much as it did a ruling on the unusual statute in Kansas which provided that juries should sentence a defendant to die – rather than serve life in prison – when the evidence for and against imposing death is equal. In *Brown v. Sanders*, a second 5-4 decision, the Court upheld the petitioner's death sentence even though two of the sentencing factors presented to the jury were declared invalid. In *Oregon v. Guzek*, the Court held that states may reasonably refuse to allow convicted capital defendants to offer alibi evidence for the first time at the sentencing phase of their trials; two Justices would have permitted the exclusion of any evidence at sentencing that cast doubt upon the jury's guilty verdict, but the majority were obviously unwilling to go that far.

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Introduction

The six capital punishment decisions which were decided during the 2005-2006 Term involved issues concerning: (1) a challenge to the lethal injection protocol as cruel and unusual punishment in violation of the 8th Amendment (*Hill v. McDonough)*, (2) constitutionality of a death penalty state statute that requires death if plus and minus factors are in balance (*Kansas v. Marsh*), (3) whether petitioner's compelling new evidence, though at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before the state courts (*House v. Bell*), (4) disagreement among the courts regarding whether witness testimony was "mitigating evidence" (designed to spare the 18 year old from lethal injection) or "alibi evidence"(that went directly to whether the defendant was guilty) which should have been presented during the guilt or innocence phase of the trial (*Oregon v. Guzek*), (5) whether State's law governing admissibility of third-party guilt evidence violates the capital defendant's constitutional right to present a complete defense premised on due process, confrontation, and compulsory process clauses (*Holmes v. South Carolina*), and (6) whether a new trial is warranted if two of several aggravating factors found by the jury are later held to be invalid (*Brown v. Sanders*).

In three cases[1] the Court kept alive the appeals of the death row inmates in Florida, Tennessee, and South Carolina. In the other three cases,[2] the Court affirmed the States' death penalty sentences.

Hill v. McDonough[3]

On June 12, 2006, the Court, held unanimously, that the use of lethal injection as a form of execution in the State of Florida constituted a challenge to the cruel and unusual provision of the Eighth Amendment and properly raised a claim under 42 U.S.C. § 1983, which provides a cause of action for civil rights violations, rather than under the *habeas corpus* provisions.

The petitioner (Hill) challenged Florida's injection protocol under 42 U.S.C. § 1983 as likely to cause him severe pain and suffering, but the lower courts construed his suit as a habeas petition under 28 U.S.C.§2254 and dismissed it as a procedurally barred second and successive petition.[4] In an opinion written by Justice Kennedy, the Court reversed noting the distinction between challenges to the lawfulness or duration of confinement, which must be brought via a *habeas corpus* petition, and challenges to the circumstances, which need not be.[5] The difference is that the former, but not the latter, necessarily challenges the legality of a sentence i.e., finding that a state cannot detain or execute an inmate in one particular manner does not mean that it cannot detain or execute him at all.[6] The reasoning of the Court in *Hill* was that although Florida law

[1] *Hill v. McDonough*, 126 S. Ct.2096 (2006); *House v. Bell*, 126 S.Ct. 2064 (2006); *Holmes v. South Carolina*, 126 S. Ct.1727 (2006).

[2] *Oregon v. Guzek*, 126 S. Ct. 1226 (2006); *Kansas v. Marsh*, 126 S. Ct. 2516 (2006); *Brown v. Sanders*, 126 S. Ct. 884 (2006).

[3] 126 S. Ct. 2096 (2006).

[4] *Hill v. Crosby*, 437 F.3d 1084, 1085 (11th Cir. 2006).

[5] 126 S. Ct. at 2101-2102.

[6] *Id.* at 2102.

prescribed lethal injection as the means of execution, it left the specific method of injection up to the correction officials, and Hill challenged only the particular, three-drug sequence intended for his execution.[7] Inasmuch as Hill left open the possibility that Florida could execute him by lethal injection by another method, a decision in his favor under 42 U.S.C. § 1983 did not imply that his sentence by lethal injection generally is unlawful.[8]

The Court was sensitive to the concerns raised by Florida, the United States Solicitor General and others that death-row inmates will simply challenge individual aspects of their planned executions one at a time and thereby effectively block their executions.[9] Notwithstanding, the Court rejected a proposal to require prisoners such as Hill to identify in their complaints alternative means of execution that they would accept.[10] According to the Court, heightened pleading requirements should result from changes to the Federal Rules of Criminal Procedure similar to the specific pleading requirements which are mandated by the Federal Rules of Civil Procedure and not, as a general rule, by case-by-case litigation.[11] The Court also noted that filing a section 1983 action does not entitle an inmate to a stay of execution, which allows courts to consider factors such as whether a suit is speculative or filed too late in the day.[12] At least temporarily, the decision in *Hill* may delay executions as challenges to the constitutionality to the state's lethal injection method of execution are addressed and decided.

House v. Bell[13]

On June 12, 2006, the Court decided its second death penalty case in a 5-3 decision with Justice Kennedy joined by Justices Breyer, Stevens, Souter, and Ginsburg for the majority (Justice Alito did not participate). This case raised an issue which has hung over the imposition of capital punishment in recent years as it relates to newly discovered evidence and the possibility that an innocent person could be executed.

Paul House sought release from Tennessee's death row based on what his appeal to the Court calls "new reliable evidence" of innocence[14] which involves an application of the "miscarriage-of-justice" exception to the procedural default of state claims in federal court under *Schlup v. Delo*.[15] House claimed that DNA tests show that the semen found on the murder victim, Carolyn Muncey's clothes belonged to her husband, Hubert Muncey, and not to House, as a jury in Union County, Tenn., found 20 years ago. The lower federal courts rejected his claims.[16]

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[7] *Id.*

[8] *Id.*

[9] *Id.* at 2103.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 2104.

[13] 126 S. Ct. 2064 (2006).

[14] *Id.* at 2077-2078.

[15] 513 U.S. 298 (1995) cited at 126 S. Ct. 2076-2077 (Justice Kennedy's majority opinion said that House's case fits under the rule announced in the 1995 case *Schlop v. Delo* which stated that innocence claims should reopen appeals if, in light of new evidence, "it is more likely than not that no reasonable juror would have found the petitioner guilty").

[16] *House v. Bell*, 386 F.3d 668, 707-709 (6th Cir. 2004).

The issue before the Supreme Court was first how strong his case for innocence must be to qualify for habeas review in federal court.[17] In addition, House asked the Court to resolve an issue left open earlier and find the new evidence exonerated him.[18] Although the Court has not explicitly decided that it is unconstitutional to execute a convicted but innocent person, it suggested the possibility in 1993 in *Herrera v. Collins*.[19] There in a 5-4 opinion, however, it ruled that Leonel Torres Herrera had no right to reopen his case 10 years after his conviction, based solely on his claim of new proof of innocence.[20] Justices O'Connor and Kennedy joined that opinion without endorsing the suggestion and with the stipulation that they believed that there was little doubt of Herrera's guilt.[21]

The *House* Court referred to the standard of *Schup v. Delo* and held that it was more likely than not that no reasonable juror viewing the record as a whole would find House guilty beyond a reasonable doubt.[22] Justice Kennedy, writing for the majority, noted that "...'all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial'" must be taken into account.[23] He stated that when an inmate comes to federal court with evidence of innocence, "[t]he court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors."[24]

The majority decided that House's revelation about DNA and the blood stains were enough to overcome the strict standards that must be met before prisoners are allowed to re-argue issues of innocence long after their convictions.[25] They declined to reach, however, the question left open in *Herrera*, whether the Constitution precludes execution of an "actually innocent" defendant found guilty and sentenced in a constitutionally adequate trial.[26] Should such a right exist, House had failed present evidence of sufficient persuasion to claim it.[27]

Chief Justice Roberts, in the dissent, said the majority had ignored the trial judge's determination that House and several of his witnesses were unreliable. The Chief Justice also noted that the trial judge had found that Muncey's autopsy blood was spilled on House's jeans after the FBI already had determined that the blood on his pants belonged to the victim.[28] Justice Roberts' dissent agreed with the majority on the *Herrera* issue, but argued that despite the evidence, "the case

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[17] 126 S.Ct. at 2087.

[18] *Id.* at 2086-87.

[19] 506 U.S. 390, 417 (1993)("We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. . . . .[T]he threshold showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold").

[20] *Id.* at 417-19.

[21] *Id.* at 419, 427 (O'Connor and Kennedy, JJ. concurring).

[22] 126 S.Ct. at 2076-2077.

[23] *Id.*

[24] *Id.* at 2077.

[25] *Id.* at 2087.

[26] *Id.* at 2086-87.

[27] *Id.* at 2087.

[28] *Id.* at 2092-2094.

against House remains substantially unaltered from the cases presented to the jury."[29] As a result, Justice Roberts said, the *Schlup* standard was not met.[30]

The judgment upholding the denial of *habeas corpus* relief was reversed, and the case was remanded for consideration of House's procedurally barred claims.

Holmes v. South Carolina[31]

Holmes was convicted of multiple crimes, including first degree murder, and sentenced to death. At his trial, the court did not allow Holmes to present evidence that a third party had committed the crimes he had been charged with. On May 1, 2006, the Supreme Court, with Justice Alito writing the opinion for a unanimous Court, ruled that South Carolina had deprived Bobbie Lee Holmes of a fair trial when it prevented him from putting on evidence contradictory to the State's case and which also pointed to another possible suspect. The prosecution relied heavily on forensic evidence that strongly supported petitioner's guilt. The petitioner sought to rebut the State's forensic evidence by introducing expert testimony suggesting that the evidence had been contaminated and that the police had engaged in a plot to frame him. The petitioner also sought to introduce evidence that another man by the name of Jimmy McCaw White had been in the victim's neighborhood on the morning of the *assault* and White had either acknowledged petitioner's innocence or admitted to committing the crimes himself. In White's pretrial testimony, he denied making the incriminating statements and provided an alibi for the time of the assault.[32]

The trial court excluded petitioner's third-party guilt evidence citing the State Supreme Court's *Gregory* decision, which held that this evidence is admissible if it raises a reasonable inference as to the defendant's own innocence, but is inadmissible if it merely casts a bare suspicion or raises a conjectural inference as to another's guilt.[33] The State Supreme Court, affirming the trial court, cited both *Gregory* and its later decision in *Gay*,[34] and held that where there is strong forensic evidence of an appellant's guilt, gratuitous evidence regarding a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.[35] Applying this standard, the South Carolina State Supreme Court held that the petitioner could not overcome the forensic evidence against him.[36]

The U.S. Supreme Court granted *certiorari* based upon the question regarding whether South Carolina's rule governing the admissibility of third-party guilt evidence violates a criminal

[29] *Id.* at 2093.

[30] *Id.* at 2087. ("The question is not whether House was prejudiced at his trial because the jurors were not aware of the new evidence, but whether all the evidence, considered together, proves that House was actually innocent, so that no reasonable juror would vote to convict him.")

[31] 126 S. Ct. 1727 (2006).

[32] *Id.* at 1730-731.

[33] *State v. Gregory*, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941).

[34] *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001).

[35] *State v. Holmes*, 361 S.C. 333, 342-43, 605 S.E.2d 19, 24 (2004).

[36] *Id.*

defendant's constitutional right to present a complete defense grounded in the Due Process, Confrontation, and Compulsory Process Clauses.[37]

The U.S. Supreme Court held that a criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce evidence of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict.[38] The Court said:

> [S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. This latitude, however, has limits. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. This right is abridged by evidence rules that infringe] upon a weighty interest of the accused and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'
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> While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. An application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. Such rules are widely accepted and are not challenged here. In *Gregory*, the South Carolina Supreme Court adopted and applied a rule intended to be of this type. In *Gay* and this case, however, that court radically changed and extended the *Gregory* rule by holding that, where there is strong evidence of a defendant's guilt, especially strong forensic evidence, proffered evidence about a third party's alleged guilt may (or perhaps must) be excluded. Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues. Furthermore, as applied below, the rule seems to call for little, if any, examination of the credibility of the prosecution's witnesses or the reliability of its evidence.
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> [The point of this is that] by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied below did not heed this point, the rule is 'arbitrary' in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third-party guilt rules were designed to further. Nor has the State identified any other legitimate end served by the rule. Thus, the rule violates a criminal defendant's right to have a meaningful opportunity to present a complete defense.[39]

Justice Alito was guided by a string of Supreme Court decisions which were used as precedent to set up a balancing test to weigh and determine the opportunity for the defendant to present a complete defense.[40] In a situation where South Carolina's rule was that if the State had put on

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[37] *Holmes v. South Carolina*, 126 S.Ct.34 (2005).

[38] 126 S.Ct. at 1728.

[39] *Id.* at 1728-1729 (internal citations omitted).

[40] *I.e., United States v. Schaefer*, 523 U.S. 303 (1998); *Rock v. Arkansas*, 483 U.S. 44 (1987); *Crane v. Kentucky*, 476 (continued...)

strong forensic evidence of the defendant's guilt, the defendant could be prohibited from raising an alternative theory of a third-party's guilt. Under these circumstances, the Court concluded that Holmes did not have a meaningful opportunity to present a complete defense. The Court decided that this rule was arbitrary and irrational for the reason "... that by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt."[41]

Kansas v. Marsh[42]

On June 26, 2006, the Supreme Court narrowly upheld the death penalty in Kansas in a 5-4 decision which reversed the Kansas Supreme Court and ruled that the Kansas' death penalty statute does not violate the Eighth or Fourteenth Amendments when it allows imposition of the penalty should the jury determine that the aggravating and mitigating factors are of equal weight.

Marsh was convicted of capital murder, first-degree premeditated murder, and aggravated arson and burglary stemming from the deaths of Mary Anne Pasch and her 19-month-old daughter. The jury sentenced Marsh to death after finding the existence of three aggravating circumstances that were not outweighed by the mitigating circumstances. Marsh appealed his conviction, arguing that the trial court had erred in excluding, based on state law, his evidence connecting the woman's husband to the crime.[43]

During the time that Marsh's appeal was pending, the Kansas Supreme Court held in *State v. Lepas* that Kansas' death penalty statute – under which Marsh had been sentenced – was unconstitutional because it mandated a sentence of death when the aggravating and mitigating circumstances offset and counterbalanced each other.[44] The court held that the U.S. Supreme Court decision in *Walton v. Arizona*,[45] was not controlling because Arizona did not impose the death penalty when there was a tie between the aggravating and mitigating circumstances.[46] Notwithstanding, the Kansas Supreme Court attempted to salvage the death penalty in the *Claps* case by reconstructing the Kansas statute so that equipoise would not mandate the death penalty by construing it to mean that the aggravating circumstance(s) must "outweigh any mitigating circumstances found to exist" before capital punishment may be imposed.[47]

When Marsh appealed his death sentence in 2004, the Kansas Supreme Court held that its attempt to rewrite the language of the statute was in error because the process used to select which

(...continued)

U.S. 683 (1986); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967).

[41] *Id.* at 1735.

[42] 126 S. Ct. 2516 (2006).

[43] *Id.* at 2520-521.

[44] *State v. Claps*, 272 An. 894, 899-903, 40 P.3d 139, 166-67 (2001). The Kansas statute (An. Stat. Ann. §21-4624(e)) provided that juries should sentence a defendant to die – rather than serve life in prison – when the evidence for and against imposing death were equal.

[45] 497 U.S. 639, 649-51 (1990), overruled on other grounds, *Ring v. Arizona*, 536 U.S. 584 (2002)(upholding Arizona's death penalty statute that burdened the defendant with establishing mitigating evidence sufficient to justify leniency once the state has established an aggravating factor).

[46] 272 An. at 1006-1007, 40 P.3d at 226.

[47] 272 An. at 1018, 40 P.3d at 234.

defendants are sentenced to death does not comport with the fundamental respect for humanity underlying the Eighth Amendment. The Kansas Supreme Court held that there was "no way" that Kansas' weighing equation is permissible under the Eighth and Fourteenth Amendments.[48]

Justice Thomas, writing for the 5-4 majority, said "our precedents establish that a state enjoys a range of discretion in imposing the death penalty...."[49] The decision reversed the Kansas Supreme Court decision which held that the law violated the Eighth Amendment's protection against cruel and unusual punishment. In upholding the Kansas statute, the U.S. Supreme Court cited *Walton v. Arizona*.[50] In *Walton,* the Court held that a state death penalty statute may give the defendant the burden to prove that mitigating circumstances outweigh aggravating circumstances.[51] Finding that *Walton* controlled , the Court reasoned that the Kansas' death penalty statute may constitutionally direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigating circumstances do not outweigh aggravating circumstances, even when they are of equal weight.[52] Even if *Walton* did not directly control, the Court stated, a state has a range of discretion in imposing the death penalty, including how the aggravating and mitigating circumstances are weighed, as long as the state system satisfies the requirements of *Fermion v. Georgia* and *Gregg v. Georgia*.[53] The Court reasoned that the use of mitigation evidence is a product of the requirement of individualized sentencing.[54] The Court also found that the Kansas death penalty statute rationally narrows the class of death-eligible defendants and allows a jury to consider any mitigating evidence that is relevant to its sentencing determination.[55]

Justice Souter, with Justices Stevens, Ginsberg, and Breyer joining, issued a dissenting opinion.[56] Justice Shouter noted that the Kansas statute would lead to death sentences in doubtful cases and "is obtuse by any moral or social measure."[57]

Justice Souter agrees with the Kansas Supreme Court that essentially, the Eighth Amendment forbids a mandatory death penalty in "doubtful cases," and that this is precisely what the Kansas statute does (that is, a case where mitigating factors equally balance aggravating factors is a "doubtful case" in Justice Shouters estimation)[58]. Justice Souter's concern is that in such a case, which he calls a tie, the tiebreaker has nothing to do with the details of the crime or any facts about the defendant, but that the statute presents mandatory death as the tiebreaker.[59] Justice Souter is troubled by this in light of the fact that the past decade has shown DNA test exonerating numerous death row defendants.[60] Citing the experience of Illinois, Justice Souter's dissent noted that 13 deathrow inmates were released between 1977 and 2000, triggering a state moratorium on

[48] 278 An. at 534-45, 102 P.3d at 457-64.

[49] 126 S. Ct. at 2525.

[50] *Id.* at 2522, citing *Walton v. Arizona* 497 US 639 at 645.

[51] *Id.* at 2523.

[52] *Id.* at 2524.

[53] *Id.* at 2519, citing, *Fermion v. Georgia,* 408 U.S. 238 (1972) and *Gregg v. Georgia,* 428 U.S. 153 (1976).

[54] *Id.* at 2523.

[55] *Id.* at 2526.

[56] *Id.* at 2541 (Souter, Stevens, Ginsberg and Breyer, JJ. dissenting).

[57] *Id.* at 2546.

[58] *Id.* at 2543.

[59] *Id.* at 2542

[60] *Id* at 2544.

executions, and referred to studies that he said, showed that dozens of death row inmates in other states were wrongly convicted.[61] Justice Scalia said the studies that Justice Souter cited are factually inaccurate, because many of the inmates they list as innocent were not exonerated but were released for technical legal reasons.[62]

Oregon v. Guzek[63]

On February 22, 2006, the Supreme Court in an 8-0 decision (Justice Alito not participating), ruled that Oregon courts are not required to allow the defendant to introduce new alibi evidence pertaining to his innocence at the sentencing phase of the trial.[64] Two Justices, Scalia and Thomas, concurred in the result but would have recognized a state right to bar all residual doubt of guilty evidence from sentencing proceedings.[65]

Oregon tried Guzek, who was 18 at the time he was convicted, for the offense of capital murder. The evidence showed that Guzek and two associates decided to burglarize the Houser family home. After entering the home, an associate killed Rod Houser, and Guzek then robbed and killed Lois Houser. After the police learned that Guzek held a special grudge against the Housers, they traced and apprehended him and his associates. The associates confessed and testified at trial, painting Guzek as the ring leader.

Guzek's defense during the penalty phase of this trial rested in part upon an alibi. He presented two alibi witnesses, his grandfather and his mother, who testified that Guzek had been with one or the other at the time of the crime. The jury, disbelieving the alibi, sentenced him to death.

Guzek appealed and the Oregon Supreme Court affirmed the conviction; but the court ordered a new sentencing proceeding.[66] Guzek was again sentenced to death; he again appealed; and the Oregon Supreme Court again ordered re-sentencing.[67] Guzek was sentenced to death for the third time; he again appealed; and again the Oregon Supreme Court found the sentencing procedures faulty.[68] Seeking to avoid further errors at the next (the fourth) sentencing proceeding, the Oregon Supreme Court also addressed the admissibility of certain evidence Guzek sought to introduce at that proceeding, including live testimony from his mother concerning his alibi.[69]

The Oregon Supreme Court held that the Eighth and Fourteenth Amendments provide Guzek a federal constitutional right to introduce this evidence at his upcoming sentencing proceeding.[70] At

[61] *Id* at 2544-2545.

[62] *Id* at 2531-2535.

[63] 126 S. Ct. 1226 (2006).

[64] *Id.* at 1230-231.

[65] *Id.* at 1233-234 (Scalia and Thomas, JJ. dissenting).

[66] *State v. Guzek*, 310 Ore. 299, 307, 797 P.2d 1031, 1036 (1990).

[67] *State v. Guzek*, 322 Ore. 245, 271, 906 P.2d 272, 287 (1995).

[68] *State v. Guzek*, 336 Ore. 424, 464, 86 P.3d 1106, 1129 (2004).

[69] 336 Ore. at 456-63, 86 P.3d at 1124-128.

[70] *Id.*

the State's (Oregon) request, the U.S. Supreme Court agreed to review that issue under certiorari.[71]

During the sentencing phase of Guzek's trial, the defense tried to introduce witness testimony – "findings of fact" – that placed him away from the murder scene. The defense called this "mitigating evidence" designed to spare Guzek from lethal injection. Different courts have disagreed on whether it was actually "alibi evidence" that applied directly to whether a defendant was guilty and should have been presented during the guilt or innocence phase of the trial.[72]

The Supreme Court ruled that Oregon courts are not required to allow the defendant to introduce new alibi evidence pertaining to his innocence at the sentencing phase of the trial. The Court reasoned that states may put reasonable limits on the evidence a defendant may present.[73] Particularly at the sentencing phase, when the question is not whether the defendant committed the crime but how,[74] and since the issue of innocence had already been litigated, and the state law allows the defendant to present evidence of his innocence in the form of transcripts from his original trial by a jury, the Oregon court did not have to hear Guzek's additional evidence of innocence.[75]

Justices Scalia and Thomas concurred in the result but lamented that the Court had failed to take advantage of "the opportunity to put to rest, once and for all, the mistaken notion that the Eighth Amendment requires that a convicted capital defendant be given the opportunity, at his sentencing hearing, to present evidence and argument concerning residual doubts about his guilt."[76] Justice Alito took no part in the case.[77]

Brown v. Sanders[78]

On January 11, 2006, the Court in a 5-4 decision affirmed Sanders' death sentence and refined its death penalty jurisprudence by establishing a new rule: "an invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances."[79]

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[71] *Oregon v. Guzek*, 544 U.S. 998 (2005).

[72] Justice Scalia's concurrence lists a series of state and lower federal court cases that had held that a capital defendant had no right to offer at sentencing mitigation evidence of residual doubt as to his guilt, 126 S.Ct. at 1234 (Scalia and Thomas, JJ. dissenting), citing, *Zeigler v. Crosby*, 345 F.3d 1300, 1310 (11th Cir. 2003); *Evans v. Thompson*, 881 F.2d 117, 121 (4th Cir. 1989); *Duest v. State*, 855 So.2d 33, 40-41 (Fla.2003); *Commonwealth v. Fisher*, 572 Pa. 105, 115-116, 813 A.2d 761, 767 (2002); *People v. Emerson*, 189 Ill.2d 436, 501-504, 245 Ill.Dec. 49, 727 N.E.2d 302, 338-339 (2000); *State v. Fletcher*, 354 N.C. 455, 470-472, 555 S.E.2d 534, 544 (2001); *Melson v. State*, 775 So.2d 857, 898-899 (Ala.Crim.App.1999).

[73] 126 S.Ct.at 1232.

[74] *Id.*

[75] *Id.* at 1233.

[76] *Id.* at 1233 (Scalia and Thomas, JJ. concurring in the judgment).

[77] *Id.* at 1233.

[78] 126 S. Ct. 884 (2006).

[79] *Id.* at 892 (emphasis in the original).

Sanders was convicted of first-degree murder, attempted murder, robbery, burglary, and attempted robbery. The jury, at the guilt phase of his trial, found four "special circumstances" under California law, each of which independently rendered him eligible for the death penalty: (1) murder committed during the course of a robbery; (2) murder committed in the course of a burglary; (3) murder committed to prevent a witness from testifying; and (4) murder committed in an "especially heinous, atrocious, or cruel" manner.[80] At the penalty phase, the jury was instructed to consider a list of sentencing factors relating to the petitioner's background and the nature of the crime including "the circumstances of the crime to which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true."[81] The jury sentenced the defendant to death. The California Supreme Court, on direct appeal, set aside two of the four "special circumstances": the burglary-murder special circumstance under state merger law, and the "heinous, atrocious, or cruel" special circumstance because it had previously found this standard unconstitutionally vague.[82] However, it affirmed the death sentence, referring to the Supreme Court's decision in *Zant v. Stephens* to uphold a death sentence decision despite the invalidation of two of several aggravating factors.[83] The Supreme Court denied *cert* on direct appeal.[84]

Sanders then filed for federal *habeas*, which was denied at the district court level. The Ninth Circuit reversed, concluding that the California court had misapplied *Zant*, which is only applicable to non-weighing states, in upholding the verdict despite the invalidity of two of the special circumstances, because two others remained.[85] It determined California to be a weighing state, and applied the Court's decision in *Stringer v. Black* to mean that California courts could only uphold the death sentence by finding the jury's use of the invalidated special circumstances to be harmless beyond a reasonable doubt or by independently reweighing the factors.[86]

The Supreme Court reversed the Ninth Circuit's decision and held that no new trial was constitutionally required.[87] The Court established the rule that a jury's consideration and finding of an invalid sentencing factor taints any death verdict unless the same facts and circumstances evidence a valid sentencing factor also found by the jury.[88] The Court said that the existing valid aggravating factors which fit the description of the invalid factors were sufficient and therefore Sanders' death sentence was not "skewed" and neither did the invalid factors narrow the field "... of aggravating facts the jury was entitled to consider in determining sentence."[89]

Justice Scalia, joined by Chief Justice Roberts and Justice O'Connor, Kennedy, and Thomas, delivered the opinion of the Court. Justices Stevens and Souter dissented because they felt the

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[80] *Id.* at 893.

[81] *Id.* at 888.

[82] *People v. Sanders*, 51 Cal.3d 471, 515-20, 273 Cal.Rptr. 537, 563-65, 797 P.3d 561, 587-99 (1990).

[83] 51 Cal.3d at 520-21, 273 Cal.Rptr. at 565-66, 797 P.3d at 589-90.

[84] *Sanders v. California*, 500 U.S. 948 (1991).

[85] *Sanders v. Woodford*, 373 F.3d 1054, 1062-67 (9th Cir. 2004).

[86] *Id.*

[87] 126 S.Ct. at 894.

[88] Or to repeat the words of the Court, "[a]n invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." *Id.* at 892.

[89] 126 S. Ct. at 892-893.

majority's announcement of a new standard inappropriately complicated the law in the area.[90] Justices Breyer and Ginsberg dissented because they felt that in some situations impressing upon the jury that the facts and circumstances supported an invalid finding would taint the process even if the same facts and circumstances also supported and resulted in a valid finding.[91]

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[90] *Id.* at 895-96 (Stevens and Shouter, JJ. dissenting).

[91] *Id.* at 903 (Brewer and Ginsberg, JJ. dissenting)("the problem before us is not a problem of admissibility of evidence. It is a problem of the emphasis given that evidence by the State or the trial court. If that improper emphasis is strong enough, it can wrongly place a thumb on death's side of the scale").