

The Emerging Death Penalty Jurisprudence of the Roberts Court

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I. INTRODUCTION

In 1976, four years after finding the nation's death penalty laws to be constitutionally flawed, the U.S. Supreme Court established the parameters of modern American death penalty jurisprudence. Since then the Court has gone through several phases. The Court proceeded cautiously from 1977 to 1982, limiting the death penalty to those who committed murder in a manner deemed especially heinous and despicable by judges and juries, requiring even-handedness and consistency in capital sentencing, and insisting that sentencing authorities examine the individual characteristics of each offender and the particular circumstances of his crime. From 1983 to 2001, however, the Court took a more aggressive stance in favor of capital punishment. The Justices rejected major constitutional challenges to the fairness of death penalty laws and upheld the constitutionality of executing mentally retarded offenders, sixteen- and seventeen-year-old offenders, and felony accomplices who neither killed nor intended to kill. Beginning in 2002, the Justices once again began to scrutinize death penalty statutes and procedures closely and with a critical eye. The Court reversed its holdings permitting the executions of mentally retarded offenders and juvenile offenders, tightened standards for appellate review of the competence of capital defense attorneys, and invalidated sentencing procedures that seemed likely to produce arbitrary or discriminatory life-ending verdicts.

In 2005, the composition of the Supreme Court changed for the first time in eleven years, foreshadowing still another shift in the Court's decisional tendencies in capital cases as well as in other areas of law. On September 29, 2005, the U.S. Senate confirmed John Roberts, a judge on the U.S. Court of Appeals for the District of Columbia, as the new Chief Justice of the Supreme Court, replacing Chief Justice William Rehnquist, who passed away earlier that year. A few months later, on January 31, 2006, the Senate confirmed Judge Samuel Alito of the U.S. Court of Appeals for the Third Circuit to fill the vacancy created by Justice Sandra Day O'Connor's resignation from the Court. As of the end of the Court's

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2006–2007 term, Chief Justice Roberts had presided over two complete terms and Justice Alito had participated in most of the 2005–2006 term and the entire 2006–2007 term. Both of the new Justices are likely to serve on the Court for many more years, and it is apparent that they already have begun to affect the substance and tone of the Court’s death penalty decisions.

This article focuses on the Supreme Court’s death penalty jurisprudence during the 2005–2006 and 2006–2007 terms. It begins with a brief review of the various approaches the Court took toward capital punishment from 1976 to 2005 and then analyzes the major death penalty decisions of the past two terms. It is argued that the change in the composition of the Court has fostered still another reversal of course in the Court’s death penalty rulings. The Roberts Court has loosened the standards for evaluating the competence of capital defense attorneys, strengthened the hands of capital prosecutors, and upheld strict and constitutionally vulnerable statutory and procedural roadblocks to the appellate review of capital sentences. Ironically, the public and a growing number of elected officials have expressed renewed concerns about the morality and effectiveness of death penalty laws. The article concludes, however, that the Court’s reluctance to grant meaningful procedural safeguards to capital defendants and to impose further substantive limitations on the use of the death penalty is likely to continue in the 2007–2008 term and for at least the next several years.

II. THE EVOLUTION OF DEATH PENALTY LAW: 1972–2005

A. *Establishing a New Constitutional Framework: 1972–1976*

The modern era of American capital punishment jurisprudence began with the U.S. Supreme Court’s *Furman v. Georgia*¹ decision in 1972. Striking down Georgia’s capital punishment statute, the Court indicated that all then-existing state and federal death penalty laws violated the Eighth Amendment’s cruel and unusual punishments clause² because these laws failed to provide judges or juries with specific, clear, and fair guidelines to follow when deciding whether to sentence defendants to death and thus led to death sentences that were imposed in an arbitrary, capricious, or discriminatory manner.³ Over the next four years, thirty-five states enacted

1. 408 U.S. 238 (1972).

2. U.S. CONST. amend. VIII.

3. *Furman*, 408 U.S. at 239–374. The *Furman* decision generated ten opinions: a brief per curiam opinion and one by each of the nine Justices. Of the five Justices who constituted the majority, two—

new death penalty laws,⁴ but many opponents of capital punishment saw *Furman* as a decision that left little room to reconcile any death penalty law with the Constitution and were hopeful that the Court would soon bring an end to the American practice of capital punishment.⁵

In 1976, however, the Court refused to take the next step. In *Gregg v. Georgia*⁶ and its companion cases,⁷ the Court made it clear that the death penalty is not an unconstitutional punishment for the crime of murder so long as legitimate guidelines and proper procedures are used in reaching the decision to impose it.⁸ The *Gregg* Court upheld so-called “guided-discretion” death penalty statutes that require two-stage capital trials—a guilt-adjudication stage to decide whether the defendant is guilty of a capi-

Justices Brennan and Marshall—would have gone further and found capital punishment to violate the Eighth Amendment under all circumstances. See *id.* at 257–306, 314–71. See generally Daniel D. Polsby, *The Death of Capital Punishment?: Furman v. Georgia*, 1972 SUP. CT. REV. 1 (1972).

The per curiam opinion states, in part, that “the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.” *Furman*, 408 U.S. at 239–40. A careful reading of the opinions of the five Justices who made up the majority reveals that *Furman* is an Eighth Amendment holding. The Fourteenth Amendment is mentioned only because the Court always cites it when it strikes down a state law on the basis of one of the provisions of the Bill of Rights that originally applied only against the federal government. Through the historical process of “selective incorporation,” the Court has decided on a case-by-case basis that most of the provisions of the first eight amendments to the Constitution are binding on the states as a result of the Fourteenth Amendment’s command that “[no state shall] deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. The Supreme Court held that the Eighth Amendment’s ban on cruel and unusual punishments was one of those fundamental rights that must be enforced against state officials as well as federal officials in *Robinson v. California*, 370 U.S. 660, 667 (1962).

One year prior to *Furman*, the Court held that death penalty laws that leave the decision of whether to impose capital punishment to the unguided discretion of judges and juries—the same kind of laws found to violate the Eighth Amendment in *Furman*—do not violate the due process clause of the Fourteenth Amendment. *McGautha v. California*, 402 U.S. 183 (1971). The Court has never overruled *McGautha*, but it attempted, arguably unsuccessfully, to reconcile *Furman* and *McGautha* in *Gregg v. Georgia*, 428 U.S. 153, 195 n.47 (1976). See *infra* notes 6–10 and accompanying text.

4. See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 267–75 (2002).

5. See, e.g., MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973).

6. 428 U.S. 153 (1976). In addition to holding that capital punishment does not always violate the constitutional ban on cruel and unusual punishments, *Gregg* also found Georgia’s post-*Furman* capital punishment statute to be constitutionally acceptable. See *id.* at 196–207.

7. *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding the constitutionality of Texas’s post-*Furman* death penalty statute); *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding the constitutionality of Florida’s post-*Furman* death penalty statute).

8. See *Gregg*, 428 U.S. at 170–87. The *Gregg* Court pointed out that when ratified in 1791, the cruel and unusual punishments clause clearly was not intended to apply to capital punishment. *Id.* at 176–79. The Court cited the fact that thirty-five states enacted post-*Furman* capital punishment statutes as strong evidence that the death penalty, at least when imposed for the taking of human life, did not offend contemporary society’s “evolving standards of decency.” *Id.* at 179–82 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). The Court also stressed that it was reasonable for legislatures to conclude that capital punishment serves at least two legitimate societal goals—retribution and deterrence—and that the death penalty therefore cannot be found to be nothing more than the needless and purposeless infliction of pain and suffering. *Id.* at 182–87.

tal offense and a penalty stage to consider whether to impose the sentence of death.⁹ In the penalty stage, the jury (or in a few states, the judge) must consider specific “aggravating” and “mitigating” factors concerning the circumstances of the offense and the defendant’s character and record, and then return with either a sentence of death or a sentence of lengthy (usually life) imprisonment.¹⁰

Although the *Gregg* Court bestowed its approval on well-crafted guided-discretion laws, the Justices simultaneously struck down another type of death penalty law that several states enacted in the aftermath of *Furman*. In *Woodson v. North Carolina*¹¹ and *Roberts v. Louisiana*,¹² a five-to-four majority ruled that mandatory death penalty laws—laws that automatically imposed the death sentence on defendants found guilty of first-degree murder or a particular type of murder—violate the Eighth Amendment. Such laws, the majority reasoned, would undermine the Court’s new requirement that sentencing authorities must consider all relevant information about the character of the offender and the nature of his crime.¹³ This, the majority declared, was now an indispensable part of the process of determining whether an offender truly deserved to die.¹⁴ Mandatory death sentencing schemes, on the other hand, resulted in the “blind infliction” of the death penalty and thus were inconsistent with “the fundamental respect for humanity underlying the Eighth Amendment.”¹⁵

B. *The Immediate Post-Gregg Years: 1977–1982*

From 1977 to 1982, the Court proceeded carefully while attempting to clarify the constitutional boundaries of capital punishment. The Court, for example, limited capital punishment to cases in which the offender killed someone, holding that the death penalty is a disproportionate and thus unconstitutional punishment for the crimes of rape¹⁶ and robbery¹⁷ where the victim is not killed as well as for people who participate with others in a felony that results in murder, but who neither kill, intend to kill, nor at-

9. *Id.* at 188–95. The Court did not mention that it had rejected the claim that the use of a unitary capital trial—one in which the jury determines both guilt and punishment after a single trial and in a single verdict—violates the Sixth Amendment right to a fair trial and the Fourteenth Amendment due process clause in *Crampton v. Ohio*, 402 U.S. 183 (1971), a companion case to *McGautha v. California*, 402 U.S. 183 (1971).

10. *Gregg*, 428 U.S. at 196–207.

11. 428 U.S. 280 (1976).

12. 428 U.S. 325 (1976).

13. *Woodson*, 428 U.S. at 297–304.

14. *Id.* at 303–305.

15. *Id.* at 304.

16. *Coker v. Georgia*, 433 U.S. 584 (1977).

17. *Hooks v. Georgia*, 433 U.S. 917 (1977) (per curiam).

tempt to kill during the course of the crime.¹⁸ The Court also stressed that capital sentencers must consider all relevant mitigating evidence proved by the defense before returning a death sentence.¹⁹ Another early decision reflecting an effort to ensure fairness and reliability in capital sentencing was *Godfrey v. Georgia*,²⁰ which established that the aggravating circumstances considered by capital juries must be defined clearly enough to provide meaningful guidance, thereby lessening the likelihood that death sentences will be imposed arbitrarily. In 1980, the Court invalidated an Alabama law that prohibited trial judges from instructing jurors that they have the option to find a capital defendant guilty of a lesser included non-capital offense when the evidence supports such a verdict.²¹ And in *Bullington v. Missouri*,²² an important double jeopardy question was resolved when the Court held that a jury's initial vote for life over death was an implied acquittal of death penalty eligibility, thus precluding imposition of a death sentence after the defendant successfully appealed his first conviction but was reconvicted of the same crime. In the immediate aftermath of *Gregg*, the Court seemed acutely aware that "death is a different kind of punishment from any other"²³ and should be imposed under stringent safeguards to ensure fairness and consistency.

C. Expanding the Reach of Capital Punishment: 1983–2001

From 1983 to 2001, the Court retreated from the cautious approach to capital punishment it took in the years immediately following *Gregg*. The insistence on strict procedural safeguards was replaced by an attitude that it was time to "get on with it" and stop interfering with the will of the people as reflected by the laws passed by legislative bodies.²⁴ For example, in *Zant v. Stephens*,²⁵ the majority proclaimed that the states have a legitimate interest in speedier resolutions of capital cases and that "not every imper-

18. *Enmund v. Florida*, 458 U.S. 782 (1982).

19. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

20. 446 U.S. 420 (1980).

21. *Beck v. Alabama*, 447 U.S. 625 (1980).

22. 451 U.S. 430 (1981).

23. *Beck*, 447 U.S. at 637 (quoting *Gardner v. Florida*, 430 U.S. 349, 357 (1977)).

24. Arguably, the Court's emerging new attitude first became apparent in Justice Rehnquist's dissent from denial of certiorari in *Coleman v. Balkcom*, 451 U.S. 949 (1981). Pointing to the lengthy appeals process in capital cases, Justice Rehnquist lamented that "[g]iven so many bites at the apple, the odds favor petitioner finding some court willing to vacate his death sentence because in its view his trial or sentence was not free from constitutional error." *Id.* at 957. Urging his colleagues to make a better effort to expedite the administration of the death penalty, Rehnquist referred to the slow pace of executions as a "mockery of our criminal justice system." *Id.* at 958.

25. 462 U.S. 862 (1983).

fection in the deliberative process is sufficient . . . to set aside a state court judgment."²⁶

Some of the Court's holdings during this period reiterated the need for fairness in capital proceedings, but most of the Court's late twentieth century death penalty jurisprudence proved to be disadvantageous for capital defendants and inmates already sentenced to die. This trend became evident in cases raising the issue of whether state death penalty procedures gave the defendant a full opportunity to make juries aware of all relevant mitigating evidence.²⁷ The Court did not repudiate its position that the sentencer must be permitted to consider any relevant mitigating circumstances when deciding whether or not to sentence a defendant to death. However, the reach of these decisions was circumscribed by decisions such as *Johnson v. Texas*.²⁸ In *Johnson*, the Court held that the judge's failure to explicitly instruct the jury to consider mitigating evidence about the defendant's age did not *prevent* the jury from considering the mitigating effect of the defendant's youth.²⁹

The Court also backed away, without fully retreating, from its *Woodson-Roberts* stance against mandatory death penalty laws. In 1987, a five-to-four majority invalidated a Nevada law that mandated a death sentence in all cases in which a prisoner is convicted of murder while serving a life-without-parole prison sentence.³⁰ Three years later, however, the Court upheld a California law that requires capital juries to impose the death penalty if they find that the aggravating circumstances outweigh any mitigating circumstances³¹ and a Pennsylvania law that requires a death sentence when a capital jury finds at least one statutory aggravating circumstance and no mitigating circumstances.³² The Court distinguished these cases from the *Woodson* and *Roberts* cases by explaining that a death sentence is not automatically triggered upon a murder conviction: "It is imposed only after a determination that the aggravating circumstances

26. *Id.* at 885; see also *Barefoot v. Estelle*, 463 U.S. 880, 887-96 (1983) (bestowing approval on expedited review procedures to be followed by federal appeals courts in order to speed death penalty appeals toward a final resolution). In *Barefoot*, the Court also upheld the admissibility of testimony by state-hired psychiatrists in Texas who regularly told capital-sentencing juries that defendants, if not executed, were certain to commit future violent crimes. 463 U.S. at 896-99. Writing for the majority, Justice White conceded that research studies showed that "expert" predictions about future dangerousness turn out to be incorrect sixty-six percent of the time. See *id.* at 898-903. He dismissed the importance of such studies, however, stressing that psychiatrists are not wrong about future dangerousness all of the time, "only most of the time." *Id.* at 901.

27. See, e.g., *Graham v. Collins*, 506 U.S. 461 (1993); *Penry v. Lynaugh*, 492 U.S. 302 (1989).

28. 509 U.S. 350 (1993).

29. See *id.* at 368-70.

30. *Sumner v. Shuman*, 483 U.S. 66 (1987).

31. *Boyde v. California*, 494 U.S. 370 (1990).

32. *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

outweigh the mitigating circumstances present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances.”³³

The Court’s greater willingness to defer to the political branches of government in this time period had the effect of broadening the class of death-eligible defendants. In *Tison v. Arizona*,³⁴ the Court modified its earlier decision disallowing the death penalty for felony murderers—non-killers who participate with others in a felony that leads to murder.³⁵ The *Tison* Court held that even when such offenders neither killed nor intended to kill, they nevertheless could be sentenced to death if they participated in the underlying felony in a “major” way and if they exhibited a “reckless indifference to human life” while doing so.³⁶ The Court also upheld the constitutionality of laws permitting the execution of mentally retarded offenders³⁷ and juvenile offenders.³⁸ Even in the face of overwhelming statistical evidence of racial bias in capital sentencing in Georgia, the Court repudiated Eighth and Fourteenth Amendment challenges to the fairness of that state’s capital punishment statute.³⁹

33. *Id.* at 305.

34. 481 U.S. 137 (1987).

35. *See supra* note 18 and accompanying text.

36. *See Tison*, 481 U.S. at 150–58.

37. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

38. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

39. *McCleskey v. Kemp*, 481 U.S. 279 (1987). In *McCleskey*, the Court heard a major constitutional challenge to the death sentence imposed on an African-American man convicted of murdering a white police officer in a Georgia furniture store robbery. *Id.* at 283 (stating facts). *McCleskey*’s attorneys presented the Court with statistical evidence that Georgia’s post-*Gregg* capital-sentencing procedures were saturated with racial discrimination and thus violated both the Fourteenth Amendment’s guarantee of equal protection under the law and the Eighth Amendment’s ban on cruel and unusual punishments. *Id.* at 286–290. The evidence consisted of a detailed and methodologically sophisticated study of over 2000 murder cases in which the death penalty could have been imposed in Georgia during the 1970s. *Id.* The study revealed, inter alia, that death sentences were imposed in twenty-two percent of the cases involving black defendants and white victims; eight percent of the cases involving white defendants and white victims; three percent of the cases involving white defendants and black victims; and one percent of the cases involving black defendants and black victims. *Id.* at 286.

Writing for a five-justice majority, Justice Powell assumed for the purposes of reaching the constitutional issues that the study was statistically valid. *Id.* at 292 n.7. He explained, however, that the study did not and could not prove *McCleskey*’s allegation of an equal protection violation because to prevail under the equal protection clause, a death-sentenced petitioner would have to prove what *McCleskey* could not prove—that the state legislators who passed Georgia’s death penalty statute did so for the very purpose of furthering racially discriminatory capital sentencing or that “the decision-makers in his case acted with discriminatory purpose.” *Id.* at 292. As for the argument that the study showed that the Georgia death penalty was arbitrarily and discriminatorily applied in violation of *Furman*’s proclamation that arbitrary or discriminatory death sentences violate the Eighth Amendment, Justice Powell responded that the study indicates, at most “a discrepancy that appears to correlate with race,” that apparent disparities in sentencing are inevitable in both capital and non-capital cases, and that the study thus does not demonstrate a constitutionally significant risk of capricious or discriminatory capital sentencing. *Id.* at 312, 313–15. In dissent, Justice Brennan accused the majority of ignor-

D. Renewed Caution and New Limitations on Death Eligibility: 2002–2005

From 2002 to 2005, the Court clearly began to take a more accommodating approach towards constitutional issues raised by death-row petitioners. During this period, the Court announced two major decisions reducing the categories of offenders eligible for capital punishment and several other decisions that demonstrated greater concern about the rights of capital defendants.

To be sure, the Court did not stray too far from its tendency to uphold constitutionally problematic laws and procedures that work to the advantage of capital prosecutors. A number of significant decisions in the 2002–2005 time period tightened restrictions on death penalty appeals and rejected capital defendants' constitutional claims. For example, in a 2003 case, *Woodford v. Garceau*,⁴⁰ the Court held that limits on capital appeals that were included in the Antiterrorism and Effective Death Penalty Act of 1996⁴¹ (AEDPA) apply even to capital appeals that were in a preliminary stage *before* the AEDPA was enacted. Writing for a six-justice majority, Justice Thomas asserted that only substantive appeals that had been formally filed in a federal court before the passage of the AEDPA were exempt from the new appeals limits.⁴² Thus, death-sentenced inmates who had taken only such preliminary steps as seeking a motion for a stay of execution or requesting court appointment of an attorney had not truly initiated what could be called a "case" and would be bound by the AEDPA's new restrictions.⁴³

In another important 2003 ruling, the Court undermined its 1981 ruling in *Bullington v. Missouri*⁴⁴ that the Fifth Amendment's double jeopardy clause applies to capital-sentencing proceedings. In *Sattazahn v. Pennsylvania*,⁴⁵ the Court explained that in *Bullington*, the jury, by voting for life imprisonment over a death sentence, had, in effect, "acquitted" the defendant of the factors necessary to impose the death sentence.⁴⁶ In *Sattazahn*'s case, however, the trial judge, pursuant to Pennsylvania law, had imposed a life sentence after the jury deadlocked on whether to sentence the defen-

ing "precisely the type of risk of irrationality in sentencing that we have consistently condemned in our Eighth Amendment jurisprudence." *Id.* at 321.

40. 538 U.S. 202 (2003).

41. Antiterrorism & Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 19, 21, 22, 28, 40, 42, 49, and 50 U.S.C.).

42. *Woodford*, 538 U.S. at 205–10.

43. *Id.* at 207–09.

44. *See supra* note 22 and accompanying text.

45. 537 U.S. 101 (2003).

46. *Id.* at 107–08.

dant to death.⁴⁷ Writing for a five-justice majority, Justice Scalia contended that this was a “non-result” that was not the equivalent of an “acquittal” that would have established a legal entitlement to a life sentence.⁴⁸

However, the Court’s greater willingness to rule in favor of capital defendants from 2002 until 2005 was unmistakable. For example, in a 2003 case, *Miller-El v. Cockrell*,⁴⁹ the Court, with only Justice Thomas dissenting, ordered a federal appeals court to grant a habeas hearing to a death-row inmate who made a “substantial showing” that the selection of his jury had been infected by racial prejudice.⁵⁰ After the appellate court again denied the inmate’s claim, the Supreme Court again took his case and reversed the ruling of the appellate court. In *Miller-El v. Dretke*,⁵¹ the Court vacated the conviction and death sentence, stressing that prosecutors had used peremptory challenges to remove ten of eleven eligible black jury panelists from the trial jury and had failed to offer credible race-neutral reasons for doing so.⁵²

It is equally telling that after years of routinely rejecting death penalty appeals based on claims of ineffective assistance of trial counsel,⁵³ the Supreme Court began to take such claims seriously. For example, in *Wiggins*

47. *Id.* at 104–05.

48. *Id.* at 109–10.

49. 537 U.S. 322 (2003).

50. *See id.* at 326–48. The guidelines for preventing purposeful racial discrimination in jury selection were spelled out in *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the equal protection clause of the Fourteenth Amendment does not permit prosecutors to systematically exclude black veniremen from juries and providing that once the defendant makes a prima facie case indicating that race was a factor in the state’s decision to exercise a peremptory challenge, the burden falls on the prosecutor to provide a race-neutral reason for striking the juror).

51. 545 U.S. 231 (2005).

52. *Id.* at 253–66.

53. The Court established the current standard for determining whether a defendant’s conviction or death sentence must be reversed because his attorney’s assistance was so defective as to constitute a violation of the defendant’s Sixth Amendment right to counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). Justice O’Connor’s majority opinion ordained a two-part test:

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 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.

Id. at 687. O’Connor’s opinion stressed repeatedly that appellate courts must be highly deferential to the choices made by defense attorneys and must not jump to the conclusion that an attorney’s actions, omissions, or tactics were deficient or harmful to the client’s case without taking into account all of the circumstances the attorney confronted and doing so “within the wide range of reasonable professional assistance.” *Id.* at 689. Subsequently, the Court rejected ineffective-assistance claims in several prominent capital cases. *See, e.g.,* *Lockhart v. Fretwell*, 506 U.S. 364 (1993); *Burger v. Kemp*, 483 U.S. 776 (1987). This led a number of commentators to argue that *Strickland* is “toothless” and is especially inadequate for measuring attorney competence in capital trials. *See generally* Donald J. Hall, *Effectiveness of Counsel in Death Penalty Cases*, 42 BRANDEIS L.J. 225 (2004) (discussing claims that the *Strickland* standard is poorly suited for evaluating attorney competence in capital cases).

v. Smith,⁵⁴ the Court reversed a federal appellate court's finding that a death-row inmate's trial lawyers had performed competently even though they failed to investigate and inform the sentencing jury of their client's severe childhood abuse.⁵⁵ Justice O'Connor's majority opinion contended that it was clear from the trial record that the performance of the attorneys fell well below minimally acceptable standards and that there was a reasonable possibility that if the jury had been aware of the nature and extent of the mitigating evidence, it would have returned with a different sentence.⁵⁶ In light of all the circumstances, the majority concluded, trial counsel had rendered ineffective assistance of counsel, thereby violating the defendant's Sixth Amendment right to effective assistance of counsel.⁵⁷ Two years later, in *Rompilla v. Beard*,⁵⁸ the Court upheld an ineffective-assistance claim even though defense attorneys had interviewed their capital client, his family, and mental health experts in an effort to uncover mitigating evidence.⁵⁹ A five-to-four majority nevertheless found that defense attorneys had been deficient because they failed to examine their client's prior conviction file—a readily available public document—and the file would have yielded significant mitigating evidence about the defendant's childhood, mental health, and alcoholism.⁶⁰

The death penalty laws of five states were changed as the result of the Supreme Court's decision in *Ring v. Arizona*.⁶¹ In *Ring*, the Court held that the Sixth Amendment's guarantee of the right to a jury trial requires that a jury, not a judge, must make the factual findings—for example, the finding that at least one aggravating factor exists—that subject a murder defendant to the death penalty.⁶² By striking down Arizona's death-sentencing law, under which judges alone decided whether the crime included aggravating factors sufficient to warrant a possible death sentence,

54. 539 U.S. 510 (2003).

55. *Id.* at 510–19.

56. *Id.* at 522–27.

57. *Id.* at 531–38.

58. 545 U.S. 374 (2005).

59. *Id.* at 377–80.

60. *Id.* at 381–93.

61. 536 U.S. 584 (2002).

62. *Id.* at 596–609. The *Ring* Court reasoned that its holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that the Sixth and Fourteenth Amendments require that a jury, not a judge, must make any factual determination that increases the length of a criminal defendant's prison sentence beyond the prescribed statutory minimum, was simply irreconcilable with its earlier decision in *Walton v. Arizona*, 497 U.S. 639 (1990), which upheld the constitutionality of a death penalty statute that required a judge, not a jury, to make the factual finding that a capital crime encapsulated at least one aggravating factor making the defendant eligible for the death penalty. *Ring*, 536 U.S. at 596–609. The Court therefore overruled *Walton*, observing that “[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death.” *Id.* at 609.

the *Ring* holding had the effect of invalidating similar laws in Colorado, Idaho, Montana, and Nebraska.⁶³ *Ring* also raised questions that still have not been clearly resolved about the constitutionality of laws in four other states—Alabama, Delaware, Florida, and Indiana—in which the judge decides between life and death after considering the jury’s recommendation.⁶⁴ In *Schriro v. Summerlin*,⁶⁵ the Court made it clear that *Ring* applies only prospectively, not retroactively, to death-row inmates whose convictions and sentences were final at the time *Ring* was decided. Nevertheless, many legal scholars believe—although there is some debate over the matter—that over the long run, juries will impose fewer death sentences than judges would have imposed in the states where judges will no longer make the factual determinations that can lead to a death sentence.⁶⁶

Two death penalty holdings—the first in 2002 and the second in 2005—changed the legal landscape significantly and can be expected to reduce the number of death sentences imposed in the United States. In *Atkins v. Virginia*,⁶⁷ the Supreme Court held that the Eighth Amendment prohibits the execution of mentally retarded offenders and in *Roper v. Simmons*,⁶⁸ the Court held that the Eighth Amendment prohibits the execution of sixteen- and seventeen-year-old offenders. In *Atkins*, the Court, by a six-to-three vote, overruled its 1989 decision in *Penry v. Lynaugh*.⁶⁹ The *Penry* Court, in an opinion authored by Justice O’Connor, concluded that the Eighth Amendment did not prohibit the execution of mentally retarded offenders. The *Penry* majority stressed that as of 1989 only two states had passed laws exempting the mentally retarded from death sentences.⁷⁰ By 2002, however, as Justice Stevens pointed out in his *Atkins* majority opinion—which was joined by Justice O’Connor as well as by Justices Breyer, Ginsburg, Kennedy, and Souter—the legislative landscape had changed. Between 1989 and 2002, sixteen more states passed laws banning the execution of mentally retarded offenders.⁷¹ This brought the total number of states banning such executions to thirty—the twelve states banning all executions and eighteen of the thirty-eight states with capital punishment laws.

63. Linda Greenhouse, *Justices Say Death Penalty Is Up to Juries, Not Judges*, N.Y. TIMES, June 25, 2002, at A1.

64. *Id.*

65. 542 U.S. 348 (2004).

66. Adam Liptak, *Fewer Death Sentences Likely if Juries Make Ultimate Decision, Experts Say*, N.Y. TIMES, June 25, 2002, at A21.

67. 536 U.S. 304 (2002).

68. 543 U.S. 551 (2005).

69. 492 U.S. 302 (1989).

70. *Id.* at 334.

71. *Atkins*, 536 U.S. at 314–15.

According to the majority, this was enough to establish a national consensus against the execution of mentally retarded offenders.⁷²

The *Atkins* dissenters (Chief Justice Rehnquist, Justice Scalia, and Justice Thomas) criticized the majority for discerning a national consensus against executing mentally retarded offenders in the face of the fact that twenty states retained laws permitting such executions.⁷³ But Justice Stevens claimed that “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”⁷⁴ He added that it is also significant that executions of mentally retarded offenders were rare in most states and that in the years after *Penry*, only five states—Alabama, Texas, Louisiana, South Carolina, and Virginia—executed any offenders known to be mentally retarded.⁷⁵ “The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.”⁷⁶

This new legislative consensus, Justice Stevens added, was supported by a long-established social and professional consensus.⁷⁷ Public opinion polls indicated that the majority of Americans were against executing the mentally retarded.⁷⁸ Respected professional and religious organizations, including the American Psychological Association and the United States Catholic Conference, were opposed to such executions.⁷⁹ The majority also took into account the fact that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”⁸⁰

Justice Stevens also asserted that it was difficult to square the practice of executing the mentally retarded with the *Gregg*-approved goals of retribution and deterrence.⁸¹ The purpose of retribution—making sure that a criminal gets his “just deserts”—cannot be truly achieved by executing people who have a diminished ability to understand the consequences of their actions.⁸² Similarly, the goal of deterrence is not likely to be achieved by threatening to execute people who have impaired abilities to learn from experience and process information about the possibility of execution as a

72. *Id.* at 315–16.

73. *Id.* at 341–48 (Scalia, J., dissenting).

74. *Id.* at 315 (majority opinion).

75. *Id.* at 316 & n.20.

76. *Id.*

77. *Id.* at 316 n.21.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 317–20.

82. *Id.* at 319.

punishment for their conduct.⁸³ Accordingly, the majority concluded that the execution of mentally retarded offenders is little more than the needless and purposeless infliction of suffering and violates the Eighth Amendment's ban on cruel and unusual punishments.⁸⁴

The *Atkins* holding naturally spurred speculation that the Supreme Court would soon reverse another important 1989 decision—its decision in *Stanford v. Kentucky*⁸⁵ to permit executions of sixteen- and seventeen-year-

83. *Id.* at 319–20. Justice Stevens asserted that the case for categorically excluding the mentally retarded from execution is buttressed by evidence that mentally retarded persons are more likely than other suspects to confess to a crime they did not commit and less likely to provide full and meaningful information and support to defense counsel. *Id.* at 320. He added that mentally retarded defendants “are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.” *Id.* at 321.

84. *Id.* at 319–21. The *Atkins* majority cited two definitions of mental retardation—one provided by the American Association of Mental Retardation and one gleaned from the diagnostic manual of the American Psychiatric Association (APA). *Id.* at 308–09 & n.3. The two are not identical, but both stress significantly sub-average intellectual functioning and significant limitations in such skill areas as communication, social skills, home living, and self care. *Id.* Both organizations characterize mental retardation as developing before the age of eighteen, and the APA diagnostic manual adds that “[m]ild” mental retardation is typically used to describe people with an I.Q. level of 50–55 to approximately 70.” *Id.* at 309. The *Atkins* majority, however, declined to endorse one of the two definitions or to offer its own, leaving it to each state to establish its own definition and procedures for determining whether a defendant is, in fact, mentally retarded. *Id.* at 317. The result has been extraordinary confusion, extended trial and appellate hearings, and differences among states to the extent that a defendant judged not to be mentally retarded in one state could very possibly have been judged as mentally retarded by another. See generally Douglas Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. REV. 255 (2003).

85. 492 U.S. 361 (1989). The *Stanford* Court divided on a five-to-four basis. Justice Scalia wrote the plurality opinion and Justice O'Connor wrote a separate concurring opinion explaining that she agreed with the judgment and much of Justice Scalia's opinion, but did not fully support all of his arguments. She nonetheless provided the crucial fifth vote to sustain the constitutionality of executing sixteen- and seventeen-year-old offenders. Justice Scalia pointed out that executing juvenile offenders was not considered to be cruel and was not unusual when the Eighth Amendment was ratified in 1791. *Id.* at 368. Equally important, there was insufficient evidence of a contemporary national consensus against executing juvenile offenders since “[o]f the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders.” *Id.* at 370. In her concurring opinion, Justice O'Connor disputed some of Justice Scalia's arguments including his contention that state laws distinguishing juveniles from adults for noncriminal purposes—driving, drinking, voting and other such laws—were irrelevant to the Court's analysis. *Id.* at 382 (O'Connor, J., concurring). She made it clear, however, that she agreed with the plurality's most compelling point—that the majority of the states that authorize capital punishment permit it to be imposed for crimes committed at the age of 16. *Id.* at 381.

Justice O'Connor also cast the fifth vote one year earlier in *Thompson v. Oklahoma*, 487 U.S. 815 (1988). In *Thompson*, Justice Stevens authored a plurality opinion holding that the execution of offenders who were fifteen or younger at the time of their offense impinges the ban on cruel and unusual punishments. See *id.* at 818–38. Justice O'Connor's *Thompson* concurrence noted that nineteen of the thirty-seven states that then authorized capital punishment had not set a statutory minimum age for imposing it, thus weakening the argument that there was a national consensus against executing fifteen-year-olds. *Id.* at 850–52 (O'Connor, J., concurring). She also expressed doubt that all fifteen-year-olds are incapable of possessing the moral blameworthiness that would justify capital punishment. *Id.* at 853. She explained, however, that “[t]he most salient statistic that bears on this case is that [each of the 18 legislatures] that has expressly set a minimum age for capital punishment has set that age at 16 or above.” *Id.* at 849. Nevertheless, she concluded her opinion by inviting “the people's elected

old offenders. The arguments for excluding juvenile offenders from death eligibility are very similar to the arguments that were offered by the *Atkins* majority.⁸⁶ But the *Atkins* majority pointedly noted that even though *Stanford* and *Penry* were decided on the same day in 1989, only two states subsequently raised the minimum age for imposing the death penalty to eighteen, as compared to the sixteen states that had enacted legislation ending the execution of mentally retarded offenders.⁸⁷ By 2005, however, three more states raised the threshold age for death eligibility to eighteen,⁸⁸ and this was enough to convince the majority of the Court to reverse *Stanford*.

In *Roper v. Simmons*,⁸⁹ five of the six Justices who constituted the *Atkins* majority concluded that the cruel and unusual punishments clause forbids execution for crimes committed by offenders under eighteen years of age. Justice O'Connor joined the majority in *Atkins*, but she dissented in *Roper* for two major reasons. First, she asserted that there had not been enough change in legislative trends to justify overruling *Stanford*.⁹⁰ Second, she reasoned that whereas mentally retarded offenders as a class suffer from major, lifelong impairments that make death an excessive punishment, some seventeen-year-old murderers are mature enough, and blameworthy enough, to deserve the death penalty.⁹¹

The *Roper* majority opinion was authored by Justice Kennedy, who sixteen years earlier joined in Justice Scalia's *Stanford* plurality opinion. Now, joined by Justices Breyer, Ginsburg, Souter, and Stevens, he challenged both O'Connor's *Roper* arguments and the arguments he had em-

representatives" to decide the issue one way or another. *Id.* at 858–59. Her invitation was declined. No state subsequently enacted a law permitting death sentences to be assessed against offenders under the age of sixteen.

86. See, e.g., Kenneth C. Haas, *A Matter of Years: The Juvenile Death Penalty and the United States Supreme Court*, in *JUVENILE JUSTICE SOURCEBOOK: PAST, PRESENT, AND FUTURE* 309–35 (Albert R. Roberts ed., 2004).

87. *Atkins*, 536 U.S. at 315 n.18. The two states that raised the threshold age for death-sentence eligibility were Indiana and Montana. *Id.*

88. The third of the three states did so not by enacting new legislation, but by way of a decision by its highest court. In *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003), the Missouri Supreme Court ruled, contrary to the then existing U.S. Supreme Court precedent of *Stanford v. Kentucky*, that executing offenders under the age of eighteen violated the U.S. Constitution's Eighth Amendment bar on cruel and unusual punishment. The Missouri tribunal cited Kansas and New York as having recently passed laws limiting capital punishment to offenders who were eighteen or older at the time of their crime and stressed that the legal landscape on the question of executing juvenile offenders now was very similar to the legal landscape the *Atkins* Court found sufficient to ascertain a national consensus against executing mentally retarded offenders. *Id.* at 407–09. The court also stressed that, as in *Atkins*, the direction of legislative change was consistent and that juvenile executions had become increasingly rare in the states that still allowed them. *Id.* at 408–10. Most important, the court took the position that its holding should not be based on the state of American law when *Stanford* was decided in 1989, but on the current state of the law and "current—2003—standards of decency." *Id.* at 407.

89. 543 U.S. 551 (2005).

90. *Id.* at 593–98 (O'Connor, J., dissenting).

91. *Id.* at 598–603.

braced in 1989. Justice Kennedy conceded that changes in state laws pertaining to the minimum age for imposing capital punishment had come more slowly than had changes relevant to the issue of executing mentally retarded criminals.⁹² He claimed, however, that the contemporary evidence of a national consensus against executing juveniles was in many respects similar to the evidence relied upon in *Atkins*.⁹³ He also contended that sixteen- and seventeen-year-olds were similar to mentally retarded adults in that they are more vulnerable to negative influences, less likely to be capable of controlling their immediate surroundings, and are in other ways substantially less blameworthy than most adult criminals.⁹⁴

Justice Kennedy's comparison of the legislative landscapes applicable to both *Atkins* and *Roper* showed that one of the key factors used in both cases was in fact identical. By 2002, when *Atkins* was decided, eighteen of the thirty-eight states that authorized capital punishment banned executions of the mentally retarded, and by 2005, when *Roper* was decided, eighteen of the thirty-eight states authorizing capital punishment banned executions of offenders under the age of eighteen.⁹⁵ Thus, *Roper* was analogous to *Atkins* in that "30 states prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach."⁹⁶

The majority acknowledged that the pace of change had been much faster on the issue of executing mentally retarded offenders—from two death penalty states banning such executions in 1989 to eighteen in 2002—than it had been on the issue of executing juvenile offenders—from thirteen death penalty states banning such executions to eighteen in 2005.⁹⁷ The slower rate of abolition, according to Justice Kennedy, was not nearly as important as what was the most significant similarity in both cases—"the consistency of the direction of change."⁹⁸ He added that it would make little sense to permit juvenile executions to continue simply because the wrongfulness of executing juveniles was widely recognized sooner than it was recognized for the mentally retarded.⁹⁹ Justice Kennedy argued that it was also essential to take into account the rarity of executing juveniles even in the twenty states that still allowed it. "Since *Stanford*, six states have executed prisoners for crimes committed as juveniles [and in]

92. *Id.* at 565–67 (majority opinion).

93. *Id.* at 564–65.

94. *Id.* at 568–71.

95. *Id.* at 564.

96. *Id.*

97. *Id.* at 564–65.

98. *Id.* at 565–66.

99. *Id.* at 566–67.

the past 10 years, only three states have done so: Oklahoma, Texas and Virginia.”¹⁰⁰

Justice Kennedy relied heavily upon the kinds of evidence that Justice Scalia’s *Stanford* opinion characterized as irrelevant.¹⁰¹ He emphasized that social science studies indicate that juveniles are more likely to be immature, impetuous, and reckless than are adults.¹⁰² Such studies also disclose that juveniles are much more likely than adults to be influenced by antisocial peer pressure, to have an underdeveloped sense of responsibility, and to lack control of their emotions.¹⁰³ “In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under eighteen years of age from voting, serving on juries, or marrying without parental consent.”¹⁰⁴ This was enough to satisfy the majority that the two major penological justifications for the death penalty—retribution and deterrence—apply to juveniles with considerably less force than to adults.¹⁰⁵

In *Atkins*, Justice Stevens’s majority opinion cited the overwhelming disapproval of the practice of executing mentally retarded offenders “within the world community,” but did so in a brief footnote.¹⁰⁶ By contrast, Justice Kennedy devoted six full paragraphs of the *Roper* majority opinion to international law.¹⁰⁷ It was appropriate for the Court to look to the laws of other nations and international organizations as instructive for interpreting the meaning of the Eighth Amendment, he explained, because “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”¹⁰⁸ Justice Kennedy cited Article 37 of the United Nations Convention on the Rights of the Child as expressly prohibiting capital punishment for crimes committed by juveniles under the age of eighteen and pointedly noted that every nation in the world had ratified it except for the United

100. *Id.* at 564–65.

101. *See Stanford*, 492 U.S. at 374–80 (declaring that laws establishing a minimum age for such activities as drinking alcohol, serving on juries, or voting are irrelevant to the issue of the constitutionality of executing juvenile murderers, as are such indicia as scientific studies of adolescent behavior, public opinion polls, the positions taken by various professional associations, and trends in international law); *id.* at 378 (“The battle must be fought, then, on the field of the Eighth Amendment; and in that struggle socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon. The punishment is either ‘cruel and unusual’ (*i.e.* society has set its face against it) or it is not. The audience for these arguments, in other words, is not this Court but the citizenry of the United States.”).

102. *Roper*, 543 U.S. at 569–70.

103. *Id.*

104. *Id.* at 569.

105. *Id.* at 571–73.

106. *Atkins*, 536 U.S. at 316 n.21.

107. *Roper*, 543 U.S. at 575–79.

108. *Id.* at 578.

States and Somalia.¹⁰⁹ He found it especially compelling that since 1990 only seven nations other than the United States had executed juveniles—Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China—and all of these countries now have renounced the practice, leaving the United States as “alone in a world that has turned its face against the juvenile death penalty.”¹¹⁰

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, responded with a scalding dissent that, unlike Justice O’Connor’s dissenting opinion, took issue with every argument presented by the majority.¹¹¹ Like the *Atkins* dissenters, he criticized the majority for finding a national consensus against imposing the death penalty on seventeen-year-old offenders despite the fact that twenty of the thirty-eight states with death penalty laws still authorized such executions.¹¹² “Words have no meaning if the views of less than fifty percent of death penalty States can constitute a national consensus.”¹¹³ The twelve states with no death penalty, Justice Scalia insisted, should not be part of the calculus for discerning a national consensus against juvenile executions because these states have not had to grapple with the specific issue of whether to exempt juveniles from the death penalty.¹¹⁴ Including these states in the legislative analysis “is rather like including old-order Amishmen in a consumer-preference poll on the electric car.”¹¹⁵ The truth of the matter, as Scalia saw it, was that the majority of states that authorize executions had considered arguments to abolish juvenile executions, but had decided that the best policy was to leave it to state officials—and ultimately to juries—to make the admittedly rare decision, based on the evidence accrued at a fair trial, that a particular seventeen-year-old, with full understanding of what he was doing, committed an especially heinous murder and deserved to die for it.¹¹⁶ He sardonically added that “[t]he attempt by the Court to turn its remarkable minority consensus into a faux majority by counting Amishmen is an act of nomological desperation.”¹¹⁷

The dissenting Justices also chastised the majority for taking the views of “the so-called international community” into account when interpreting the U.S. Constitution.¹¹⁸ Justice Scalia declared that the majority’s notion

109. *Id.* at 576.

110. *Id.* at 577.

111. *See id.* at 607–30 (Scalia, J., dissenting).

112. *Id.* at 608–09.

113. *Id.* at 609.

114. *Id.* at 610–11.

115. *Id.*

116. *See id.* at 611–15.

117. *Id.* at 611.

118. *Id.* at 622.

that American law should be informed by, let alone conform to, the laws of other countries or international bodies should be repudiated, and he accused the majority of citing trends in international law only when doing so supported the personal views of the majority Justices.¹¹⁹ It was revealing, he wrote, that no one in the *Roper* or *Atkins* majorities ever pointed out that the controversial American exclusionary rule, which prohibits the use of illegally seized evidence in criminal cases, has been rejected by every other nation in the world and even by the European Court of Human Rights.¹²⁰ It was even more telling, he added, that none of the majority Justices had ever taken the position that the Court's abortion jurisprudence, making the United States "one of only six countries that allow abortion on demand until the point of viability," should be informed by the international community.¹²¹ "Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent."¹²²

III. ANOTHER REVERSAL OF COURSE

A. *The Changed Composition of the Court*

The tone of the majority and dissenting opinions in *Atkins* and *Roper* displayed a Court that was bitterly divided on death penalty questions. Both holdings reduced the reach of the death penalty and must be considered major victories for opponents of capital punishment. However, the death penalty holdings of the Court's 2005–2006 and 2006–2007 terms indicate that similar victories are unlikely in the near future and that the Court is returning to the death penalty jurisprudence of the 1983 to 2001 period. Abolitionists have succeeded in changing public attitudes toward capital punishment in recent years, and the death penalty is under attack in an increasing number of states.¹²³ But for the immediate future, the more important change is in the composition of the Supreme Court.

From 1994 to 2005, the composition of the Court did not change. In the area of capital punishment law, this more often than not resulted in voting alignments in which Justices Breyer, Ginsburg, Souter, and Stevens found constitutional problems with death penalty laws and in which Chief

119. *Id.* at 622–27.

120. *Id.* at 624–25.

121. *Id.* at 625–26.

122. *Id.* at 608.

123. *See infra* notes 285–326 and accompanying text.

Justice Rehnquist, Justice Scalia, and Justice Thomas found no such problems. This often put Justice O'Connor or Justice Kennedy in the position of a so-called "swing justice" whose fifth vote could tilt the balance in favor of invalidating death penalty laws and reversing death sentences. This pattern began to emerge with greater frequency from 2002 until 2005, most significantly in *Atkins* where O'Connor and Kennedy provided the fifth and sixth votes and in *Roper* where Kennedy provided the fifth vote.

Eleven years was an unusually long time for the same nine Justices to serve on the Supreme Court, and the beginning of change came on July 1, 2005, when Justice O'Connor announced her intention to retire effective upon the confirmation of her successor.¹²⁴ Soon thereafter, President Bush announced the appointment of Judge John Roberts of the U.S. Court of Appeals for the District of Columbia. However, on September 3, before the U.S. Senate could act on the Roberts nomination, Chief Justice Rehnquist passed away after several years of struggling with thyroid cancer and other health problems. This left two vacancies on the Court and the President quickly withdrew his nomination of Roberts to replace O'Connor as an Associate Justice and instead appointed him to succeed Rehnquist as Chief Justice. The Senate easily confirmed Roberts as the new Chief Justice on September 29, 2005. With her successor still to be determined, Justice O'Connor continued to serve well into the Court's 2005–2006 term. On October 31, 2005, President Bush nominated Judge Samuel Alito of the U.S. Court of Appeals for the Third Circuit to replace O'Connor. The Senate confirmed Alito on January 31, 2006, thereby allowing O'Connor to step down.

When the Supreme Court's 2006–2007 term ended on June 28, 2007, it was very clear that the two changes in the Court's composition had yielded a Court that was more ideologically conservative than its predecessor in every area of law including criminal law generally and capital punishment law in particular. So far, Chief Justice Roberts has mirrored the thinking and voting of Chief Justice Rehnquist in capital cases. As a federal appeals judge, Roberts was regarded as moderate-to-conservative on most issues, but his ideological tendencies in criminal cases could not be reliably predicted because he had served on the D.C. Circuit for only two years and that circuit handles relatively few criminal cases.¹²⁵ In speeches and interviews, the new Chief Justice said that he hoped that he could help to

124. The sequence of events beginning with Justice O'Connor's retirement announcement and ending with the confirmation of Justice Alito on January 31, 2006 is chronicled along with behind-the-scene details in JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 185–315 (2007) and JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 240–336 (2007).

125. See, e.g., Jeffrey Rosen, *Roberts's Rules*, *ATLANTIC MONTHLY*, Jan. 1, 2007, at 104.

achieve greater consensus among the Justices in important areas of law and to reduce the number of five-to-four decisions, particularly the ones that produce acrimonious opinion writing.¹²⁶

B. The Supreme Court's 2005–2006 Term Death Penalty Decisions

In the 2005–2006 term, the Court decided relatively few controversial cases in the criminal law area and in other areas of law, and there was an increase in unanimous opinions and a decrease in five-to-four decisions. It is revealing, however, that the new Chief Justice participated in all four of the term's significant, non-unanimous death penalty cases and that three of the four were decided to the detriment of death-row petitioners. A fourth decision, *House v. Bell*,¹²⁷ resulted in a victory for a death-row inmate, but did little to advance the cause of fairness in capital cases. In *House*, the Supreme Court reversed a Sixth Circuit ruling that barred a Tennessee prisoner from pursuing an appeal of his conviction and death sentence. Paul Gregory House had been sentenced to die for the murder of Carolyn Muncey, a neighbor who was found beaten to death approximately 100 yards from the home she shared with her husband.¹²⁸ House appealed to the state courts, alleging jury-instruction errors and arguing that he had received ineffective assistance of counsel at trial.¹²⁹ After the Tennessee courts rejected all of House's appeals and petitions for post-conviction relief, he filed a final state post-conviction petition seeking investigative and/or expert assistance to help him reassert his claims.¹³⁰ The Tennessee Supreme Court, however, ruled that any new claims by House were barred under a state law stipulating that claims not brought in prior post-conviction petitions are presumptively waived.¹³¹

House next sought habeas corpus relief in federal court and this time he cited newly discovered evidence including DNA test results proving that semen found on the victim's nightgown belonged to Mrs. Muncey's husband and not, as claimed by trial prosecutors, to House.¹³² Despite the new evidence, the trial court and the Sixth Circuit, meeting en banc, denied federal habeas review under the rule that federal courts will not consider claims that have been procedurally defaulted under state law unless the petitioner can demonstrate cause for the default and prejudice from the

126. *See id.*

127. 126 S. Ct. 2064 (2006).

128. *Id.* at 2068–72.

129. *Id.* at 2075.

130. *Id.*

131. *Id.*

132. *Id.*

errors asserted in his petition.¹³³ House and his attorneys argued that House's case fell under the miscarriage-of-justice exception to the cause-and-prejudice standard¹³⁴—an exception established by the Supreme Court in *Schlup v. Delo*¹³⁵ that permits a petitioner to pursue an otherwise procedurally defaulted claim if he can show that “it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.”¹³⁶ By an eight-to-seven vote the Sixth Circuit ruled that House's claims were not compelling enough to be considered under the miscarriage-of-justice standard.¹³⁷

House v. Bell gave the Supreme Court an excellent opportunity not only to widen the scope of the *Schlup* miscarriage-of-justice standard but to clear away the confusion that surrounds another possible gateway to federal habeas review in otherwise defaulted capital cases involving claims of innocence. In *Herrera v. Collins*,¹³⁸ Chief Justice Rehnquist authored a puzzling majority opinion that asserted that a death-sentenced prisoner cannot obtain federal habeas relief solely on the ground of newly discovered evidence of “actual innocence” when he has no accompanying claim of a violation of his constitutional rights.¹³⁹ However, in response to the

133. *Id.* at 2075–76. The “cause and prejudice” rule was created by the Supreme Court. *See, e.g., Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Isaac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

134. *House*, 126 S. Ct. at 2075–76.

135. 513 U.S. 298 (1995).

136. *Id.* at 327.

137. *House*, 126 S. Ct. at 2076.

138. 506 U.S. 390 (1993).

139. *Id.* at 398–402 (citing such cases as *Moore v. Dempsey*, 261 U.S. 86, 87–88 (1923)) (“What we have to deal with [in habeas cases] is not the petitioners’ innocence or guilt but solely the question whether their constitutional rights have been preserved”). Chief Justice Rehnquist argued that historically the primary purpose of federal habeas review has been to ensure that lower courts did not violate a criminal defendant’s constitutional rights, not to evaluate new evidence of innocence. *Id.* at 400–01. He also stressed that the historic remedy—and an effective one—for saving factually innocent but wrongfully convicted people from an undeserved punishment is executive clemency. *See id.* at 411–17. “[H]istory is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.” *Id.* at 415. In dissent, Justice Blackmun countered that although clemency proceedings sometimes saved the lives of erroneously convicted defendants, executive clemency, at best, was an ad hoc exercise of authority by governors and other elected officials that was highly fallible and, in fact, had failed to save the lives of a number of factually innocent people. *Id.* at 430 n.1 (Blackmun, J., dissenting).

Five years later, in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the Court ruled on the question of whether death-sentenced prisoners are entitled to any Fifth or Fourteenth Amendment due process protection in the clemency process. The Court held that the procedures followed by Ohio’s Adult Parole Authority in capital cases, though so minimal that neither the prisoner nor his attorney were entitled to testify or to present evidence during the clemency hearing, were sufficient to satisfy the due process clause. *See id.* at 275–88. Chief Justice Rehnquist wrote for the Court, stressing that clemency hearings are the province of the executive branch of government, have not historically been the business of courts, and would seldom, if ever, be appropriate subjects for judicial review. *Id.* at 275–85. He also joined with Justices Scalia, Thomas, and Kennedy in asserting that due process protections are not constitutionally required in capital clemency proceedings. *Id.* at 283–85.

question of whether the execution of a factually innocent person violates the Eighth or Fourteenth Amendments, Rehnquist, without clearly answering the question, wrote:

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.¹⁴⁰

He added that even in such a hypothetical case, “the threshold showing for such an assumed right would necessarily be extraordinarily high.”¹⁴¹

House’s petition for certiorari in *House v. Bell* argued that his newly discovered evidence satisfied both the *Schlup* miscarriage-of-justice standard and the *Herrera* actual innocence standard.¹⁴² Writing for a five-justice majority that included Justices Stevens, Souter, Ginsburg, and Breyer, Justice Kennedy announced that by the narrowest of margins House had met the “stringent showing” required by the miscarriage-of-justice standard.¹⁴³ Justice Kennedy emphasized that “it bears repeating that the *Schlup* standard is demanding and permits review only in the ‘extraordinary’ case.”¹⁴⁴ Justice Kennedy offered a detailed review of the new evidence¹⁴⁵ and concluded that “although the issue is close . . . this is the rare case where—had the jury heard all the conflicting testimony—it is more likely than not that no reasonable juror viewing the record as a whole

Clemency is a privilege, he proclaimed, not a right: “If clemency is granted, [a death-sentenced inmate] obtains a benefit; if it is denied, he is no worse off than he was before.” *Id.* at 285. Justice O’Connor, joined by Justices Souter, Ginsburg, and Breyer, did not go that far, but she agreed that Ohio’s clemency procedures were constitutionally adequate. *Id.* at 288–90 (O’Connor, J., concurring in part and concurring in the judgment). Justice Stevens was the lone dissenter, contending that the Rehnquist opinion would permit clemency procedures to be infected by “the deliberate fabrication of false evidence” and that the O’Connor opinion provided “minimal, perhaps even barely perceptible” procedural safeguards for condemned inmates. *Id.* at 290–91. Justice Blackmun almost certainly would have dissented in *Woodard*, but he resigned from the Court in June 2004, shortly after declaring that he had come to the conclusion that capital punishment simply cannot be administered in a constitutionally acceptable manner and that he would “no longer . . . tinker with the machinery of death.” *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

140. *Herrera*, 506 U.S. at 417.

141. *Id.* In his dissenting opinion, Justice Blackmun argued that there can be no doubt that the Eighth and Fourteenth Amendments prohibit the execution of an innocent person and concluded that “[t]he execution of a person who can show that he is innocent comes perilously close to simple murder.” *Id.* at 446.

142. *House*, 126 S. Ct. at 2075–76.

143. *Id.* at 2068.

144. *Id.* at 2077.

145. *See id.* at 2068–75, 2078–86.

would lack reasonable doubt.”¹⁴⁶ House thus would be allowed to pursue his federal habeas petition.¹⁴⁷

This undoubtedly was good news for House and his attorneys. But Justice Kennedy’s extended analysis of the factual evidence raises more questions than it answers with regard to the scope of the miscarriage-of-justice standard and does little to help other death-sentenced inmates in similar situations. Must the Supreme Court turn itself into a trial jury and plunge into the details of every case in which new evidence is discovered? Capital defendants and the processes of post-conviction justice would be better served by the articulation of a clear set of criteria that would permit capital defendants to pursue otherwise procedurally defaulted appeals whenever new evidence suggests that there is a reasonable possibility that the defendant is innocent.

With respect to the opportunity to clear away the confusion surrounding Chief Justice Rehnquist’s seemingly contradictory assertions in *Herrera v. Collins*, the *House* majority succeeded only in adding to the confusion. Justice Kennedy contended that the *Herrera* decision merely “assumed without deciding” that a death-sentenced petitioner has a substantive right under the Eighth Amendment to seek federal habeas relief when he makes a “truly persuasive” demonstration of innocence after all state avenues to his claim have been closed.¹⁴⁸ The question of whether such a right truly exists, however, remains unresolved because *Herrera*’s factual claims were far from credible.¹⁴⁹ Justice Kennedy conceded that *House*’s claims were much stronger than those asserted by *Herrera*—strong enough, in fact, to satisfy the procedural gateway to federal habeas review established by *Schlup v. Delo*.¹⁵⁰ Nevertheless, *House*’s claims, in the majority’s view, were not quite strong enough to convince the Court to decide whether there actually is a *Herrera* right to seek federal relief for petitioners who have defaulted their state claims but have made a “truly persuasive” case of innocence.¹⁵¹ Justice Kennedy concluded that “whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it.”¹⁵² Thus, over a decade after *Herrera*, the Supreme Court has failed to make it clear whether the Eighth Amendment prohibits the execution of innocent people, whether federal courts can hear an otherwise procedurally defaulted claim of actual innocence based on

146. *Id.* at 2086.

147. *Id.* at 2087.

148. *Id.* at 2086.

149. *Id.* at 2086–87.

150. *Id.* at 2087.

151. *Id.*

152. *Id.*

newly discovered evidence, and, if so, what standards are to be used to determine whether a claim of innocence is “truly persuasive.”

The *House* decision exemplifies a pattern of jurisprudence that has become increasingly evident since the beginning of the Court’s 2005–2006 term, the first under the stewardship of Chief Justice Roberts. When capital defendants are on the winning side, the majority opinion is mired in factual analysis and is narrowly fashioned so as to apply only to the instant petitioner. The Court refuses to clarify murky standards or to broaden existing criteria, even marginally, in a way that would ensure due process and fundamental fairness in capital trials and remove procedural obstacles to full and fair appellate review of capital convictions and sentences.

More often than not, moreover, death-row petitioners have found themselves on the losing side in significant cases involving interpretation of constitutional, statutory, and procedural guidelines. Justice Alito had not yet been confirmed when the *House* oral arguments were held and he did not participate in the decision. It is noteworthy, however, that Chief Justice Roberts, joined by Justices Scalia and Thomas, issued an opinion concurring with the majority’s refusal to pursue House’s *Herrera* claim, “assuming such a claim exists,” and dissenting from the finding that the new evidence of innocence was sufficient to permit further federal habeas review.¹⁵³

Three major cases from the Court’s 2005–2006 docket upheld death sentences imposed under procedural rules that clearly tip the scales of justice against capital defendants. In *Brown v. Sanders*,¹⁵⁴ Justice Scalia, joined by Justice O’Connor, serving her last month on the Court, as well as by Chief Justice Roberts and by Justices Thomas and Kennedy, authored the Court’s most expansive decision yet on the issue of upholding death sentences procured, in part, on the basis of unauthorized or invalid aggravating circumstances.¹⁵⁵ *Brown* held that a jury’s consideration of two

153. *See id.* at 2087–96 (Roberts, C.J., concurring in part and dissenting in part).

154. 546 U.S. 212 (2006).

155. Since 1983, the Court generally has held that an appellate court’s finding that one of several aggravating factors cited by the sentencer to justify a death sentence was invalid does not necessarily invalidate the death sentence. In “weighing states,” states that allow sentencing juries to consider only aggravating factors that bear on the defendant’s eligibility for capital punishment in the first place, the jury’s consideration of an invalid eligibility factor requires reversal of a death sentence unless the state’s appellate courts determine the error to be harmless or reweigh the remaining aggravating evidence and find it to outweigh the mitigating evidence. *See, e.g., Parker v. Dugger*, 498 U.S. 308 (1991). In “non-weighing states,” states that permit sentencing juries to consider aggravating factors different from, or in addition to, the eligibility factors used to find the defendant eligible for capital punishment in the first place, the jury’s consideration of an invalid eligibility factor requires reversal of a death sentence if the jury’s consideration of the invalid eligibility factor led it to hear evidence that was not otherwise before the jury or if the reason for the invalidity of the aggravating factor is that it led the jury to draw adverse inferences from constitutionally protected conduct or to consider aggravating evidence that was irrelevant, constitutionally impermissible, or more appropriately viewed as miti-

invalid aggravating factors will not make a death sentence unconstitutional if appellate courts determine that the facts supporting those factors also tend to support at least one valid aggravating factor.¹⁵⁶

In *Oregon v. Guzek*,¹⁵⁷ a case decided after Justice O'Connor's retirement and in which Justice Alito did not participate, the Court vacated an Oregon Supreme Court holding that a capital defendant, as a matter of federal law, should be allowed to present alibi evidence at his upcoming sentencing hearing, even if that evidence was inconsistent with his conviction. Writing for the Court, Justice Breyer disputed the Oregon Supreme Court's interpretation of the U.S. Supreme Court's plurality and concurring opinions in *Franklin v. Lynaugh*.¹⁵⁸ Justice Breyer said that the Oregon court had mischaracterized *Franklin* as permitting a convicted capital defendant to introduce at the sentencing stage evidence intended to cast residual doubt on his guilt.¹⁵⁹ Justice Breyer acknowledged that the *Franklin* Court discussed the question of whether capital defendants might have such a right, but he argued that the Court did not resolve the issue.¹⁶⁰

Moreover, the Court refused to address this issue in *Guzek*'s case.¹⁶¹ Justice Breyer contended that this was because even if capital defendants had the right to offer evidence designed to thwart the imposition of a death sentence based on the jury's lingering doubts about guilt, it would not extend so far as to permit *Guzek* to introduce alibi evidence that he was not present at the crime scene.¹⁶² "The law typically discourages collateral attacks of this kind," and even though capital defendants are entitled under the Eighth Amendment to present mitigating evidence about their character or record or the circumstances of the crime, they are traditionally limited to the question of *how*, not *whether*, the defendant committed the crime.¹⁶³

gating evidence. See, e.g., *Zant v. Stephens*, 462 U.S. 862 (1983). See generally RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 415–29 (3d ed. 2006).

156. *Brown*, 546 U.S. at 219–25. Justice Scalia suggested that the Court would be better served by dropping the weighing/non-weighing distinction and adopting the following 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 the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

Id. at 220 (footnote omitted).

157. 546 U.S. 517 (2006).

158. *Id.* at 525. In *Franklin v. Lynaugh*, 487 U.S. 164 (1988), the Court rejected a death-sentenced petitioner's contention that the trial judge violated his Eighth Amendment right to present all relevant mitigating evidence by refusing to instruct the jurors that any evidence they considered to militate against the death penalty could be enough, in and of itself, to justify voting against the imposition of a death sentence.

159. *Guzek*, 546 U.S. at 525.

160. *Id.*

161. *Id.* at 525–26.

162. *Id.*

163. *Id.* at 526.

It is noteworthy that this decision was unanimous. Not a single Justice pointed out that twenty years earlier, Justice Rehnquist's majority opinion in *Lockhart v. McCree*,¹⁶⁴ a case raising the question of whether the Sixth Amendment requires two juries in capital cases—a jury composed of all eligible jurors for the guilt-adjudication stage and a death-qualified jury for the penalty stage—answered that question in the negative and stressed that one of the benefits of the unitary capital jury is that “the defendant might benefit at the sentencing phase of the trial from the jury’s ‘residual doubts’ about the evidence presented at the guilt phase.”¹⁶⁵ Not surprisingly, Justice Rehnquist’s *Lockhart* argument was not mentioned in Justice Scalia’s *Guzek* concurring opinion, which was joined by Justice Thomas, and lamented Justice Breyer’s failure “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.”¹⁶⁶

Later in the term, Justice Thomas, joined by the newly appointed Justice Alito and by Justices Roberts, Scalia, and Kennedy, wrote the majority opinion in *Kansas v. Marsh*,¹⁶⁷ holding that a Kansas law that requires the

164. 476 U.S. 162 (1986). At issue in *Lockhart* was the constitutionality of “death qualification”—the removal for cause, prior to the guilt-adjudication stage of a capital trial, of all prospective jurors whose opposition to capital punishment is strong enough to prevent or substantially impair their willingness to impose the death sentence at the penalty stage of the trial. *Id.* at 165–67. *McCree*’s attorneys presented numerous social-science studies showing that death-qualified juries are more likely to convict defendants in the guilt-adjudication stage than are juries on which death penalty opponents are permitted to serve. *Id.* at 167–73. They argued that the scientific evidence proved that death qualification produces capital juries that are more “conviction prone” than are ordinary petit juries that decide between guilt and innocence in non-capital trials, and that capital defendants therefore are deprived of their Sixth Amendment rights to trial by an impartial jury and to trial before a jury drawn from a fair cross-section of the community. *Id.* The remedy would be two juries in capital cases—one for the guilt-adjudication stage from which potential jurors with qualms about capital punishment have not been excluded for that reason alone and a second, death-qualified, jury that could fairly evaluate the prosecutor’s arguments for imposing the death penalty as well as defense counsel’s arguments against imposing it. *See id.* at 198–206 (Marshall, J., dissenting). Justice Rehnquist’s majority opinion assumed for the purpose of reaching the constitutional issues that the studies were methodologically valid and established that death-qualified juries were more conviction prone than were ordinary trial juries. *Id.* at 173. The majority nevertheless repudiated both Sixth Amendment arguments, stressing that “exactly the same 12 individuals could have ended up on [McCree’s] jury through the ‘luck of the draw,’ without in any way violating the constitutional guarantee of impartiality” and that the Court’s prior cases on the impermissible exclusion of jurors applied only to jurors excluded on the basis of some immutable characteristic, such as race, ethnicity, or gender—not to people who are excluded “on the basis of an attribute that is within the individual’s control.” *Id.* at 176–78. *See generally* Phoebe C. Ellsworth, *Unpleasant Facts: The Supreme Court’s Response to Empirical Research on Capital Punishment*, in *CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES* 177–211 (Kenneth C. Haas & James A. Inciardi eds., 1988).

165. *Lockhart*, 476 U.S. at 181.

166. *Guzek*, 546 U.S. at 528 (Scalia, J., concurring).

167. 126 S. Ct. 2516 (2006). Justice Alito’s first written opinion was announced on May 1, 2006 in a death penalty case that precipitated no conflict among the Justices. In *Holmes v. South Carolina*, 547 U.S. 319 (2006), Justice Alito authored a brief unanimous opinion ordering a new trial for a death-row

jury to return a death sentence when the jury found the aggravating and mitigating factors to be *equally* balanced did not violate the Eighth Amendment.¹⁶⁸ Although this law clearly had a mandatory element,¹⁶⁹ the majority reasoned that it was not a *Woodson*-type full-fledged mandatory punishment law because it satisfied the constitutional mandates of *Furman* and *Gregg* by giving the jury the discretion to consider and weigh the significance of relevant mitigating evidence.¹⁷⁰ Justices Breyer, Ginsburg, Stevens, and Souter joined in dissent, with Justice Souter arguing that the constitutional provision against cruel and unusual punishment should be understood to disallow a “doubtful” death sentence when aggravating and mitigating factors are of equal weight, especially in light of recent years in which we have seen “repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests.”¹⁷¹

C. The Supreme Court’s 2006–2007 Term Death Penalty Decisions

The Court’s 2006–2007 term saw a continuation of the pattern by which the most important death penalty cases are decided in favor of the state and against petitioning prisoners, with Justices Roberts, Alito, Scalia, Thomas, and Kennedy prevailing over Justices Breyer, Ginsburg, Stevens, and Souter. That Chief Justice Roberts has been consistently voting to uphold death penalty laws may be somewhat surprising to some Court-watchers, but Justice Alito’s consistently pro-capital punishment positions so far have surprised no one. As a judge on the U.S. Court of Appeals for the Third Circuit, Alito earned a reputation as a reliably conservative voice and, as was widely reported, some attorneys jokingly referred to him as “Scalito.”¹⁷² During his Senate confirmation hearings, Alito’s supporters denied that Alito would be “Scalia’s clone,” and he was confirmed by a fifty-eight to forty-two vote.¹⁷³ It would be simplistic to claim that Alito sees law and his role as a Justice in the same way as Scalia or any other Justice, past or present. But Alito overwhelmingly voted against criminal

inmate who was not permitted to present exculpatory evidence that another man committed the crime because of a South Carolina law that bars such evidence when the state has introduced strong forensic evidence of the defendant’s guilt. *See id.* at 321–31. All nine Justices agreed that the rule was arbitrary and irrational and violated the defendant’s due process right to present a meaningful defense. *See id.* at 325–31.

168. *See Marsh*, 126 S. Ct. at 2520–29.

169. *See supra* notes 30–33 and accompanying text.

170. *Marsh*, 126 S. Ct. at 2524–26.

171. *Id.* at 2544 (Souter, J., dissenting).

172. *See GREENBURG, supra* note 124 at 290–97.

173. TOOBIN, *supra* note 124 at 315–16.

defendants as a federal judge,¹⁷⁴ and his pro-capital punishment votes proved critical during the 2006–2007 term. There is little doubt that he will vote to uphold death penalty laws more consistently than did Justice O'Connor.

The Court's death penalty jurisprudence in the 2006–2007 term suggests that there will be few, if any, *Atkins*- or *Roper*-like holdings over the next several years. Nine death penalty holdings were announced and eight were decided by a vote of five-to-four. Justice Kennedy was the "swing" vote in each of these cases, joining Justices Breyer, Ginsburg, Stevens, and Souter in four decisions in favor of death-row litigants and joining Chief Justice Roberts and Justices Alito, Scalia, and Thomas in four decisions that rejected constitutional challenges to death penalty laws or procedures. The latter decisions, however, involved especially critical questions about the fairness of trial and appellate death penalty procedures, and the outcomes demonstrate a greater willingness than was seen in the 2002–2005 period to side with prosecutors and to overlook errors by defense attorneys in capital cases. The Court's 2006–2007 term death penalty jurisprudence also points to the pivotal role that Justice Kennedy now plays as well as to the difference that Justice Alito's presence on the Court will make in capital cases (and in many other areas of law) in the years to come.

The only case, strictly speaking, that was not decided by a five-to-four vote was *Roper v. Weaver*.¹⁷⁵ Even though a five-justice majority simply dismissed the case without deciding its merits, the dismissal provoked disagreement from Chief Justice Roberts and a strongly worded dissent from Justices Scalia, Thomas, and Alito. The question was whether a federal court of appeals had exceeded its authority under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) when it invalidated a death sentence on the ground that the prosecutor's closing argument was unfairly inflammatory.

The AEDPA bars federal habeas courts from reversing state criminal convictions or sentences absent a finding that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."¹⁷⁶ This inherently vague admonition has proved troublesome for federal courts. The line between "contrary to" and "unreasonable application of" is blurry, and the statute provides no guidance with regard to the level of specificity by which to judge whether Supreme Court interpreta-

174. See, e.g., Charles Lane, *Privacy Ruling Likely Will Hinge on Alito*, WASH. POST, May 19, 2006, at A11.

175. 127 S. Ct. 2022 (2007).

176. 28 U.S.C. § 2254(d)(1).

tions of federal law are “clearly established.”¹⁷⁷ Since 2000, however, the Supreme Court generally has taken the position that an incorrect application of state law is not necessarily an “unreasonable” application of “clearly established” federal law and that clearly established federal law refers to “the holdings, as opposed to the dicta, of this Court’s decisions . . .”¹⁷⁸

In *Carey v. Musladin*,¹⁷⁹ for example, the Court vacated a Ninth Circuit panel’s reversal of a California Court of Appeals ruling that a criminal defendant’s Sixth Amendment right to a fair trial was not violated when a judge, presiding over a murder trial, permitted an alleged murder victim’s family members to sit in the front row of the courtroom spectator’s gallery while wearing buttons displaying the alleged victim’s picture.¹⁸⁰ Writing for a unanimous Court, Justice Thomas acknowledged that criminal defendants have a clearly established right to a fair trial and that it was not unreasonable for the Ninth Circuit to conclude that in this instance the wearing of the buttons was so prejudicial that it violated the defendant’s fair-trial rights.¹⁸¹ However, even though the Supreme Court has upheld the constitutional right to a fair trial many times, the Court has never decided a case raising the specific question of whether “such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial.”¹⁸² Thus, the federal appeals court erred by finding that permitting the spectators to wear the buttons was contrary to clearly established federal law, and the state rulings denying the defendant’s claim and upholding his conviction must prevail.¹⁸³

In *Roper v. Weaver*, Missouri prosecutors argued that an Eighth Circuit panel had committed a similar error by ruling that the Missouri Supreme Court had erroneously applied clearly established federal law when it upheld a death sentence despite inflammatory and improper statements made by the prosecutor in his sentencing-stage closing argument.¹⁸⁴ The state court found that the prosecutor’s comments were not so outrageous and prejudicial that any reasonable trial judge would have declared a mistrial on due process grounds.¹⁸⁵ The federal court disagreed, citing several specific types of prosecutorial statements including the prosecutor’s claim that executing the defendant was necessary to win the “war on drugs,” an anal-

177. See *Williams v. Taylor*, 529 U.S. 362, 374–90 (2000).

178. *Id.* at 412 (O’Connor, J., concurring).

179. 127 S. Ct. 649 (2006).

180. *Id.* at 651–53.

181. *Id.* at 653–54.

182. *Id.* at 653.

183. *Id.* at 654.

184. *Roper*, 127 S. Ct. at 2023–24.

185. See *State v. Weaver*, 912 S.W.2d 499 (Mo. 1995).

ogy liking the role of a juror to the role of a soldier who must do his or her duty and have the courage to kill, and an emotional appeal to the jury to “kill [the defendant] now.”¹⁸⁶ Such statements, the court declared, violate longstanding Supreme Court admonitions against closing statements that offend the principle of due process as well as Eighth Amendment precedents that require capital sentencing to be an individualized decision based on the character of the defendant and the particular circumstances of the crime.¹⁸⁷

The state countered by asking the Supreme Court to find that the federal tribunal exceeded its authority under the AEDPA in that the prosecutor’s statements were factually unique and never had been precisely addressed in any of the Supreme Court’s decisions on the constitutional boundaries of prosecutors’ closing arguments.¹⁸⁸ The Supreme Court, however, found that the state’s petition for review was improvidently granted and dismissed the case, thus leaving intact the Eighth Circuit’s reversal of the death sentence.¹⁸⁹ After examining the procedural history of the case, Justices Breyer, Ginsburg, Stevens, Souter, and Kennedy joined in a brief per curiam opinion that took note of the fact that Weaver actually filed his petition for habeas corpus before the AEDPA took effect and it reached the court of appeals after AEDPA’s effective date only because the trial court had erroneously dismissed it as premature.¹⁹⁰ Because two other capital cases filed in the same jurisdiction had raised the same issue—unduly inflammatory closing statements by prosecutors—and had been correctly dismissed as pre-AEDPA cases, the majority believed that it would be unfair to decide Weaver’s case under the stringent standards of the AEDPA.¹⁹¹ A dismissal was necessary, the majority explained “to prevent these three virtually identically situated litigants from being treated in a needlessly disparate manner.”¹⁹²

Chief Justice Roberts responded with a cryptic, one-sentence concurrence noting that while he was willing to go along with the dismissal, he did not agree with all of the reasons given by the majority.¹⁹³ By contrast, Justice Scalia, joined by Justices Thomas and Alito, characterized the majority’s action as having “no justification,” “quite wrong,” “wasteful,” and “particularly perverse.”¹⁹⁴ The error made by the trial judge, he argued,

186. See *Weaver v. Bowersox*, 438 F.3d 832, 835–37 (8th Cir. 2006).

187. *Id.* at 839–42.

188. *Roper*, 127 S. Ct. at 2022–23.

189. *Id.* at 2022–24.

190. *Id.*

191. *Id.*

192. *Id.* at 2024.

193. *Id.* (Roberts, J., concurring).

194. *Id.* at 2024–26 (Scalia, J., dissenting).

“does not affect the *legal* conclusion that AEDPA applies to [this case],”¹⁹⁵ and the result was that a “grossly erroneous” interpretation of the AEDPA that works to the disadvantage of prosecutors remains in effect.¹⁹⁶

The four cases from the 2006–2007 term that resulted in fully decided victories for death-row inmates came from Texas, and three were announced on the same day, April 25, 2007. *Abdul-Kabir v. Quarterman*,¹⁹⁷ *Brewer v. Quarterman*,¹⁹⁸ and *Smith v. Texas*¹⁹⁹ dealt with an idiosyncratic aspect of Texas death penalty law that is no longer in effect. In 1989, the Supreme Court ruled that the jury instructions then used in Texas capital cases were constitutionally deficient because they could not ensure that jurors would give full consideration to a defendant’s mitigating evidence.²⁰⁰ Jurors had been told to address only three questions—whether the murder was deliberate, whether the defendant was likely to commit future acts of violence, and whether the defendant’s conduct in killing the victim was unreasonable in response to the provocation, if any, by the victim—and if all three answers were “yes,” a death sentence was automatic.²⁰¹ The Texas legislature in 1991 addressed the problem by instructing judges to tell jurors to take “all of the evidence” into consideration,²⁰² but in the intervening two-year period, many judges either took no corrective measures or measures that the Supreme Court eventually found to be inadequate.²⁰³

Abdul-Katir, Brewer, and Smith were tried and sentenced to death during this period and appealed their death sentences. However, the U.S. Court of Appeals for the Fifth Circuit refused to grant habeas corpus hearings to Abdul-Kabir or to Brewer on the ground that the law pertaining to proper jury instructions in Texas was muddled and confusing at the time of their trials and thus their death sentences were not obtained on the basis of “an unreasonable application of clearly established federal law” as required by the AEDPA.²⁰⁴ Smith’s appeals were rejected by the Texas Court of

195. *Id.* at 2024.

196. *Id.* at 2027.

197. 127 S. Ct. 1654 (2007).

198. 127 S. Ct. 1706 (2007).

199. 127 S. Ct. 1686 (2007).

200. *See Penry v. Lynaugh*, 492 U.S. 302, 315–28 (1989).

201. *See id.* at 322–26.

202. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(1) (Vernon 2006).

203. *See Penry v. Johnson*, 532 U.S. 782 (2001) (holding that a jury must be adequately given the opportunity to give effect to mitigating evidence and rejecting as inadequate the Texas supplemental “nullification instruction” that directed jurors to consider mitigating evidence, but permitted jurors to do so only by somehow negating or ignoring what may have been their death-sentence-supportive affirmative responses to statutorily required special questions about the defendant’s mens rea and his future dangerousness). The Supreme Court reiterated this holding in *Smith v. Texas*, 543 U.S. 37 (2004) (per curiam), *aff’d on other grounds*, 127 S. Ct. 1686 (2007).

204. *Abdul-Kabir*, 127 S. Ct. at 1662–64; *Brewer*, 127 S. Ct. at 1709–11.

Criminal Appeals on the ground that there was little likelihood that the jury had failed to consider the mitigating evidence and thus the inadequate jury instructions amounted to a “harmless error” that was not subject to state post-conviction review.²⁰⁵

In all three cases, the majority held that the lower courts had misconstrued longstanding, well-established, and clearly articulated Supreme Court decisions and had misapplied the procedural rules invoked to uphold the death sentences. Justice Stevens wrote for the Court in *Abdul-Kabir* and in *Brewer*, and he rebuked the Fifth Circuit for “ignoring the fundamental principles established by our most relevant precedents,”²⁰⁶ and for failing to “heed the warnings that have repeatedly issued from this Court” that the jury must be allowed to fully consider all relevant mitigating evidence “in its calculus of deciding whether a defendant is truly deserving of death.”²⁰⁷ Justice Kennedy authored the majority opinion in *Smith v. Texas*, explaining that he agreed with the other majority Justices that the Texas court erred in finding that it was unlikely that Smith’s jury had not considered the mitigating evidence and that the inadequate jury instructions could not be considered to be harmless.²⁰⁸ The dissenting Justices in these cases expressed strong disagreement with the majority’s approach, with Chief Justice Roberts accusing the majority of taking an “utterly revisionist” view of the Court’s mitigating-factors jurisprudence and giving the Court “far too much credit in claiming that our sharply divided, ebbing and flowing decisions in this area [of law] gave rise to ‘clearly established’ federal law.”²⁰⁹

Abdul-Kabir, *Brewer*, and *Smith* cannot realistically be regarded as major victories for those who are opposed to capital punishment or for those, pro- or con-capital punishment, who are concerned that capital punishment is not always imposed in a fair, reliable, and constitutionally appropriate manner. It can only be worrisome and disconcerting that the Court reaffirmed only by the narrowest of margins jury-instruction principles that it has consistently and clearly articulated since 1989.²¹⁰

Late in the term, the Court announced its decision in a case that was closely watched by death penalty foes. In *Panetti v. Quarterman*,²¹¹ the Court forestalled the execution of a mentally ill inmate in Texas. However, the holding did not go nearly as far as opponents of capital punish-

205. *Smith*, 127 S. Ct. at 1694–96.

206. *Abdul-Kabir*, 127 S. Ct. at 1671.

207. *Brewer*, 127 S. Ct. at 1714.

208. *Smith*, 127 S. Ct. at 1697–99.

209. *Brewer*, 127 S. Ct. at 1715 (Roberts, C.J., dissenting).

210. See *supra* notes 200–203 and accompanying text.

211. 127 S. Ct. 2842 (2007).

ment had hoped. In 1986, the Court in *Ford v. Wainwright*²¹² held that the Eighth Amendment does not permit the execution of prisoners who are insane at the time of their pending execution and that such inmates cannot be executed unless and until their sanity is restored.²¹³ However, the standard to be used in determining whether an inmate suffers from mental illness to a sufficient degree to warrant postponing his execution was left vague and was not laid out beyond Justice Powell's concurring opinion that "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."²¹⁴

Critics of capital punishment hoped that the *Panetti* case would lead to a clear definition of insanity that would block executions when there was evidence of substantial mental illness, even in cases where the inmate seems to comprehend the reality of his death sentence. But, writing for the majority, Justice Kennedy declined to define a new standard for determining a prisoner's competency to be executed. He found, however, that the Texas courts and the Fifth Circuit employed an overly restrictive standard in determining that Scott Panetti was sane enough to execute. Panetti had been found to be a schizophrenic by doctors both before and after his 1995 trial for killing his wife's parents.²¹⁵ Court-ordered psychiatric evaluations disclosed that Panetti suffered from "a fragmented personality, delusions, and hallucinations," and evaluations done after his trial indicated that his condition had only worsened.²¹⁶ Nevertheless, in response to Panetti's petition to postpone his scheduled execution, court-appointed experts in 2004 concluded that he "knows that he is to be executed, and that his execution will result in his death."²¹⁷ The Texas courts and the Fifth Circuit subsequently ruled that Panetti had a minimal understanding of the fact of his impending execution and the reason for it and that that was enough to go forward with the execution.²¹⁸

The *Panetti* majority rejected the standard used by the lower courts as too restrictive to satisfy the standard required by *Ford v. Wainwright*. Justice Kennedy conceded that *Ford* "did not set forth a precise standard for

212. 477 U.S. 399 (1986). For a well-researched history of the compelling but in some ways all too common circumstances surrounding the case of Florida death-row inmate Alvin Ford, see KENT S. MILLER & MICHAEL L. RADELET, EXECUTING THE MENTALLY ILL: THE CRIMINAL JUSTICE SYSTEM AND THE CASE OF ALVIN FORD (1993).

213. *Ford*, 477 U.S. at 401–18.

214. *Id.* at 422 (Powell, J., concurring).

215. *Panetti*, 127 S. Ct. at 2848–49.

216. *Id.* at 2848.

217. *Id.* at 2851.

218. *Id.* at 2851–52, 2859–60.

competency.”²¹⁹ Nevertheless, the minimal standard employed by the Fifth Circuit—whether a prisoner is aware “that he is going to be executed and why he is going to be executed”—was too simplistic in that it did not allow decision makers to consider the evidence that Panetti “suffers from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced.”²²⁰ “Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose.”²²¹

Declaring that the records in Panetti’s case were not informative enough to permit the majority to articulate a clear standard for determining competency for execution, Justice Kennedy remanded the case to the federal trial court for further proceedings consistent with the Court’s opinion.²²² Justice Thomas wrote for the dissenting Justices and argued that the majority had erred procedurally and that under the AEDPA and its own precedents, the Court should not have accepted Panetti’s case for review.²²³ But having done so, according to Justice Thomas, the majority succeeded only in misconstruing *Ford* and producing “a half-baked holding that leaves the details of the insanity standard for the District Court to work out.”²²⁴

The four cases in which the Court voted to uphold state laws and procedures that led to death sentences, like the four Texas cases, confirm that the Justices are bitterly divided on death penalty issues. These decisions also indicate that in the cases that matter the most, Justice Kennedy is likely to join with the four Justices who consistently vote to endorse death sentences. Indeed, in the first death penalty case to be decided in the 2006–2007 term—*Ayers v. Belmontes*²²⁵—Justice Kennedy delivered the majority opinion upholding a death sentence imposed by confused jurors who were told by the prosecutor to ignore constitutionally relevant mitigating evidence. In *Belmontes*, the Court considered whether California’s death-sentencing scheme had misled a capital-sentencing jury into believing that they were not permitted to consider “forward-looking” mitigating evidence introduced by the defendant.²²⁶ The Supreme Court has made it clear that mitigating evidence of a defendant’s good behavior in prison and

219. *Id.* at 2860.

220. *Id.* at 2860–62.

221. *Id.* at 2862.

222. *Id.* at 2862–63.

223. *See id.* at 2863–74 (Thomas, J., dissenting).

224. *Id.* at 2873.

225. 127 S. Ct. 469 (2006).

226. *Id.* at 472–73.

the likelihood that he will be non-violent and make positive contributions if sentenced to life imprisonment must be considered by a capital jury.²²⁷ California's death penalty law, however, asks capital jurors to consider a set of general "special factors" rather than circumstances that are specifically labeled as "aggravating" or "mitigating," and this has led to concerns that the inherent vagueness of the special circumstances often befuddles jurors, leading them to ignore pertinent mitigating evidence.²²⁸

Belmonte's attorneys complained that none of the special circumstances made it clear to the jurors that they were to take his prior good prison behavior and his religious beliefs into account.²²⁹ They also argued that one of the factors that the jury was asked to consider—"any other circumstance which extenuated the gravity of the crime even though it is not a legal excuse for the crime"—increased the likelihood that jurors would think that they could not consider the evidence showing that Belmonte would lead a constructive life if incarcerated rather than executed.²³⁰ In his majority opinion, Justice Kennedy conceded that the future-prison-conduct evidence was central to the defense's case against a death sentence.²³¹ Nevertheless, based on a review of the trial record, the majority concluded that it was "implausible" that the jurors would have thought that they were foreclosed from considering the mitigating evidence.²³² According to Justice Kennedy, any harm to the defense's case was mitigated because the trial judge told the jury to consider "all of the evidence."²³³ Since this admonition presumably included the forward-looking evidence, there was no reason to reverse the death sentence.²³⁴

Justice Stevens wrote for the dissenting Justices and reached a very different conclusion after examining the trial record. He stressed that the prosecutor told the jurors that he doubted that they should consider the evidence of the defendant's religious experiences at all; that the trial judge's instructions, taken as a whole, would have led a reasonable juror to think that he could not consider the prison-conduct evidence under the "gravity of the crime" factor; and that during deliberations the jurors asked numerous questions about this evidence, none of which the judge answered

227. See *Skipper v. South Carolina*, 476 U.S. 1 (1986) (holding that the Eighth Amendment requires the admission of mitigating evidence that a capital defendant has behaved well when in prison and can be expected to continue to do so if sentenced to lengthy imprisonment rather than to death).

228. See *Belmonte*, 127 S. Ct. at 473–75.

229. *Id.* at 472–73.

230. See *id.* at 473–77.

231. *Id.* at 476.

232. *Id.* at 477–78.

233. *Id.* at 477–79.

234. *Id.* at 478–80.

in a way that would eliminate “their obvious confusion.”²³⁵ “I simply cannot believe that the jurors took it upon themselves to consider testimony they were all but told they were forbidden from considering.”²³⁶ At the very least, he concluded, the jurors were confused as to whether they could take the mitigating evidence into account, and this kind of confusion created “a risk of error sufficient to warrant relief for a man who has spent more than half his life on death row.”²³⁷

In *Lawrence v. Florida*,²³⁸ the Court tackled an important procedural question requiring the Justices again to decide the extent to which the AEDPA circumscribes prisoners’ ability to bring a federal habeas corpus petition challenging their convictions or death sentences. The AEDPA established a one-year deadline for state prisoners to file a federal habeas petition for review of a state judgment,²³⁹ and the one-year period is tolled while the inmate’s state post-conviction appeals are “pending.”²⁴⁰ Lawrence filed a petition against his death sentence 113 days after the Florida Supreme Court ruled against his state appeal, but he claimed that he did so because he and his attorney believed that the tolling period did not begin until his petition for certiorari—his concurrent appeal to the U.S. Supreme Court—had been denied and that his petition for certiorari was still pending when he filed his federal habeas petition.²⁴¹

Writing for the majority, Justice Thomas quoted the applicable provision of the AEDPA: “The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.”²⁴² This language, according to Justice Thomas required a strict interpretation: “Read naturally, the text of the statute must mean that the statute of limitations is tolled only while state courts review the application.”²⁴³ The U.S. Supreme Court, he explained, is a federal court, not a state court, and thus does not participate in the state’s post-conviction procedures.²⁴⁴ The tolling period began when the Florida Supreme Court denied relief, and the fact that Lawrence’s separate certiorari petition was still pending before a *federal* court was irrelevant.²⁴⁵

235. *See id.* at 483–88 (Stevens, J., dissenting).

236. *Id.* at 492.

237. *Id.*

238. 127 S. Ct. 1079 (2007).

239. 28 U.S.C. § 2244(d)(1).

240. *Id.* § 2244(d)(2).

241. *Lawrence*, 127 S. Ct. at 1081–83.

242. *Id.* at 1082 (quoting 28 U.S.C. § 2244(d)(2)).

243. *Id.* at 1083.

244. *Id.*

245. *Id.* at 1083–85.

Lawrence also argued that his lawyer's mistake should entitle him to equitable tolling.²⁴⁶ Justice Thomas, however, expressed concern that accepting this argument could lead to extending the toll-limitations period "for every person whose attorney missed a deadline."²⁴⁷ He added that miscalculations by attorneys are "simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel."²⁴⁸ The federal courts thus were precluded from considering Lawrence's habeas petition to vacate his death sentence.²⁴⁹

Writing for the dissenting Justices, Justice Ginsburg criticized the majority's reading of the AEDPA as unsound and unwarranted.²⁵⁰ Petitions to the U.S. Supreme Court for certiorari, she stressed, "do not exist in a vacuum."²⁵¹ They arise from suits filed in lower courts and "[w]hen we are asked to review a state court's denial of habeas relief, we consider an application for that relief—not an application for federal habeas relief."²⁵² She concluded that the majority's unduly narrow interpretation of the tolling provision was contrary to the intention of Congress and unfairly terminates the tolling process before the Supreme Court has the opportunity to consider the merits of a prisoner's claims.²⁵³

Another controversial case from the 2006–2007 term adds to the evidence that the current Court is polarized on death penalty questions and will tilt in favor of the state in the most significant cases. Tellingly, in *Uttecht v. Brown*,²⁵⁴ Justice Kennedy delivered the majority opinion. *Uttecht* raised a particularly important question—whether a Washington state trial judge had improperly granted a prosecutor's motion to dismiss a potential capital juror who expressed some qualms about capital punishment, but who also said that he would be willing to impose it in an appropriate case.²⁵⁵ The standard for excusing a capital jury panelist who acknowledges that he is opposed to capital punishment, thus raising concern that he may not be capable of fair consideration of the prosecutor's arguments for

246. *Id.* at 1085.

247. *Id.*

248. *Id.* The Supreme Court has repeatedly held that neither indigent ordinary prisoners nor indigent death-sentenced prisoners are constitutionally entitled to the appointment of counsel to help them prepare petitions for certiorari to the Court or to help them in state post-conviction appeals. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722 (1991); *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Ross v. Moffitt*, 417 U.S. 600 (1974).

249. *Lawrence*, 127 S. Ct. at 1085–86.

250. *Id.* at 1086–90 (Ginsburg, J., dissenting).

251. *Id.* at 1086.

252. *Id.*

253. *Id.* at 1089–90.

254. 127 S. Ct. 2218 (2007).

255. *See id.* at 2222–24.

imposing the death sentence in the penalty phase of the trial, was established in 1985: “[W]hether the juror’s views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”²⁵⁶ In *Uttecht*, the excused juror, during a lengthy voir dire, told the judge that he supported capital punishment, but would not be as inclined to impose it unless the defendant otherwise might go free and kill again.²⁵⁷ When asked whether he could vote for a death sentence if there were no chance of parole, the juror answered: “If I was convinced that was the appropriate measure.”²⁵⁸ Because Washington, like many death penalty states, offers life imprisonment without parole as the alternative to the death penalty, prosecutors argued that the juror’s responses showed that he would automatically vote against the death penalty.²⁵⁹ The trial judge’s decision to grant the request to dismiss the juror was reversed by the U.S. Court of Appeals for the Ninth Circuit, which found that the trial transcript unambiguously showed that the juror was not “substantially impaired” and overturned the death sentence that the trial jury imposed.²⁶⁰

Emphasizing that federal appellate courts owe substantial deference to a state trial judge’s ability to determine the qualifications of a potential juror, Justice Kennedy’s majority opinion accused the Ninth Circuit panel of misreading the trial record and failing to accord the proper deference to the trial judge.²⁶¹ Justice Kennedy pointed out that trial judges are present during the voir dire process and are in a much better position to assess a potential juror’s demeanor and thinking than are appellate courts, which have to rely upon a written trial transcript that cannot capture all of the nuances and human elements of what happens in the courtroom.²⁶² He

256. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). This standard was first articulated in *Adams v. Texas*, 448 U.S. 38, 45 (1980). *Wainwright* resolved a conflict between the *Adams* standard and the standard established in the pre-*Furman* case of *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968) (permitting the exclusion only of “those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant’s guilt”). See also *Lockhart v. McCree*, 476 U.S. 162 (1986); *supra* notes 164–65 and accompanying text. It should be noted that the Supreme Court also has held that the due process clause of the Fourteenth Amendment requires exclusion from a capital jury of any venireman who makes it clear during voir dire that he would automatically vote to impose a death sentence, regardless of the mitigating evidence. *Morgan v. Illinois*, 504 U.S. 719 (1992). *Morgan* prompted an angry dissenting opinion from Justice Scalia, who was joined by Justice Thomas and Chief Justice Rehnquist, and who asserted that the Constitution does not entitle a capital defendant even to identify during voir dire potential jurors who would ignore relevant mitigating evidence and automatically vote for the death penalty. See *id.* at 739–52 (Scalia, J., dissenting).

257. *Uttecht*, 127 S. Ct. at 2226–27.

258. *Id.* at 2227.

259. *Id.*

260. *Id.* at 2227–28.

261. *Id.* at 2228–31.

262. *Id.* at 2224.

added that the majority's review of the transcript showed that the court of appeals was simply wrong and that the transcript revealed no "substantial impairment" on the part of the dismissed juror.²⁶³ Accordingly, the decision to vacate the death sentence was reversed and the case was remanded for further proceedings.²⁶⁴

Justice Stevens wrote on behalf of the four dissenting Justices and minced no words in denouncing the majority's holding. He began by accusing the majority of going much too far in reversing the judgment of the federal court of appeals and extending a "completely unwarranted" level of deference to state trial courts in capital cases.²⁶⁵ It was clear, he added, that the federal appeals court carefully reviewed the transcript, correctly noted that the potential juror repeatedly affirmed in response to the prosecutor's questions that he could impose the death penalty in any situation, and correctly applied the applicable Supreme Court precedents in deciding to reverse the death sentence.²⁶⁶ "Under our precedents, a juror's statement that he would vote to impose a death sentence where there is a possibility that the defendant may reoffend, provided merely as an example of when that penalty might be appropriate, does not constitute a basis for striking a juror for cause."²⁶⁷ The majority, he declared, had redefined the meaning of "substantially impaired" and gotten it "horribly backwards."²⁶⁸ A death sentence should not be upheld, he concluded, when trial judges disqualify potential jurors whose only failing is "to harbor some slight reservation in imposing the most severe of sanctions."²⁶⁹

The death penalty decision that arguably provides the best evidence of the Court's retreat from its 2002–2005 direction—and its likely path for at least the next several years—is *Schriro v. Landrigan*.²⁷⁰ The *Landrigan* case underscores the importance of Justice Alito's presence on the Court. His predecessor, Justice O'Connor, joined five-to-four majorities in the two aforementioned cases—*Wiggins v. Smith* and *Rompilla v. Beard*—in which the Court signaled its willingness to hold defense attorneys to a higher standard than in past cases when evaluating claims of ineffective assistance of counsel brought by death-row inmates.²⁷¹ In *Landrigan*, however, Justice Alito provided the fifth vote to deny an ineffective-

263. *Id.* at 2228–30.

264. *Id.* at 2231.

265. *Id.* at 2239 (Stevens, J. dissenting).

266. *Id.* at 2241–42.

267. *Id.* at 2241.

268. *Id.* at 2243.

269. *Id.* at 2244.

270. 127 S. Ct. 1933 (2007).

271. See *supra* notes 53–60 and accompanying text.

assistance claim that raised issues similar to those in the *Wiggins* and *Rompilla* cases.

Landrigan posed the question of whether a federal district court had properly dismissed an Arizona death-row inmate's habeas petition as so weak as not even to deserve an evidentiary hearing.²⁷² Jeffrey Landrigan alleged that his attorney failed to do a reasonably adequate job of investigating mitigating evidence, including his serious mental illness at the time of his crime and its origins in his turbulent childhood and the violent behavior and drug use of his biological father and other relatives who were not interviewed by the defense.²⁷³ Justice Thomas wrote for the majority and acknowledged that Landrigan's biological father and other relatives were not interviewed.²⁷⁴ Justice Thomas, however, maintained that this lapse should be considered in the context of Landrigan's behavior at his trial.²⁷⁵ He repeatedly interrupted his attorney, told him not to call his birth mother and ex-wife to testify on his behalf, and told the judge: "I think if you want to give me the death penalty, just bring it right on; I'm ready for it."²⁷⁶ After recounting these facts, Justice Thomas abruptly concluded that the district court was correct to deny Landrigan a hearing because the new mitigating evidence Landrigan wanted to introduce was "weak" and "would not have changed the result."²⁷⁷

As he had done in *Uttecht*, Justice Stevens authored a scathing dissenting opinion. He attacked the *Landrigan* majority's decision as "a parsimonious appraisal of a capital defendant's constitutional right to have the sentencing decision reflect meaningful consideration of all relevant mitigating evidence, a begrudging appreciation of the need for a knowing and intelligent waiver of constitutionally protected trial rights, and a cramped reading of the record."²⁷⁸ That record, he asserted, showed that the defense lawyer's investigation of possible mitigating evidence clearly was constitutionally insufficient under the Court's recent precedents.²⁷⁹ Landrigan's bizarre behavior during his trial should not have been taken as a waiver of his rights and should have made the necessity of taking the appropriate steps to gather and present evidence of serious psychological problems all the more evident.²⁸⁰ Instead, significant mitigating evidence that would have shed important light on Landrigan's criminal conduct was unknown

272. *Landrigan*, 127 S. Ct. at 1937.

273. *Id.* at 1937–39.

274. *Id.*

275. *Id.* at 1941–43.

276. *Id.* at 1943.

277. *Id.* at 1944.

278. *Id.* at 1944–45 (Stevens, J., dissenting) (citations omitted).

279. *Id.* at 1945.

280. *Id.* at 1950–52.

at his sentencing.²⁸¹ Accordingly, this was a case that, at the very least, warranted an evidentiary hearing.²⁸² Justice Stevens declared that the majority's decision "can only be explained by its increasingly familiar effort to guard the floodgates of litigation."²⁸³ But, noting that it was already the case that district courts hold evidentiary hearings in only 1.17% of all federal habeas cases, he concluded that "[t]his figure makes it abundantly clear that doing justice does not always cause the heavens to fall."²⁸⁴

IV. THE DEATH PENALTY IN RETREAT: FEWER EXECUTIONS AND GROWING POLITICAL OPPOSITION

Uttecht, *Landrigan*, and most of the Supreme Court's other major death penalty decisions in 2006 and 2007 strengthen the hands of prosecutors and weaken the power of federal courts to grant relief to prisoners who have a constitutional basis for challenging their death sentence or the fairness of their trial. This trend is likely to continue in the 2007–2008 term and for the next several years. However, it is apparent that the political momentum over the past decade has swung against capital punishment. It is telling that the number of death sentences imposed by juries in the United States has declined to its lowest level in decades. From 1986 to 2001, the number of death sentences averaged 280 per year.²⁸⁵ However, the total fell to 169 in 2002 and then began to drop even more, to 153 in 2003, 140 in 2004, 138 in 2005, 115 in 2006, and 110 in 2007.²⁸⁶ This decline almost certainly reflects greater public and juror awareness of persistent problems with the death penalty. Cases in which death-row inmates have been exonerated on the basis of new evidence have been highly publicized in recent years. As of February 15, 2008, 127 inmates in twenty-six states have been released because of compelling evidence of innocence.²⁸⁷ The steady decrease in death sentences also has been attributed to growing concerns among jurors about racial discrimination in capital cases and to improved skills by defense attorneys in making arguments for mitigation.²⁸⁸ Furthermore, some prosecutors have become well aware of the

281. *Id.* at 1952–53.

282. *Id.*

283. *Id.* at 1954.

284. *Id.* at 1954–55.

285. Death Penalty Information Center, <http://www.deathpenaltyinfo.org> (last visited Feb. 15, 2008).

286. *Id.*

287. *Id.*

288. Neil A. Lewis, *Death Sentences Decline, and Experts Offer Reasons*, N.Y. TIMES, Dec. 15, 2006, at A28.

higher costs of prolonged death penalty cases and appeals as compared to life imprisonment without parole.²⁸⁹

Deepening misgivings about capital punishment are underscored by a recent drop in the number of executions carried out each year in the United States. Executions were slow to resume after the *Gregg* decision clarified the legal status of capital punishment in 1976. From 1976 to 1991, the number of executions averaged slightly less than ten per year.²⁹⁰ From 1992 to 2002, the average jumped to sixty per year, with highs of ninety-eight in 1999 and eighty-five in 2000.²⁹¹ Recently, however, a downward trend in executions has emerged, with sixty-five in 2003, fifty-nine in 2004, sixty in 2005, fifty-three in 2006, and forty-two in 2007, the lowest since 1994 when thirty-one executions took place.²⁹²

The precipitous drop in death sentences and executions has been accompanied by a noteworthy, but not overwhelming, decline in public approval of capital punishment. The highest level of support came in 1994 when a Gallup Poll found eighty percent of Americans to support the death penalty.²⁹³ In June 2007, a Gallup Poll showed the support level at sixty-five percent and an August 2007 poll conducted by the Pew Research Center found that sixty-two percent of U.S. adults favor retaining the death penalty for those convicted of murder.²⁹⁴ Research indicates that some of those who endorse capital punishment in the abstract would be willing to reconsider if they could be assured that murderers would be given a sentence of life without parole.²⁹⁵ Nevertheless, with nearly two-thirds of Americans still expressing support for the death penalty, abolition on a national basis clearly is not imminent.

In fact, it is possible that the decreasing number of executions and high public confidence in the efficacy of DNA technology could stabilize, or even bolster, public support for capital punishment by making the American people "much more confident that those receiving their last meals really are guilty of a mortal sin."²⁹⁶ Similarly, the *Atkins* and *Roper* decisions, though welcomed by abolitionists, may actually work to their disad-

289. *Id.*

290. Death Penalty Information Center, *supra* note 285.

291. *Id.*

292. *Id.* Moreover, the vast majority of executions have taken place in southern states. As of February 15, 2008, 931 of the 1099 post-*Gregg* executions (85%) have been carried out in eleven Southern states. Texas alone accounted for 405 executions (37%), followed by Virginia (98), Oklahoma (86), Missouri (66), Florida (64), North Carolina (43), Georgia (40), Alabama (38), South Carolina (37), Arkansas (27), and Louisiana (27). *See id.*

293. *Id.*

294. *Id.*

295. *See, e.g.,* William Bowers, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 LAW & SOC'Y REV. 157 (1993).

296. Gregg Easterbrook, *The Myth of Fingerprints*, NEW REPUBLIC, July 31, 2000, at 22.

vantage in the short run. The exclusion of mentally retarded and juvenile offenders from death penalty eligibility could very well have the effect of “sanitizing” capital punishment, making it more difficult to persuade people that the death penalty is excessively or unfairly imposed.

Regardless of trends in national public opinion polls, political opposition to the death penalty has gained momentum in a growing number of states. For example, in May 2000, the New Hampshire legislature became the first in the nation to vote to abolish capital punishment in the post-*Gregg* era.²⁹⁷ However, the bill was vetoed by Governor Jeanne Shaheen, and the legislature could not muster the two-thirds majority required to override the veto.²⁹⁸ New Hampshire thus retains its capital punishment law. But arguably nothing has changed; the state has not executed anyone since 1939.²⁹⁹

Also in 2000, Illinois became the first death penalty state in the modern era to impose a formal moratorium on executions.³⁰⁰ Former Governor George Ryan imposed the moratorium because of concerns that the Illinois system of capital punishment was plagued by error and caprice.³⁰¹ Since the state reinstated capital punishment in 1977, he pointed out, twelve prisoners were put to death, but thirteen death-row inmates were cleared of murder charges, often only because journalists, students, and professors at Northwestern University unearthed vital exculpatory evidence that state officials had either missed or ignored.³⁰² In 2002, the governor conducted clemency hearings for nearly every death-row inmate in Illinois.³⁰³ The hearings, replete with both the bloody details of gruesome crimes and shocking stories of erroneous convictions, created anguish for the families and friends of everyone involved.³⁰⁴ But in the end, Governor Ryan, declaring that “[o]ur capital system is haunted by the demon of error,” pardoned four more inmates he said he believed to be innocent—bringing the total number of exonerated Illinois death-sentenced inmates to seventeen—and commuted the death sentences of 167 others to life in prison.³⁰⁵ In January 2003, as his final act of office, he emptied his state’s death row.³⁰⁶

297. Pamela Ferdinand, *A Death Penalty Bellwether? N.H. Lawmakers Set to Vote for Repeal, but Governor Vows a Veto*, WASH. POST, May 18, 2000, at A3.

298. *Id.*

299. Death Penalty Information Center, *supra* note 285.

300. Dirk Johnson, *Illinois, Citing Verdict Errors, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1.

301. *Id.*

302. *Id.*

303. Jodi Wilgoren, *After Sweeping Clemency Order, Ex-Governor Ryan Is a Celebrity, but a Solitary One*, N.Y. TIMES, Feb. 7, 2003, at A16.

304. *Id.*

305. *Excerpts from Governor’s Speech on Commutations*, N.Y. TIMES, Jan. 12, 2003, § 1, at 22; Wilgoren, *supra* note 303.

306. *Id.*

Legislators have been considering legislation designed to lessen errors and restore credibility to the capital-sentencing system, but as of February 15, 2008, the moratorium remains in effect.³⁰⁷

In May 2002, the governor of Maryland, Paris Glendening, imposed a moratorium on executions in anticipation of a comprehensive study of the Maryland death-sentencing process.³⁰⁸ The study found that Maryland prosecutors were far more likely to seek the death penalty in cases where black defendants were accused of killing white victims and that geography—the particular county in which a case was prosecuted and the attitudes of prosecutors in that county—was a major factor affecting whether a defendant faced capital charges.³⁰⁹ In 2003, Glendening's successor Robert Ehrlich, rescinded the moratorium.³¹⁰ However, in 2006, Maryland elected a governor, Martin O'Malley, who strongly opposes capital punishment and who in 2007 sought its repeal by the Maryland legislature.³¹¹ In March 2007, legislation to replace the death penalty with life without parole failed by a single vote in a Senate committee.³¹² Meanwhile, Maryland's highest court has ordered a halt to all executions on the ground that the state's lethal-injection procedures have not been properly adopted.³¹³ Governor O'Malley has refused to issue regulations that may have allowed executions to resume, and in a July 2007 interview, he said that he would press the legislature to repeal the death penalty when it reconvenes in 2008.³¹⁴ Thus, Maryland now has a de facto moratorium on executions, and it is possible that it will abolish capital punishment in the next few years.³¹⁵

By far the most important victory yet for opponents of capital punishment occurred on December 17, 2007, when New Jersey Governor Jon Corzine signed a bill to abolish the state's death penalty.³¹⁶ New Jersey thereby became the first state to repeal capital punishment in the post-*Gregg* era. The New Jersey legislature placed a formal moratorium on executions in 2006 and appointed a special commission to study the pros

307. Death Penalty Information Center, *supra* note 285.

308. Jo Becker, *Death Penalty Moratorium in Question*, WASH. POST, Mar. 7, 2003, at B4.

309. *Id.*

310. *Id.*

311. John Wagner & Eric Rich, *O'Malley's Inaction Irks Prosecutors*, WASH. POST, July 8, 2007, at C11.

312. *Id.*

313. *Id.*

314. *Id.*

315. *But see* John Wagner, *Repeal of Md. Death Penalty Still Seems Out of Reach*, WASH. POST, Dec. 26, 2007, at B1.

316. Craig R. McCoy, *N.J. First to Abolish the Death Penalty*, PHILADELPHIA INQUIRER, Dec. 18, 2007, at A1.

and cons of abolition.³¹⁷ In January 2007, the commission, citing the risks of wrongful executions, the exorbitant costs of capital litigation, and the dearth of evidence showing that the death penalty deters murder any more effectively than does life imprisonment, overwhelmingly recommended the elimination of capital punishment.³¹⁸ In May 2007, the New Jersey Senate's judiciary committee approved legislation to replace capital punishment with life without parole and voted to release the measure to the full Senate.³¹⁹ On December 10, 2007, the Senate voted twenty-one to sixteen in favor of the measure³²⁰ and three days later the New Jersey Assembly approved it by a vote of forty-four to thirty-six.³²¹ Before signing the bill, Governor Corzine commuted the death sentences of the eight men on death row to life-without-parole sentences and said that he saw it as his moral duty to end "state-endorsed killing."³²²

Legislative momentum against capital punishment also is on the upsurge in a number of other states. In 2004, the New York Court of Appeals, the state's highest court, declared the existing death penalty law (which was passed in 1995 and under which no one has been executed) to be unconstitutional.³²³ Since then, the New York legislature has rejected every effort to pass a new law.³²⁴ Legislatures in Nebraska, New Mexico, and Montana came close to repealing capital punishment in 2007.³²⁵ Altogether, at least seventeen states currently are considering legislation that would either abolish capital punishment or impose a moratorium on it: Illinois, Maryland, New York, Arizona, Colorado, Connecticut, Kansas, Kentucky, Missouri, Montana, Nebraska, New Hampshire, New Mexico, Oregon, South Dakota, Tennessee, and Washington.³²⁶

V. NEW ISSUES FOR THE U.S. SUPREME COURT

Not all of the political momentum leads in the direction of abolition. Over the past few years, several state legislatures including those of Geor-

317. Ronald Smothers, *New Jersey Moves Closer to Abolishing Death Penalty*, N.Y. TIMES, May 11, 2007, at B4.

318. *Id.*

319. *Id.*

320. Craig R. McCoy, *N.J. Closer to Ending Death Penalty*, PHILADELPHIA INQUIRER, Dec. 11, 2007, at A1.

321. Craig R. McCoy, *N.J. Legislature Approves Abolishing Death Penalty*, PHILADELPHIA INQUIRER, Dec. 14, 2007, at B1.

322. McCoy, *supra* note 316.

323. *See People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004).

324. Death Penalty Information Center, *supra* note 285.

325. *Id.*

326. *Id.*

gia, Missouri, Utah, Virginia, and Texas have been considering measures that would have the effect of expanding the categories of death-eligible offenders.³²⁷ Texas, in fact, recently became the sixth state—joining Louisiana, Georgia, Montana, Oklahoma, and South Carolina—to authorize the death penalty for offenders convicted of the rape of a minor not resulting in murder.³²⁸ Shortly before Texas passed this law, the Louisiana Supreme Court, in *State v. Kennedy*,³²⁹ affirmed the death sentence imposed on a man convicted of the aggravated rape of his eight-year-old stepdaughter. He appealed, in part, on the ground that executing someone for a crime that does not result in death is a grossly disproportionate punishment and therefore violative of the Eighth Amendment's proscription against cruel and unusual punishments.³³⁰ The U.S. Supreme Court granted certiorari on January 4, 2008,³³¹ thus setting the stage for what promises to be the most controversial death penalty case of the 2007–2008 term.

In *Kennedy*, the Louisiana Supreme Court evaluated the constitutionality of a 1995 law permitting capital punishment for the aggravated rape of a child under the age of twelve.³³² The court began by taking a close look at the U.S. Supreme Court's 1977 decision in *Coker v. Georgia* to invalidate on Eighth Amendment grounds the death sentence of a man convicted of raping a woman who survived his attack.³³³ Justice White's *Coker* plurality opinion never precisely answered the question of the constitutionality of capital punishment for those convicted of raping but not killing a child,

327. *Id.*

328. See TEX. PENAL CODE § 12.42(c)(3) (Vernon 2006). For an early assessment of the impact the new Texas statute could have on the constitutionality of Louisiana's child rape law, see Adam M. Gershowitz, *The Death Penalty for Child Rape: Why Texas May Help Louisiana*, JURIST, May 2, 2007, available at <http://jurist.law.pitt.edu/forumy/2007/05/death-penalty-for-child-rape-why-texas.php> (last visited Feb. 15, 2008).

329. *State v. Kennedy*, 957 So. 2d 757 (La. 2007).

330. See Brief of Petitioner, *Kennedy v. Louisiana*, No. 07–343, 2008 WL 466093 (U.S. Feb. 14, 2008).

331. *Kennedy v. Louisiana*, 957 So. 2d 757 (La. 2007), cert. granted, 128 S. Ct. 829 (U.S. Jan. 4, 2008) (No. 07–343).

332. See *Kennedy*, 957 So. 2d at 779. The Louisiana Supreme Court first upheld the constitutionality of the state's 1995 law permitting capital punishment to be imposed for the crime of aggravated rape of a child under the age of twelve in *State v. Wilson*, 685 So. 2d 1063 (La. 1996), cert. denied, *Bethley v. Louisiana*, 520 U.S. 1259 (1997). The U.S. Supreme Court denied certiorari because the appellees in *Wilson* originally filed a motion to quash their indictments on the basis of the law's alleged unconstitutionality and had been "neither convicted of nor sentenced for any crime" and therefore lacked standing to proceed. *Id.* Interestingly, Justice Stevens, joined by Justices Ginsburg and Breyer, took the unusual step of publishing a brief statement emphasizing the well-established principle that the Court's decisions to deny petitions for a writ of certiorari do not "in any sense constitute a ruling on the merits of the case in which the writ is sought." *Id.* For a critical analysis of the Louisiana capital rape law and the state supreme court's *Wilson* decision, see James H.S. Levine, Note, *Creole and Unusual Punishment—A Tenth Anniversary Examination of Louisiana's Capital Rape Statute*, 51 VILL. L. REV. 417 (2006).

333. *Kennedy*, 957 So. 2d at 781.

but the Louisiana Supreme Court stressed that the *Coker* Court referred to the question of the proportionality of executing the rapist of an “adult woman” fourteen times.³³⁴ Accordingly, the state supreme court concluded that *Coker* should be interpreted as clearly prohibiting capital punishment for the rape of an adult woman, but as leaving open the question of the constitutionality of executing those convicted of raping a child or those convicted of other brutal or atrocious non-homicide offenses.³³⁵

The Louisiana Supreme Court next pointed out that even though the U.S. Supreme Court in the period following *Gregg* has not upheld the death sentence for anyone convicted of a crime which did not result in the taking of human life, the Court in both *Atkins v. Virginia* and *Roper v. Simmons* declared that “capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”³³⁶ As the Louisiana justices saw it, child rape is the most heinous and despicable of all non-homicide offenses, and inevitably causes great harm and suffering to the victim.³³⁷ Moreover, adults who rape children, unlike the mentally retarded and juvenile offenders spared the possibility of execution by *Atkins* and *Roper*, cannot always be said to lack full moral blameworthiness for their crimes.³³⁸ Although executing mentally retarded and juvenile offenders arguably does not advance the legitimate purposes of capital punishment, “execution of child rapists will serve the goals of deterrence and retribution just as well as execution of first-degree murderers would.”³³⁹

Perhaps the strongest—and certainly the most intriguing—argument proffered by the Louisiana Supreme Court is the very argument that the *Atkins* and *Roper* majorities found to be so convincing: that when determining whether there is a national consensus that a challenged punishment offends contemporary standards of decency and thereby violates the Eighth Amendment, “it is not so much the number of these States that is significant, but the consistency of the direction of change.”³⁴⁰ The *Roper* majority, for example, found it significant that five states that had permitted the death penalty for juveniles prior to the 1989 *Stanford* holding changed their laws by the time of the *Roper* ruling.³⁴¹ The Louisiana Supreme Court thus found it just as significant that since 1995, when Louisiana

334. *Id.*

335. *Id.*

336. *Id.* at 783 (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005)).

337. *See id.* at 788–89.

338. *See id.*

339. *Id.* at 789.

340. *Id.* at 783 (quoting *Atkins v. Virginia*, 536 U.S. 304, 315 (2002)).

341. *Id.* at 783.

amended its capital punishment statute to authorize the death penalty for the rape of a minor, four more states—Georgia, Montana, Oklahoma, and South Carolina—also addressed this issue and passed similar laws.³⁴² The Louisiana justices acknowledged that these four statutes were somewhat more narrowly drawn than Louisiana's statute in that Georgia requires the victim to be less than ten years old and Montana, Oklahoma, and South Carolina permit a death sentence only when the defendant has a prior conviction for the sexual assault of a child.³⁴³ These differences, however, mattered little; it was more significant that all of the states that changed their laws relative to the issue of permitting death to be imposed in some cases on child rapists moved in the same direction.³⁴⁴ Equally important, the court examined the death penalty laws of the other jurisdictions authorizing capital punishment and found that fourteen states and the federal government do not restrict capital punishment to crimes resulting in the loss of human life.³⁴⁵ In addition to the five states providing for capital punishment in cases of child rape, nine more allow death sentences for such crimes as treason and espionage, as does the federal government.³⁴⁶

The court concluded, however, that the most important evidence of the constitutionality of the child-rape capital punishment law was that five states have enacted such laws in spite of the confusion as to whether *Coker's* prohibition of capital punishment applies to all rape cases or only to cases of adult rape:

[E]ven after the Supreme Court decided in *Coker* that the death penalty for rape of an adult woman was unconstitutional, five states nevertheless have capitalized child rape since then, a number which the Supreme Court held in *Roper* was sufficient to indicate a new consensus regarding society's standards of decency towards the juvenile death penalty. In fact, the trend is more compelling than in *Roper*, given the *Roper* Court's reliance on five states abolishing the death penalty for juveniles after *Stanford* held that the death penalty for juveniles was constitutional. Here, we have five states enacting the death penalty for child rape in spite of *Coker*, which held that the death penalty for rape of an adult was unconsti-

342. *Id.* at 784–85.

343. *Id.*

344. *Id.* at 788.

345. *Id.* at 785–88.

346. *Id.* The state supreme court also observed that four states—Colorado, Idaho, Montana, and South Dakota—have retained laws authorizing execution for those convicted of aggravated kidnapping offenses which do not result in loss of human life despite a U.S. Supreme Court ruling, *Eberheart v. Georgia*, 433 U.S. 917 (1977) (per curiam) that can be read to have barred such executions. See *Kennedy*, 957 So. 2d at 786–87.

tutional. Furthermore, it is likely that the ambiguity over whether *Coker* applies to all rape or just adult rape has left other states unsure of whether the death penalty for child rape is constitutional. These states may just be taking a “wait and see” attitude until the Supreme Court rules on the precise issue.³⁴⁷

It seems fair to say that the Louisiana Supreme Court has “thrown down the gauntlet” to the U.S. Supreme Court. The state tribunal has taken the “consistency of the direction of change” argument employed by the *Atkins* and *Roper* majorities to invalidate death penalty laws and forged it into a sword to carve a path for upholding the constitutionality of child rape capital punishment laws.

When oral arguments are heard in the spring of 2008, the state’s attorneys will point out that at least *six* states have passed such laws.³⁴⁸ Kennedy’s attorneys, on the other hand, are likely to stress that the Court has long looked to another indicator of the existence of a societal consensus against a particular punishment—the frequency with which prosecutors seek and juries return verdicts imposing the punishment in question. By the time the Court decides *Kennedy*, Patrick Kennedy may very well be the only child rapist on death row—at the most, one of a handful of such offenders. Justices Stevens, Souter, Ginsburg, and Breyer are likely to look favorably upon this evidence and to endorse other arguments against upholding these laws. On the other hand, Chief Justice Roberts and Justices Scalia, Thomas, and Alito almost certainly will point to the nascence of these laws and return to a counter-argument that such evidence is meaningless—one that Justice Scalia stressed in his plurality opinion in *Stanford v. Kentucky*: “[I]t is not only possible, but overwhelmingly probable, that the very considerations which induce petitioners and their supporters to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed.”³⁴⁹

In other words, why should the people of a state that has voted in a democratic manner to enact legislation to make it possible to impose a particular type of punishment on a particular type of offender be told by unelected judges that they will not be allowed to use the punishment at all because their prosecutors and juries have seen fit to proceed with caution and decency and thus to impose the punishment only in exceedingly rare cases in which the offender has committed a truly horrific crime with devastating consequences for the victim or victims? Justice Kennedy joined in this part of Justice Scalia’s *Stanford* opinion, but he implicitly rejected this

347. *Id.* at 788.

348. See *supra* note 328 and accompanying text.

349. *Stanford v. Kentucky*, 492 U.S. 361, 374 (1989).

reasoning when he joined the *Atkins* and *Roper* majorities. How will the Justice Kennedy of 2008 respond to this logic? Indeed, as the author of the *Roper* majority opinion in which he embraced the “consistency of the direction of change” argument that was first articulated in Justice Stevens’s *Atkins* majority opinion, how will Justice Kennedy respond to the use of this argument to justify the constitutionality of new death penalty laws? This case almost certainly will be decided by a five-to-four vote with Justice Kennedy providing the pivotal vote. Moreover, it is likely to be one of many future death penalty cases in which Justice Kennedy’s reaction to arguments about how to interpret and apply the Eighth Amendment will prove to be decisive.

This is a predictable scenario for another case on the Court’s 2007–2008 docket. In *Snyder v. Louisiana*,³⁵⁰ the Court will decide whether to reverse a death sentence on the basis of claims that the trial judge incorrectly granted all of the prosecutor’s motions to use peremptory challenges to remove qualified black venire members from the jury and subsequently permitted the prosecutor to tell the all-white jury in his closing argument that Allen Snyder, an African American charged with stabbing his wife to death, was in the same situation as O.J. Simpson, whom the prosecutor added, “got away with it.”³⁵¹ Snyder and his attorneys contend that the judge’s handling of the jury-selection process and his acquiescence to the prosecutor’s closing-argument statements infected the trial with racial bias to the extent that the verdict and death sentence could not possibly meet the high standards of reliability required by the Eighth and Fourteenth Amendments.³⁵²

The facts in *Snyder* are similar to the facts in the previously mentioned case of *Miller-El v. Dretke*,³⁵³ a case from the 2004–2005 term in which Justice Kennedy joined the majority opinion reversing a death sentence on the ground that the trial judge incorrectly found credible race-neutral reasons for upholding peremptory challenges to ten of eleven eligible jury panelists. On the other hand, it was Justice Kennedy who in the 2006–2007 term’s *Uttecht v. Brown*³⁵⁴ decision authored the majority opinion that emphasized the superior position of trial judges in determining whether jurors could fairly impose capital punishment. It is quite possible, of course, that in *Miller-El*, Justice Kennedy was influenced by Justice O’Connor, who joined the *Miller-El* majority opinion and who seemed to

350. 127 S. Ct. 3004 (2007).

351. See *State v. Snyder*, 942 So. 2d 484, 486–500 (La. 2006).

352. Linda Greenhouse, *Supreme Court Reconsiders Pivotal Louisiana Case on Racial Selection of Juries*, N.Y. TIMES, Dec. 5, 2007, at A22.

353. See *supra* notes 49–52 and accompanying text.

354. See *supra* notes 254–71 and accompanying text.

have become increasingly skeptical of lower court decisions that rejected death-row inmates' claims of racial prejudice. This variety of skepticism apparently is not shared by Justice Alito, who joined the *Uttecht* majority opinion and who voted in favor of upholding the death sentence in every non-unanimous capital case in which he participated in the 2005–2006 and 2006–2007 terms. It would not be a great surprise if Justice Kennedy were to join with Justices Alito, Roberts, Scalia, and Thomas in a five-to-four vote to extend *Uttecht*-like deference to the trial judge who presided over Allen Snyder's capital trial.

There is another closely watched capital case on the Court's 2007–2008 docket that could prompt a five-to-four split. In granting certiorari in the case of *Baze v. Rees*,³⁵⁵ the Court accepted a petition from death-row inmates in Kentucky who claim that the lethal-injection process used to carry out executions in Kentucky (and in most of the states that authorize capital punishment) violates the Eighth Amendment by creating an unacceptable risk that condemned inmates will suffer needlessly prolonged and excessive pain and agony.³⁵⁶

In two nineteenth century cases, one involving the constitutionality of the firing squad as a method of execution³⁵⁷ and one challenging the newly invented electric chair as cruel and unusual,³⁵⁸ the Court opined, without formally deciding, that both methods of execution were constitutional: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the [C]onstitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."³⁵⁹ The Court has never found any of the methods of execution used in the United States—hanging, the firing squad, electrocution, the gas chamber, or lethal injection—to be unconstitutional.³⁶⁰

In *Baze*, the Court will not declare lethal injection, in and of itself, to be an unconstitutional method of execution. It is possible, however, that the Court by a close vote will hold that the particular three-drug protocol used by most executing states and/or the haphazard procedures sometimes

355. 128 S. Ct. 34 (2007), amended by 128 S. Ct. 372 (2007).

356. *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006).

357. *Wilkerson v. Utah*, 99 U.S. 130 (1878).

358. *In re Kemmler*, 136 U.S. 436 (1890).

359. *Id.* at 447.

360. The Court's decisions against granting certiorari in cases raising constitutional challenges to the constitutionality of particular methods of execution sometimes have sparked vigorous dissenting opinions. See, e.g., *Glass v. Louisiana*, 471 U.S. 1080 (1985) (Brennan, J., dissenting from denial of certiorari) (declaring electrocution to be barbaric and unnecessarily cruel); *Gomez v. U.S. Dist. Court*, 503 U.S. 653 (1992) (Stevens, J., dissenting from order to vacate stay of execution) (avowing that execution by cyanide gas is inhumane and torturous).

used to administer the drugs can be violative of the Eighth Amendment. Ironically, if the Court does so, it may weaken the growing political momentum to abolish or sharply limit the use of the death penalty. One reason the current abolition movement has gained ground in recent years is because of mounting concerns that lethal injection, originally touted as a humane method of execution, may actually inflict greater pain and suffering than did previous methods of execution.³⁶¹ Quite a few lethal injections have been botched, many taking more than thirty minutes while the condemned inmate struggled to breathe or to speak.³⁶² Members of execution teams have testified that lethal injections have been carried out in dark, cramped rooms by non-medical personnel who often are unsure of the correct dosage of lethal chemicals necessary to ensure a quick death.³⁶³ Moreover, evidence has emerged that the second of the three chemicals used in most lethal-injection states, pancuronium bromide—also known as Pavulon and long banned for use in euthanizing animals—causes extraordinary pain while simultaneously paralyzing its victims, leaving them unable to move or talk.³⁶⁴ This means that if the first drug, sodium pentathol is injected in too small a dosage, the inmate will not be fully anesthetized.³⁶⁵ As a result the third drug, potassium chloride, which induces cardiac arrest, would be felt as an excruciatingly painful burning in the heart and veins.³⁶⁶ The prisoner, however, would be unable to cry out or otherwise express his agony.³⁶⁷

Concerns about the many reports of flawed executions and the very real possibility that this kind of torment has been occurring with some regularity have seemed to energize death penalty opponents and led to temporary bans on lethal injections in several states in 2007.³⁶⁸ Shortly after the Court granted certiorari in *Baze*, it began, without explanation, to grant stays of execution to death-row petitioners, a pattern that has recently been followed by other state and federal courts.³⁶⁹ The result is a de facto

361. See generally Elizabeth Weil, *The Needle and the Damage Done*, N.Y. TIMES MAG., Feb 11, 2007, at 46; Megan Denver, Joel Best & Kenneth C. Haas, *Methods of Execution as Institutional Fads*, 10 PUNISHMENT & SOC'Y (forthcoming 2008).

362. Elizabeth Weil, *It's Not Whether to Kill, but How*, N.Y. TIMES, Nov. 4, 2007, at 43.

363. Weil, *supra* note 361.

364. Darryl Fears, *A Reprieve in Nevada Adds to Lethal-Injection Drama*, WASH. POST, Oct. 16, 2007, at A3.

365. Linda Greenhouse, *Justices to Enter the Debate over Lethal Injection*, N.Y. TIMES, Sept. 26, 2007, at A24.

366. *Id.*

367. *Id.*

368. *Id.*

369. Linda Greenhouse, *Justices Stay Execution: A Signal to Lower Courts*, N.Y. TIMES, Oct. 31, 2007, at A1. Justices Scalia and Alito have dissented from some of the Court's stays of execution. *Id.*

nationwide moratorium on executions, and none have been carried out since September 25, 2007.³⁷⁰

If the Court decides *Baze* on the merits and declares the three-drug execution protocol to be unconstitutional,³⁷¹ two consequences can be reliably predicted. First, most executing states will adopt a less complicated protocol, perhaps injecting condemned inmates with a single, massive dose of barbituates—the way animals are euthanized.³⁷² Second, public outrage, to the extent that it exists, over the use of a possibly torturous method of execution will diminish, and at least some of the steam will go out of the current movement to abolish capital punishment.

VI. CONCLUSION

As the Supreme Court is presently constituted, the dynamics of interaction among the Justices appear to have influenced Justice Kennedy to cast his vote in favor of the state in the capital punishment cases that are particularly contentious and matter the most. For the past two years, Justice Kennedy has been inclined to join the Roberts-Scalia-Thomas-Alito bloc in capital cases, and he is not likely to author another *Roper*-type majority opinion.

As of February 1, 2008, the average age of Justice Kennedy and the four Justices who consistently vote in favor of death penalty laws is sixty-two, with Chief Justice Roberts the youngest at fifty-three. The average age of the four Justices who consistently vote to reverse death sentences is seventy-five, with Justice Stevens the oldest at eighty-seven. Thus, even if a Democrat assumes the presidency on January 20, 2009, and even if Democrats continue to maintain a majority of the U.S. Senate and House of Representatives, the Court's demographics are likely to work against a major change in the ideological tendencies of the Court in capital punishment cases and other areas of law.

370. Death Penalty Information Center, *supra* note 285. On February 8, 2008, the Nebraska Supreme Court held that electrocution creates an undue risk of unnecessary pain, suffering, and mutilation of the body and therefore violates the Nebraska Constitution's prohibition of cruel and unusual punishments. *See State v. Mata*, 275 Neb. 1 (2008). Nebraska was the only state that relied solely on the electric chair as its method of execution—seven others permit inmates to choose it instead of lethal injection under some circumstances—and the Nebraska legislature is expected to consider enacting legislation that would replace the electric chair with a form of lethal injection that does not rely on the same sequence of three chemicals under review in *Baze v. Rees*. *See* Adam Liptak, *Nebraska's Top Court Forbids Electrocution*, N.Y. TIMES, Feb. 9, 2008, at A9; *supra* notes 355–69.

371. The oral arguments in *Baze* were heard on January 7, 2008, and several Justices expressed the view that Kentucky's only lethal-injection execution was not botched and that the Court thus might be wise, as Justice Stevens put it, to "wait for another case" to decide the issue. *See* Robert Barnes, *Lethal-Injection Ruling May Have to Wait*, WASH. POST, Jan. 8, 2008, at A2.

372. Fears, *supra* note 364.

The Court's present composition and decisional leanings almost certainly will trump politics and policy arguments in the near future. The Supreme Court is likely to rule in favor of the government and against petitioning death-row inmates in the most significant cases of the next several years.³⁷³ Moreover, the Court can be expected to reject every challenge to the constitutionality of capital punishment, in and of itself, for many years to come.

Perhaps sometime in the next several decades, a Court composed of Justices yet to be appointed and confirmed to the highest court in the land will hold that the death penalty, under all circumstances, violates the U.S. Constitution. Regardless, the ball now is clearly back in the hands of the opponents of capital punishment. They will not be able to rely on the Supreme Court. Rather, they will have to strengthen their arguments, extend their efforts to mobilize their supporters, and make a persuasive case for abolition to the American people. This will require working harder than ever not only in Washington, D.C., but in the legislatures in every state capitol and in every courthouse where some human beings hold the power to choose death over life for other human beings.

373. Although a decision to deny a petition for a writ of certiorari does not amount to a decision on the merits, those who argue that the Court has not done enough to ensure that capital punishment is administered with sufficient fairness and due process can point to January 14, 2008 when the Court denied certiorari in *Fields v. United States*, 76 U.S.L.W. 3372 (U.S. Jan. 14, 2008) (No. 07-6395). Fields was seeking a reversal of his death sentence on the ground that the sentencing jury was allowed to hear evidence based solely on hearsay about crimes he allegedly committed but for which he was never tried. See *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007). One of the most controversial death penalty issues yet to be resolved by the Supreme Court is the question of whether the state should be permitted to introduce during the penalty stage of a capital trial evidence that the defendant has committed extraneous, unadjudicated crimes in addition to the crime for which he has just been convicted. Sixteen states currently allow such evidence to be admitted and six of these states admit it with virtually no limitations. See generally COYNE & ENTZEROTH, *supra* note 155, at 525-26.