

Death Penalty Law

by Holly Geerdes*
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I. INTRODUCTION

This Article surveys fifteen death penalty decisions of the United States Supreme Court from June 1, 2004 through June 20, 2005. It was written as a companion to *Death Penalty Law*,¹ a survey of death penalty decisions of the Georgia Supreme Court from June 1, 2004 through May 31, 2005. Focusing on the Court's decisions that affect the trial and appeal of death penalty cases, this Article, with some exceptions, does not concern holdings in capital cases that are common to other criminal appeals.

A. *Medellin v. Dretke*

In *Medellin v. Dretke*,² a Mexican national was sentenced to death in Texas. The state trial court rejected his state habeas corpus claim that the state had failed to notify him of his right under the Vienna Convention³ to consular access.⁴ The district court also denied his federal habeas corpus petition making the same claim.⁵ While Medellin's case was awaiting appeal to the Fifth Circuit Court of Appeals, the International Court of Justice ("ICJ") issued a decision regarding various

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1. Holly Geerdes & Nikki Cox, *Death Penalty Law*, 57 MERCER L. REV. 139 (2005).

2. 125 S. Ct. 2088 (2005).

3. Vienna Convention on Consular Relations and Optional Protocols art. 36, Mar. 24, 1963, 23 U.S.T. 3227, 596 U.N.T.S. 262.

4. *Medellin*, 125 S. Ct. at 2089.

5. *Id.*

Mexican nationals sentenced to death in the United States.⁶ The ICJ determined that:

the Vienna Convention guaranteed individually enforceable rights, that the United States had violated those rights, and that the United States must “provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals” to determine whether the violations “caused actual prejudice,” without allowing procedural default rules to bar such review.⁷

Despite the ICJ’s *Avena* judgment, the Fifth Circuit denied Medellín’s appeal based on his procedural default and on its prior holdings that the Vienna Convention did not create an individually enforceable right.⁸

After the United States Supreme Court granted certiorari, but before oral arguments began, President George W. Bush issued a memorandum stating that the United States would uphold its international obligations and require state courts to follow the ICJ’s decision in *Avena*.⁹ Medellín then filed another application for state habeas corpus relief, and the Supreme Court ultimately dismissed its grant of certiorari.¹⁰

In dismissing the writ of certiorari, the Court noted five issues that could prevent federal habeas relief, and thus render its opinion of Medellín’s case merely academic or advisory.¹¹ First, a violation of the consular access provisions under the Vienna Convention may be barred from judicial determination in a federal habeas proceeding unless Medellín establishes that *Reed*¹² does not prevent his claim.¹³ Second, regarding the claims that the state had “adjudicated on the merits,” federal habeas relief is allowed only if the adjudication “was contrary to, or an unreasonable application of, clearly established Federal [sic] law, as determined by the Supreme Court.”¹⁴ The three claims that the state court “adjudicated on the merits” were (1) that the Vienna

6. Case concerning *Avena* and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

7. *Medellin*, 125 S. Ct. at 2089-2090 (quoting Case Concerning *Avena* and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, at paras. 121-22, 153 (Mar. 31)).

8. *Id.* at 2090.

9. *Id.* (citing President George W. Bush, Memorandum for the Attorney General, Feb. 28, 2005, available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>).

10. *Id.*

11. *Id.*

12. *Reed v. Farley*, 512 U.S. 339, 349 (1994) (holding that a violation of federal statutory rights is not cognizable in a postconviction proceeding unless it meets the “fundamental defect” test announced in *Hill v. United States*, 368 U.S. 424, 428 (1962)).

13. *Medellin*, 125 S. Ct. at 2090-91.

14. *Id.* at 2091 (quoting 28 U.S.C. § 2254(d)(1) (2000)).

Convention did not create judicially enforceable individual rights, (2) that state procedural default rules barred Medellín's claim, and (3) that Medellín had failed to show he was prejudiced by the failure to notify the Mexican consulate of his arrest.¹⁵ Before receiving federal habeas relief, Medellín would have to overcome the deferential standard for these three findings.¹⁶

The third issue that may have barred federal habeas relief was that "a habeas corpus petitioner generally cannot enforce a 'new rule' of law."¹⁷ The Court would have to decide how the *Avena* judgment affects its ordinary "new rule" jurisprudence before granting relief.¹⁸ Fourth, in order to receive federal habeas relief, Medellín must first get a certificate of appealability by making a substantial showing that his alleged treaty violation was a denial of a constitutional right.¹⁹ Finally, Medellín would have to show that he exhausted all available state court remedies in order to gain federal habeas relief based on the President's memorandum or the ICJ's *Avena* judgment.²⁰ Because of these five unresolved issues and the chance that the state court would grant relief, based on the defendant's habeas corpus claim, the Supreme Court dismissed the writ of certiorari granted to Medellín's case.²¹

B. *Schriro v. Summerlin*

In *Schriro v. Summerlin*,²² Summerlin was convicted of first-degree murder and sexual assault. The trial court imposed a death sentence based on a finding of two aggravating factors,²³ and the Arizona Supreme Court affirmed the sentence on direct review.²⁴ While the case was pending in the Ninth Circuit Court of Appeals, the United States Supreme Court decided two germane cases. First, in *Apprendi v. New Jersey*,²⁵ the Court held that the constitutional guarantees of due process and trial by jury require that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the

15. *Id.*

16. *Id.*

17. *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 330 (1989)).

18. *Id.*

19. *Id.* (citing 28 U.S.C. § 2253(c)(1), (2) (2000)).

20. *Id.* at 2091-92.

21. *Id.* at 2092.

22. 542 U.S. 348 (2004).

23. *Id.* at 350 (citing ARIZ. REV. STAT. ANN. § 13-703(F)(2) (2005) (a prior felony conviction involving use or threatened violence); ARIZ. REV. STAT. ANN. § 13-703(F)(6) (2005) (commission of the offense in an especially heinous, cruel, or depraved manner)).

24. *Id.*

25. 530 U.S. 466 (2000).

prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”²⁶ Second, in *Ring v. Arizona*,²⁷ the Court held that, because Arizona law authorized the death penalty only if an aggravating factor was present, *Apprendi* required the existence of such a factor to be proved to a jury, not a judge.²⁸ Retroactively applying the new rule announced in *Ring*, the Ninth Circuit invalidated Summerlin’s death sentence.²⁹

The two theories relied on by the Ninth Circuit to justify its retroactive application of *Ring* were either that it was a substantive rule or, alternatively, that it was a “watershed” procedural rule.³⁰ New substantive rules generally apply retroactively because they “necessarily carry a significant risk that a defendant stands convicted of ‘an act that the law does not make criminal’” or faces a punishment that the law cannot impose upon the defendant.³¹ New procedural rules generally do not apply retroactively because “they do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.”³² Only an extremely narrow set of “watershed rules of criminal procedure” implicating the fundamental fairness and accuracy of the criminal proceeding” will apply retroactively.³³ After considering both theories, the United States Supreme Court reversed the Ninth Circuit’s decision, concluding that the *Ring* procedural rule did not apply retroactively to cases already final on direct review.³⁴

The Supreme Court first reasoned that the *Ring* holding was procedural because it rested entirely on the Sixth Amendment³⁵ right to a jury trial and did not alter the range of conduct or class of persons that Arizona law subjected to the death penalty.³⁶ Accordingly, *Ring*, like other procedural rules allocating decision-making authority, “altered the range of permissible methods for determining whether a defendant’s

26. *Summerlin*, 542 U.S. at 350 (quoting *Apprendi*, 530 U.S. at 490).

27. 536 U.S. 584 (2002).

28. *Summerlin*, 542 U.S. at 351 (citing *Ring*, 536 U.S. 583, 603-09 (2002)).

29. *Id.*

30. *Id.* at 352-53.

31. *Id.* at 352 (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998); *Davis v. United States*, 417 U.S. 333, 346 (1974)).

32. *Id.*

33. *Id.* (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990); *Teague v. Lane*, 489 U.S. 288, 311 (1989)).

34. *Id.* at 358.

35. U.S. CONST. amend. VI.

36. *Summerlin*, 542 U.S. at 353.

conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment.”³⁷ The trial court rejected the defendant’s argument that *Ring* was substantive because it modified the elements of his offense.³⁸ The Court reasoned that requiring a jury to find a certain fact because the state of Arizona made that fact essential to the death penalty, a procedural holding, was distinguishable from the Court making a certain fact essential to the death penalty, a substantive holding.³⁹

The Supreme Court further reasoned that *Ring* was not a “watershed rule of criminal procedure.”⁴⁰ The judicial factfinding permitted by *Ring* did not so “seriously diminish[]” the accuracy as to create an “impermissibly large risk of punishing conduct the law does not reach,”⁴¹ and therefore, the fundamental fairness and accuracy of the criminal proceeding was not affected.⁴²

C. *Deck v. Missouri*

Beginning on the first day of the sentencing phase in his capital case in *Deck v. Missouri*,⁴³ Deck was shackled with visible leg irons, handcuffs, and a belly chain.⁴⁴ The trial court overruled defense counsel’s numerous objections to the restraints, and the jury ultimately sentenced Deck to death.⁴⁵ Affirming the death sentence on appeal, the Missouri Supreme Court concluded that the restraints did not prejudice the defendant and that the trial court did not abuse its discretion in requiring shackles because the record indicated Deck was a flight risk.⁴⁶ The United States Supreme Court granted certiorari and held that the use of visible shackles during the penalty phase of a capital case is unconstitutional, “unless that use is justified by an essential state interest . . . specific to the defendant on trial.”⁴⁷

First, the Supreme Court recounted the long history of the firmly established rule that use of visible shackles in the guilt-innocence phase of a criminal trial is forbidden, unless overcome by an essential state

37. *Id.*

38. *Id.* at 354.

39. *Id.*

40. *Id.* at 356.

41. *Id.* at 355-56 (citing *Teague*, 489 U.S. at 312-13; quoting *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

42. *Id.* at 355 (citing *Saffle*, 494 U.S. at 495).

43. 125 S. Ct. 2007 (2005).

44. *Id.* at 2010.

45. *Id.*

46. *Id.*

47. *Id.* at 2009-10 (emphasis omitted).

interest such as escape prevention, physical security, or courtroom decorum.⁴⁸ Three fundamental legal principles motivated the judicial hostility to shackling in the guilt-innocence phase: first, visible restraints undermine the presumption of innocence until proven guilty;⁴⁹ second, physical restraints can diminish the constitutional right to counsel because they may hinder the defendant's ability to participate in his own defense; and third, in order to reflect the seriousness of the proceedings, judges must maintain a formal dignity in their courtrooms, which includes respectful treatment of the defendants.⁵⁰ Given the overall prejudicial effect of visible shackles, the constitutional right to due process does not allow the use of these restraints unless justified by specific circumstances of the particular case.⁵¹

Considering these three principles in the context of the penalty phase of a capital case, the Supreme Court held that the same rule against use of visible restraints applied to the defendant's case.⁵² Although the first concern of undermining the presumption of innocence no longer applied in the penalty phase, the jury's choice of life or death is a critical decision that must not be influenced by the sight of shackles.⁵³ Visible restraints create the impression that the court considers the defendant a danger to society, which undermines the jury's ability to weigh all the relevant considerations when choosing a sentence.⁵⁴ The Supreme Court concluded that "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding," but the Court also noted that this constitutional requirement was not absolute.⁵⁵ In exercising discretion, a judge may make a case-specific determination that the defendant must be shackled in order to protect the courtroom and its occupants.⁵⁶

In *Deck* the State made three arguments that restraints were properly used in the penalty phase.⁵⁷ First, the State argued that the jury was unaware of the restraints, but the Supreme Court disagreed because the record showed the defendant had been shackled in the jury's presence.⁵⁸ Second, the State argued that the trial judge acted within his discretion,

48. *Id.* at 2010-12.

49. *Id.* at 2013 (citing *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

50. *Id.*

51. *Id.* at 2014.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 2015.

57. *Id.*

58. *Id.*

but the Court again disagreed, alluding to evidence that the trial judge imposed shackles on Deck because he “already [had] been convicted” and to “take any fear out of the juror[s]’ minds.” The trial judge did not, however, explain why the jury may have had any fear.⁵⁹ Third, the State argued that Deck was not prejudiced by the restraints, but the Court reiterated that shackling is “inherently prejudicial.”⁶⁰ Therefore, the State did not meet its burden of proving “beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.”⁶¹ For these reasons, the Supreme Court reversed the judgment of the Missouri Supreme Court.⁶²

D. Brown v. Payton

In *Brown v. Payton*,⁶³ during the penalty phase of Payton’s murder trial, the prosecution presented evidence of the defendant’s prior convictions and violent acts while the defense concentrated on the defendant’s postcrime commitment to God.⁶⁴ The trial court instructed the jury to consider eleven different statutory factors in deciding the sentence, including factor (k), a catchall provision directing jurors to consider “[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.”⁶⁵ Defense counsel wanted this factor’s wording clarified to indicate that the jury could consider evidence of the defendant’s background and character, but the trial court declined to modify the instruction.⁶⁶ During closing argument, the prosecutor stated that factor (k) was not intended to encompass anything that happened after the crime was committed.⁶⁷

After the jury sentenced Payton to death, he appealed to the California Supreme Court, claiming the jury was misled to believe it could not consider his postcrime religious commitment as possible mitigation evidence.⁶⁸ Applying *Boyd v. California*⁶⁹ to affirm Payton’s sentence, the court held that “there was no reasonable likelihood that

59. *Id.* (quoting Transcript of Oral Argument at 59, *Deck v. Missouri*, 125 S. Ct. 2007 (2005) (No. 04-5293)).

60. *Id.* (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986)).

61. *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

62. *Id.* at 2016.

63. 125 S. Ct. 1432 (2005).

64. *Id.* at 1436.

65. *Id.* (quoting CAL. PENAL CODE § 190.3 (West 1988) (The statute has since been amended)).

66. *Id.*

67. *Id.*

68. *Id.* at 1437.

69. 494 U.S. 370 (1990).

Payton's jury believed it was required to disregard his mitigating evidence.⁷⁰ On appeal, the Ninth Circuit Court of Appeals held that the postcrime mitigation evidence was not included in the factor (k) instructions and that this wrongful exclusion was supported by the prosecutor's closing argument.⁷¹ The Ninth Circuit also noted that, as *Boyde* concerned precrime mitigation evidence, "there is reason to doubt that a jury would similarly consider post-crime evidence of a defendant's religious conversion and good behavior in prison."⁷²

The United States Supreme Court first noted that the California Supreme Court was right to consider *Boyde* in its analysis.⁷³ The Court stated that *Boyde* concerned a challenge to factor (k) and holds that a jury can consider evidence of a defendant's background and character not related to the crime itself, including postcrime mitigation evidence.⁷⁴ The Court then stated that because the prosecutor in Payton's case argued that the postcrime mitigation evidence should not be considered by the jury, the California Supreme Court was reasonable in applying *Boyde*.⁷⁵

Although the prosecutor made three specific misstatements regarding consideration of mitigation evidence during the penalty phase, under *Boyde's* directive that the whole context of the trial be considered, the California Supreme Court's conclusion that the closing argument did not impair the jury's consideration process was not unreasonable.⁷⁶ Defense counsel previously spent two days presenting evidence of Payton's religious conversion, and the prosecutor repeatedly sought to discount the importance of this evidence.⁷⁷ Further, the trial judge's instructions did not indicate that the jury should disregard any evidence.⁷⁸ In reversing the judgment of the Ninth Circuit, the Supreme Court noted that it was not unreasonable to conclude that the jury likely found that the evidence of postcrime religious conversion could not outweigh the evidence of the brutal crime and prior violent acts committed by the defendant.⁷⁹

70. *Brown*, 125 S. Ct. at 1437 (citing *People v. Payton*, 839 P.2d 1035, 1048 (Cal. 1992)).

71. *Id.* at 1437-38.

72. *Id.* at 1438 (quoting *Payton v. Woodford*, 346 F.3d 1204, 1212 (9th Cir. 2003)).

73. *Id.* at 1439.

74. *Id.*

75. *Id.* at 1440.

76. *Id.*

77. *Id.* at 1440-41.

78. *Id.* at 1441.

79. *Id.* at 1442.

E. Bell v. Cone

In *Bell v. Cone*,⁸⁰ the trial court sentenced Cone to death after the jury found four aggravating circumstances.⁸¹ The Tennessee Supreme Court affirmed the sentence, holding that the jury had enough evidence to find that the murders were “especially heinous, atrocious, or cruel in that they involved torture or depravity of mind” because Cone brutally beat the victims to death after they stopped “cooperat[ing]” with him during the robbery of their home.⁸² Cone challenged the “heinous, atrocious, or cruel” aggravating circumstance as unconstitutionally vague under the Eighth Amendment,⁸³ but the trial court barred Cone’s petition for relief under Tennessee Code Annotated section 40-30-111,⁸⁴ a statute limiting the grounds that may be raised on collateral review to those not waived or previously determined.⁸⁵ The trial court stated that the issue regarding the statutory aggravator was “clearly [a] restatemen[t] of previous grounds heretofore determined and denied by the Tennessee Supreme Court upon Direct Appeal or the Court of Criminal Appeals upon the First Petition.”⁸⁶

After the district court denied relief, the Sixth Circuit Court of Appeals granted a writ of habeas corpus on the ground that the “especially heinous, atrocious, or cruel” aggravator language of section 40-30-111 was unconstitutionally vague.⁸⁷ First, the Sixth Circuit held that Cone’s claim had not been procedurally barred in state court.⁸⁸ Next, the Sixth Circuit determined that “the state court’s affirmance of respondent’s sentence in light of the ‘especially heinous, atrocious, or cruel’ aggravating circumstance was ‘contrary to’ the clearly established principles set forth in . . . *Godfrey v. Georgia*,”⁸⁹ and therefore, federal law commanded that the “especially heinous, atrocious, or cruel” aggravator was unconstitutionally vague.⁹⁰ Finally, by reviewing the jury’s finding under the narrowed construction of the aggravator adopted in *State v. Dicks*,⁹¹ the Sixth Circuit reasoned that the state supreme

80. 125 S. Ct. 847 (2005).

81. *Id.* at 849 n.1.

82. *Id.* (quoting *State v. Cone*, 665 S.W.2d 87, 94-95 (Tenn. 1984)).

83. U.S. CONST. amend. VIII.

84. TENN. CODE ANN. § 40-30-111 (2005).

85. *Bell*, 125 S. Ct. at 849-50.

86. *Id.* at 850 (quoting *Cone v. State*, No. P-06874 (Tenn. Crim. Ct., Dec. 16, 1993)).

87. *Id.*

88. *Id.*

89. 446 U.S. 420 (1980).

90. *Bell*, 125 S. Ct. at 851.

91. 359 F.3d 785 (6th Cir. 1981).

court had not cured any deficiency in the aggravating circumstance on direct appeal.⁹²

In reversing the Sixth Circuit, the United States Supreme Court first noted that, under 28 U.S.C. § 2254(d)(1),⁹³ “A federal court may grant a writ of habeas corpus based on a claim adjudicated by a state court if the state-court decision ‘was contrary to, or involved an unreasonable application of, clearly established Federal [sic] law, as determined by the Supreme Court of the United States.’”⁹⁴ The Court then determined that the Sixth Circuit did not give proper deference to the state court’s decision, noting that it was wrong to presume that the state supreme court did not follow federal law merely because it failed to cite *Dicks*.⁹⁵ Further, no evidence existed to support the Sixth Circuit’s claim that the state court “simply, but explicitly, satisfied itself that the labels ‘heinous, atrocious, or cruel,’ without more, applied to [the defendant’s] crime.”⁹⁶ The Court also noted that the Tennessee Supreme Court’s prior, factually similar cases that applied the narrowed construction of the “heinous, atrocious, or cruel” aggravator indicated that the state court did the same in Cone’s case.⁹⁷

The United States Supreme Court next held that the narrowed construction that the Tennessee Supreme Court applied was not unconstitutionally vague.⁹⁸ In *Dicks* the state supreme court applied the same construction of the aggravator as approved in *Proffitt v. Florida*,⁹⁹ which stated that the aggravator was “directed at ‘the conscienceless or pitiless crime which is unnecessarily torturous to the victim.’”¹⁰⁰ Under *Proffitt* the state court’s application of the aggravator was not “contrary to” clearly established federal law under 28 U.S.C. § 2254(d)(1).¹⁰¹ Even assuming that the “heinous, atrocious, or cruel” aggravator was unconstitutionally vague, the Supreme Court held that the Sixth Circuit committed reversible error “in presuming that the [s]tate [s]upreme [c]ourt failed to cure this vagueness by applying a narrowing construction on direct appeal.”¹⁰²

92. *Bell*, 125 S. Ct. at 851.

93. 28 U.S.C. § 2254(d)(1) (2000).

94. *Bell*, 125 S. Ct. at 851 (quoting 28 U.S.C. § 2254(d)(1)).

95. *Id.* at 853 (citing *Dicks*, 359 F.3d at 797).

96. *Id.* (citing *Dicks*, 359 F.3d at 797).

97. *Id.* at 853-54 (citing *State v. Melson*, 638 S.W.2d 342, 367 (Tenn. 1982)).

98. *Id.* at 854.

99. 428 U.S. 242, 255 (1976).

100. *Bell*, 125 S. Ct. at 854 (quoting *Dicks*, 359 F.3d at 797).

101. *Id.* at 854-55.

102. *Id.* at 855.

F. Miller-El v. Dretke

In *Miller-El v. Dretke*,¹⁰³ Miller-El, on trial for a 1985 murder in Texas, claimed that the prosecutors' use of peremptory strikes against ten of the eleven qualified, African-American venire members was based on race.¹⁰⁴ The trial court found that the Dallas County District Attorney's Office did not have a policy of systematically excluding African-Americans, and jury selection continued in the case.¹⁰⁵ While Miller-El's case was pending on appeal, the United States Supreme Court decided *Batson v. Kentucky*,¹⁰⁶ holding that discrimination by the prosecutor in jury selection was enough to find a constitutional violation and that proof of systematic discrimination was no longer required.¹⁰⁷ On remand from the Texas Court of Criminal Appeals, the trial court accepted the prosecutors' race-neutral reasons for the strikes and found no demonstration of racial discrimination.¹⁰⁸

The district court subsequently denied Miller-El's habeas claim under 28 U.S.C. § 2254, and the Fifth Circuit Court of Appeals denied a certificate of appealability.¹⁰⁹ The United States Supreme Court, on a grant of certiorari, reversed and remanded the case to the Fifth Circuit, holding that the merits of Miller-El's *Batson* claim should be debated.¹¹⁰ The Fifth Circuit heard the case on appeal and rejected the *Batson* claim on its merits, and the Court again granted certiorari.¹¹¹ To succeed on his claim, Miller-El had to show that the state court's conclusion was "an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding" by rebutting the "presumption of correctness by clear and convincing evidence."¹¹²

Out of 108 members of the venire panel for Miller-El's capital trial, twenty were African-American, of which ten were preemptively struck by the prosecution, nine were rightfully excused, and one served on the jury.¹¹³ The Supreme Court noted that the reasons given by the prosecutors for striking those ten African-American potential jurors

103. 125 S. Ct. 2317 (2005).

104. *Id.* at 2323.

105. *Id.* at 2322.

106. 476 U.S. 79 (1986).

107. *Miller-El*, 125 S. Ct. at 2322-23.

108. *Id.* at 2323.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 2325 (quoting 28 U.S.C. § 2254(d)(2), (e)(1)).

113. *Id.*

could have also been used to strike white jurors who served on the jury.¹¹⁴

Ultimately, the Court concluded that a broad pattern of discrimination was present.¹¹⁵ First, the prosecution's shuffling of the venire panel was problematic. In Texas, the cards bearing panel members' names may be reshuffled at the request of either side. In Miller-El's case, the prosecution reshuffled the cards twice after it was revealed that a number of African-American panel members were at the front, raising suspicion of discrimination because no racially neutral reason was offered.¹¹⁶

Next, the prosecution's questions regarding prospective jurors' thoughts on capital punishment differed between African-American and nonAfrican-American members. The prosecution used a method of questioning known as "graphic script" to cause jurors to express a hesitation to consider the death penalty, thereby creating the possibility for a peremptory strike. This graphic script was used on a much higher proportion of African-American venire panelists, and the prosecution did not offer a believable race-neutral justification for the discrepancy.¹¹⁷

Third, the prosecution again employed a method of disparate questioning when inquiring of the panel about how low a sentence they would consider imposing for murder.¹¹⁸ The method was that:

Most potential jurors were first told that Texas law provided for a minimum term of five years, but [most of the African-Americans] of the panel were not, and if a panel member then insisted on a minimum above five years, the prosecutor would suppress his normal preference for tough jurors and claim cause to strike.¹¹⁹

This disparity could not be explained by a nonracial reason.¹²⁰

Finally, the evidence demonstrated that the Dallas County office had been engaged in a policy of systematic exclusion of African-Americans from juries for several decades prior to Miller-El's case. Two Dallas County district judges who were former assistant district attorneys testified that one was threatened to be fired if he allowed any African-Americans to serve on a jury and that the other believed a systematic policy of African-American exclusion existed. Also, a manual outlining

114. *Id.* at 2325-26.

115. *Id.* at 2332.

116. *Id.* at 2332-33.

117. *Id.* at 2333-34.

118. *Id.* at 2337.

119. *Id.*

120. *Id.*

reasons for excluding African-American minorities from jury service was available to the prosecutor in Miller-El's case.¹²¹

The United States Supreme Court concluded that the Fifth Circuit wrongly held that Miller-El failed to show by clear and convincing evidence that the finding of no discrimination was erroneous.¹²² Viewed cumulatively, the evidence overwhelmingly indicated that discrimination against potential African-American jurors was prevalent.¹²³ The Court noted that Miller-El's hypothesis of racial discrimination provided a better explanation of the jury selection practices than the prosecution's pretextual race-neutral reasons, and therefore, the Court reversed the judgment of the Fifth Circuit.¹²⁴

G. *Roper v. Simmons*

*Roper v. Simmons*¹²⁵ concerned a defendant, Simmons, who committed murder at seventeen years of age.¹²⁶ A few months after he turned eighteen, Simmons was tried as an adult, convicted, and sentenced to death.¹²⁷ While defense counsel argued that Simmons's age should be a mitigating factor because individuals under the age of eighteen are less responsible, the State argued that Simmons's age combined with the brutality and senselessness of the murder was contrary to mitigation.¹²⁸ Simmons obtained new counsel and argued that he received ineffective assistance of counsel at trial because his trial counsel had not established that his age made him immature, impulsive, and susceptible to bad influence.¹²⁹ The trial court found no ineffective assistance of counsel, the Missouri Supreme Court affirmed, and the federal courts denied habeas relief.¹³⁰ Subsequent to these proceedings, the United States Supreme Court held, in *Atkins v. Virginia*,¹³¹ that the Eighth and Fourteenth Amendments¹³² prohibit the execution of a mentally retarded person.¹³³ Simmons then filed a new habeas corpus petition arguing that the reasoning of *Atkins* supported the constitutional

121. *Id.* at 2338-39.

122. *Id.* at 2339.

123. *Id.*

124. *Id.* at 2339-40.

125. 125 S. Ct. 1183 (2005).

126. *Id.* at 1187.

127. *Id.* at 1187-88.

128. *Id.* at 1188-89.

129. *Id.* at 1189.

130. *Id.*

131. 536 U.S. 304 (2002).

132. U.S. CONST. amend. XIV.

133. *Roper*, 125 S. Ct. at 1189.

prohibition of the execution of a individual who was under eighteen when the crime was committed, which prompted the Missouri Supreme Court to reverse Simmons's death sentence.¹³⁴ The United States Supreme Court then granted certiorari and affirmed the state supreme court's judgment.¹³⁵

The Eighth Amendment's prohibition against "cruel and unusual punishments," the Court noted, must be interpreted according to its text, history, and purpose, while also considering "the evolving standards of decency that mark the progress of a maturing society."¹³⁶ In 1988 the Court held, in *Thompson v. Oklahoma*,¹³⁷ that the standards of decency did not allow the execution of an offender under the age of sixteen.¹³⁸ A year later in *Stanford v. Kentucky*,¹³⁹ the Court held that the execution of offenders older than fifteen but younger than eighteen was not unconstitutional.¹⁴⁰ On the same day *Stanford* was decided, the Court also held in *Penry v. Lynaugh* ("Penry I")¹⁴¹ that the Eighth Amendment did not exclude the execution of the mentally retarded.¹⁴² Reexamining this issue in 2002, the Court in *Atkins* held that standards of decency had evolved to indicate that the execution of the mentally retarded was cruel and unusual punishment.¹⁴³ In *Atkins* the Court determined that mental retardation diminished personal culpability, thus weakening the rationale for the death penalty's use as a form of retribution or for its deterrent effect.¹⁴⁴ That finding, coupled with the national consensus against executing the mentally retarded, supported the Court's holding that it was an "excessive sanction" to execute the mentally retarded.¹⁴⁵ The Court then stated that Simmons's case allowed for a similar reexamining of the issue from *Stanford* of whether the death penalty is a permissible punishment for juvenile offenders.¹⁴⁶

Addressing the national consensus against the death penalty for juveniles, the Court noted the remarkable parallel to the national consensus against the death penalty for the mentally retarded in *Atkins*,

134. *Id.*

135. *Id.* at 1190.

136. *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)).

137. 487 U.S. 815 (1988) (plurality opinion).

138. *Roper*, 125 S. Ct. at 1190.

139. 492 U.S. 361 (1989).

140. *Roper*, 125 S. Ct. at 1191.

141. 492 U.S. 302 (1989).

142. *Roper*, 125 S. Ct. at 1191.

143. *Id.*

144. *Id.* at 1192 (citing *Atkins*, 536 U.S. at 318, 319-20).

145. *Id.*

146. *Id.*

even though a slower pace of abolition existed for the juvenile death penalty.¹⁴⁷ Thirty states had prohibited the juvenile death penalty, including twelve that rejected the death penalty altogether, and the remaining twenty states infrequently executed juveniles.¹⁴⁸

The Court reasoned that three general differences between juveniles and adults demonstrated that juvenile offenders could not be subjected to the worst form of punishment.¹⁴⁹ First, a lack of maturity results in impulsive and reckless actions.¹⁵⁰ Second, juveniles are more inclined to be influenced by negative peer pressure.¹⁵¹ Third, the character of a juvenile is less formed and more flexible than that of an adult.¹⁵² The Court determined that the reasons underlying the *Thompson* holding that individuals under sixteen could not receive the death penalty should also apply to those under eighteen.¹⁵³ The diminished culpability of juveniles removes them from the category of the worst offenders who are most deserving of the death penalty.¹⁵⁴ The Court remarked that neither retribution nor deterrence, the social purposes of the death penalty, justified imposition of a juvenile death penalty.¹⁵⁵

The Court disagreed that a categorical rule barring the death penalty for juveniles was arbitrary, noting that “it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”¹⁵⁶ Although some objections to line-drawing may exist, the Court stated society draws lines at the age of eighteen for many purposes.¹⁵⁷

Finally, the Court compared international laws with those of the United States and determined that the death penalty is a disproportionate punishment for juvenile offenders.¹⁵⁸ Although international law is not controlling, the Court has previously used it as an aide in interpreting the Eighth Amendment’s prohibition of “cruel and unusual

147. *Id.*

148. *Id.*

149. *Id.* at 1195.

150. *Id.* (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

151. *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

152. *Id.*

153. *Id.* at 1196.

154. *Id.* at 1195-96.

155. *Id.* at 1196.

156. *Id.* at 1197.

157. *Id.* at 1197-98.

158. *Id.* at 1198-99.

punishments.”¹⁵⁹ The Court noted that all other countries have either abolished or publicly disavowed the use of capital punishment for juveniles, thus making the weight of international opinion overwhelmingly against the juvenile death penalty.¹⁶⁰

H. *Johnson v. California*

In *Johnson v. California*,¹⁶¹ Johnson, an African-American male, was convicted of murdering a nineteen-month-old caucasian child.¹⁶² Of the forty-three prospective jurors for his trial, the prosecutor peremptorily struck the only three African-American jurors. When defense counsel objected that two of those strikes were based on race, the trial judge did not ask for the prosecutor’s rationale for the strikes.¹⁶³ The court instead found that the defense failed to establish a prima facie case under *People v. Wheeler*¹⁶⁴ because there had “‘not been shown a strong likelihood that the exercise of the peremptory challenges were based upon a group rather than an individual basis.’”¹⁶⁵ The trial judge did, however, warn the prosecutor that “we are very close.”¹⁶⁶ In setting aside the conviction, the California Court of Appeals held that the trial judge erred by requiring Johnson to establish a “strong likelihood” of discrimination.¹⁶⁷ Johnson’s conviction was reinstated by the California Supreme Court, which stated that *Batson* allowed state courts to establish standards to use in determining the sufficiency of a defendant’s prima facie case.¹⁶⁸ Although the state supreme court noted that “it certainly looks suspicious that all three African-American prospective jurors were removed from the jury,” it nonetheless deferred to the trial judge’s ruling.¹⁶⁹ The United States Supreme Court granted certiorari.¹⁷⁰

The Court noted that the issue concerned the scope of the first of the three enumerated *Batson* steps, which are used to guide trial courts’

159. *Id.* at 1198.

160. *Id.* at 1199-1200.

161. 125 S. Ct. 2410 (2005).

162. *Id.* at 2414.

163. *Id.*

164. 583 P.2d 748 (Cal. 1978).

165. *Johnson*, 125 S. Ct. at 2414 (quoting *People v. Johnson*, 71 P.3d 270, 272 (Cal. 2005)).

166. *Id.* at 2414 (quoting *Johnson*, 71 P.3d at 272).

167. *Id.* at 2414-15.

168. *Id.* at 2415.

169. *Id.*

170. *Id.*

constitutional review of peremptory strikes.¹⁷¹ First, the defendant must make a prima facie case “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.”¹⁷² Second, the burden then shifts to the State to “explain adequately the racial exclusion” by presenting race-neutral justifications.¹⁷³ Third, “[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.”¹⁷⁴

In deciding whether *Batson* allows California to require, at step one, that “the objector must show that it is more likely than not the other party’s peremptory challenges, if unexplained, were based on impermissible group bias,” the Supreme Court concluded that *Batson* does not.¹⁷⁵ The first step only required an “inference of discriminatory purpose,” not a standard as high as the state’s “more likely than not” requirement.¹⁷⁶ Furthermore, the purpose of *Batson* was to eliminate racial discrimination that ultimately affects the entire community, not just the defendant or juror in a specific case.¹⁷⁷ In Johnson’s case, the inference of discrimination was great enough for the trial judge to remark that “we are very close” and for the California Supreme Court to note that “it certainly looks suspicious.”¹⁷⁸ Reversing the judgment of the state supreme court, the Court determined that the inference was sufficient for Johnson to have established a prima facie case under *Batson*.¹⁷⁹

I. *Rompilla v. Beard*

In *Rompilla v. Beard*,¹⁸⁰ during the penalty phase of Rompilla’s death penalty trial, defense counsel presented only brief mitigation testimony from five members of the defendant’s family.¹⁸¹ Rompilla, claiming ineffective assistance of counsel because his trial counsel failed to present more significant mitigation evidence, appealed his death sentence to a postconviction court.¹⁸² The court held that trial counsel

171. *Id.* at 2416.

172. *Id.* (quoting *Batson*, 476 U.S. at 93-94) (citing *Washington v. Davis*, 426 U.S. 229, 239-42 (1976)).

173. *Id.* (quoting *Batson*, 476 U.S. at 94).

174. *Id.* (quoting *Purkett v. Elem*, 514 U.S. 765, 767 (1995) (*per curiam*)).

175. *Id.*

176. *Id.*

177. *Id.* at 2418 (quoting *Batson*, 476 U.S. at 94).

178. *Id.* at 2419.

179. *Id.*

180. 125 S. Ct. 2456 (2005).

181. *Id.* at 2460.

182. *Id.* at 2461.

had done enough investigation for mitigation evidence, and the Pennsylvania Supreme Court affirmed.¹⁸³ On a writ of habeas corpus, the district court granted relief after finding that the state supreme court had unreasonably applied *Strickland v. Washington*¹⁸⁴ and that defense counsel had failed to thoroughly investigate for mitigation evidence.¹⁸⁵ The Third Circuit Court of Appeals reversed, concluding that the state court's application of *Strickland* was not unreasonable and that the mitigation investigation was sufficient.¹⁸⁶ On a grant of certiorari, however, the Supreme Court reversed the judgment of the Third Circuit.¹⁸⁷

Under *Strickland* Rompilla was required to prove that the state court's finding "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal [sic] law, as determined by the Supreme Court of the United States."¹⁸⁸ A successful ineffective assistance of counsel claim under *Strickland* must prove prejudice, with the performance of counsel measured against an "objective standard of reasonableness."¹⁸⁹

In preparation for his mitigation case, Rompilla was often unhelpful and sometimes obstructive to defense counsel's investigation. Rompilla indicated that his childhood and schooling had been normal, and his five family members did not contribute much evidence because Rompilla had spent several years away from them in various forms of custody. Reports from mental health witnesses also contributed nothing significant to the investigation.¹⁹⁰

After being sentenced to death, Rompilla's new counsel claimed that the trial counsel failed to investigate other important sources of information, such as school records, evidence of Rompilla's history of alcohol dependence, and juvenile and adult incarceration records.¹⁹¹ Trial counsel and the Commonwealth both argued that there was no requirement for defense lawyers to look into every single possible source of mitigating evidence because of their limited resources, but the Supreme Court ruled that "the lawyers were [clearly] deficient in failing to examine the court file on Rompilla's prior conviction."¹⁹²

183. *Id.*

184. 466 U.S. 668 (1984).

185. *Rompilla*, 125 S. Ct. at 2461.

186. *Id.*

187. *Id.*

188. *Id.* at 2462 (quoting 28 U.S.C. § 2254(d)(1)).

189. *Id.* (quoting *Strickland*, 466 U.S. at 687-88).

190. *Id.* at 2462-63.

191. *Id.* at 2463.

192. *Id.*

Furthermore, trial counsel knew the Commonwealth intended to prove the defendant's violent nature by introducing a transcript from Rompilla's prior rape trial. The prior conviction file was readily available as a public document, but the trial counsel did not look at it until the prosecution again warned the defense counsel that it would introduce this evidence in the sentencing phase. Even then, trial counsel did not examine the entire file.¹⁹³ The Court reasoned that trial counsel could not reasonably respond to the prosecution's case for aggravation without fully examining the contents of the file.¹⁹⁴ The Court also noted that trial counsel's deficient performance was not merely against common sense, but it did not meet the American Bar Association Standards for Criminal Justice.¹⁹⁵

Determining that counsel's failure to examine the prior conviction file was unreasonable, the Court next held that this ineffective assistance was clearly prejudicial to Rompilla.¹⁹⁶ The Court noted that looking at the file would have yielded many other sources of mitigation evidence, such as prison files that revealed the defendant's childhood and mental health to be much worse than what Rompilla and his family members indicated.¹⁹⁷ The prison files would have prompted trial counsel to look at school and juvenile records that would have further revealed the true nature of Rompilla's neglected childhood and mental retardation.¹⁹⁸ The Court concluded that the unexamined evidence would have created a much stronger mitigation case than the pleas for mercy from Rompilla's family members, thereby increasing the likelihood of a more lenient sentence.¹⁹⁹

J. Blakely v. Washington

In *Blakely v. Washington*,²⁰⁰ Blakely was found guilty of second-degree kidnapping, a class B felony, after abducting his wife at knife point and transporting her across state lines in a wooden box in the back of his truck.²⁰¹ State law limited the punishment for class B felonies to no more than ten years of confinement, but the sentence that a judge

193. *Id.* at 2464.

194. *Id.* at 2465.

195. *Id.* at 2465-66 (citing 1 American Bar Association Standards for Criminal Justice, 4-4.1 (A.B.A. Standing Committee on Association Standards for Criminal Justice (2d ed. 1982 Supp.)).

196. *Id.* at 2467-68.

197. *Id.* at 2468.

198. *Id.*

199. *Id.* at 2469.

200. 542 U.S. 296 (2004).

201. *Id.* at 298.

may impose was further restricted to a “standard range” of forty-nine to fifty-three months.²⁰² A judge may, however, impose a greater sentence if he finds “substantial and compelling reasons justifying an exceptional sentence.”²⁰³ In Blakely’s case, the judge imposed an exceptional sentence of ninety months, greater than the standard range recommended by the State, on the ground that petitioner had acted with “deliberate cruelty.”²⁰⁴ Blakely argued that this sentencing procedure deprived him of his constitutional right to have a jury determine all the facts that are legally essential to his sentence beyond a reasonable doubt.²⁰⁵ Nevertheless, the Washington State Court of Appeals affirmed his sentence.²⁰⁶

In reversing the Washington State Court of Appeals, the Supreme Court first applied the rule decided in *Apprendi v. New Jersey*:²⁰⁷ “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”²⁰⁸ In Blakely’s case, however, the facts used to support the trial judge’s finding of “deliberate cruelty” had not been found by the jury or submitted by the defendant.²⁰⁹ The State argued that no *Apprendi* violation occurred because the punishment had not exceeded the ten-year statutory maximum for class B felonies.²¹⁰ The Court noted that its “precedents make clear, however, that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.”²¹¹ Concluding that the trial judge could not have imposed the exceptional ninety-month sentence solely on the basis of the facts admitted in the guilty plea, the Court held that the sentence violated Blakely’s Sixth Amendment right.²¹²

202. *Id.* at 299 (citing WASH. REV. CODE ANN. § 9A.20.021(1)(b) (West 2004)).

203. *Id.* (quoting WASH. REV. CODE ANN. § 9.94A.120(2) (West 2004)).

204. *Id.* at 300 (quoting WASH. REV. CODE ANN. § 9.94A.390(2)(h)(iii) (West 2005)).

205. *Id.* at 301.

206. *Id.*

207. 530 U.S. 466 (2000).

208. *Washington*, 542 U.S. at 301 (quoting *Apprendi*, 530 U.S. at 490).

209. *Id.* at 303.

210. *Id.*

211. *Id.* (emphasis in original).

212. *Id.* at 304.

K. Florida v. Nixon

In *Florida v. Nixon*,²¹³ defense counsel was faced with overwhelming evidence that his client, Nixon, committed a violent murder. Defense counsel determined that a strategy focusing on mitigation during the sentencing phase would be the best chance of avoiding a death sentence.²¹⁴ Counsel feared that denying commission of the murder in the guilt phase would greatly damage his credibility during the sentencing phase, and he tried several times to explain this concession strategy to Nixon. Nixon was generally unresponsive and never verbally approved or protested this strategy. During the guilt-innocence phase, defense counsel did not present a case and acknowledged that Nixon committed the murder. During the penalty phase, defense counsel urged that a death sentence was not appropriate and presented mitigation testimony of mental health experts and Nixon's friends and relatives.²¹⁵ The jury sentenced Nixon to death, but the judge did commend defense counsel for his trial tactic.²¹⁶

Nixon appealed to the Florida Supreme Court, arguing that defense counsel's concession under *United States v. Cronin*²¹⁷ was ineffective assistance of counsel and presumptively prejudicial.²¹⁸ The state supreme court ruled that a concession of guilt at trial required the defendant's "affirmative, explicit acceptance," an acceptance that Nixon had not given.²¹⁹ The Supreme Court granted certiorari to determine whether the defense counsel's failure to obtain Nixon's express consent to the concession strategy automatically created ineffective assistance of counsel and under what standard counsel's effectiveness should be evaluated.²²⁰

The Supreme Court first noted that decisions regarding basic trial rights, such as a guilty plea, cannot be decided by counsel.²²¹ The state supreme court, however, was wrong to require Nixon's "affirmative, explicit acceptance" of defense counsel's concession strategy.²²² The Court reasoned that the concession strategy was different from a guilty plea because the record showed that defense counsel, in order to exclude

213. 543 U.S. 175 (2004).

214. *Id.* at 179-80.

215. *Id.* at 182-83.

216. *Id.* at 184.

217. 466 U.S. 648 (1984).

218. *Nixon*, 543 U.S. at 185 (citing *Cronin*, 466 U.S. 648 (1984)).

219. *Id.* at 184-85 (quoting *Nixon v. Singletary*, 758 So. 2d 618, 624 (Fla. 2000)).

220. *Id.* at 186-87.

221. *Id.*

222. *Id.* at 186 (quoting *Nixon*, 758 So. 2d at 624 (Fla. 2000)).

prejudicial evidence, cross-examined the State's witnesses; this strategy did not hinder Nixon's right to appeal.²²³ Trial counsel fulfilled his duty to inform Nixon of the proposed strategy, and Nixon's characteristic silence made counsel's decision to pursue this strategy reasonable.²²⁴

The Court further explained that equating the concession strategy to a guilty plea resulted in the state supreme court applying the wrong standard to determine whether there was ineffective assistance of counsel.²²⁵ The Florida Supreme Court applied the *Cronic* presumption of prejudice standard, meant to be applied only if counsel had failed entirely to function as the client's advocate, instead of applying the correct *Strickland* standard that required only a showing that defense counsel had acted unreasonably.²²⁶ The Court reiterated that defense counsel's decision to focus on the mitigation during the penalty phase was reasonable in Nixon's case, and thus, the Court reversed the judgment of the Florida Supreme Court.²²⁷

L. *Beard v. Banks*

Beard v. Banks,²²⁸ a recent Supreme Court case, has a long history. The Pennsylvania Supreme Court affirmed Banks's death sentence on direct review in 1987. Subsequently, the United States Supreme Court decided the case of *Mills v. Maryland*,²²⁹ announcing that "the Constitution forbids States from imposing a requirement that the jury find a potential mitigating factor unanimously before that factor may be considered in the sentencing decision."²³⁰ In *Banks*, Banks sought state postconviction relief on the theory that the instructions and verdict form given in his case violated *Mills*.²³¹ The Pennsylvania Supreme Court rejected the claim on the merits in 1995, but in 2001 the Third Circuit Court of Appeals held that a *Mills* violation had occurred and reversed the death sentence.²³² The Supreme Court granted certiorari to decide whether *Mills* applied retroactively to Banks's case and, if so, whether the state supreme court unreasonably applied federal law in finding that no error occurred in light of *Mills*.²³³

223. *Id.* at 188.

224. *Id.*

225. *Id.*

226. *Id.* at 189-90.

227. *Id.* at 191.

228. 542 U.S. 406 (2004).

229. 486 U.S. 367 (1988).

230. *Banks*, 542 U.S. at 408.

231. *Id.* at 409.

232. *Id.*

233. *Id.* at 410.

The Court first reviewed the *Teague*²³⁴ analysis used to determine whether a constitutional rule of criminal procedure applied to a case on collateral review.²³⁵ Under *Teague* a court must first decide when the defendant's conviction became final.²³⁶ Next, it must ascertain the "legal landscape as it then existed," and ask whether the Constitution compels the rule.²³⁷ If the rule is determined to be new, the court must then consider whether it falls within an exception to nonretroactivity.²³⁸

Banks argued that under the state supreme court's "relaxed waiver rule," his conviction was final in 1995.²³⁹ Although the state supreme court had applied a "relaxed waiver rule" in past capital cases, the practice had always been discretionary and was not used in Banks's case.²⁴⁰ The Court concluded that Banks's conviction had been finalized in 1987 when the state supreme court affirmed his sentence on direct appeal.²⁴¹

The Court considered the legal landscape of 1987 to determine "whether the rule later announced in [*Mills*] was *dictated* by then-existing precedent—whether, that is, the unlawfulness of [respondent's] conviction was apparent to all reasonable jurists."²⁴² In deciding *Mills*, the Court had relied on *Lockett v. Ohio*²⁴³ and its progeny.²⁴⁴ Though the generalized *Lockett* rule that the sentencer in a capital case is allowed to consider any mitigating evidence may be viewed as supporting the conclusion in *Mills*, it does not mandate the *Mills* rule.²⁴⁵ Having determined that reasonable jurists could have differed as to whether the *Lockett* principle compelled *Mills*, the Court held that *Mills* did announce a new rule.²⁴⁶

The Court reasoned that a new rule could apply only to Banks's case if it fell under either of the *Teague* exceptions.²⁴⁷ The first exception,

234. *Teague v. Lane*, 489 U.S. 288 (1989).

235. *Beard*, 542 U.S. at 411.

236. *Id.*

237. *Id.* (quoting *Graham v. Collins*, 506 U.S. 461, 468 (1993); citing *Saffle v. Parks*, 494 U.S. 484, 488 (1990)).

238. *Id.* (citing *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997)).

239. *Id.*

240. *Id.* at 412.

241. *Id.* at 413.

242. *Id.* (quoting *Lambrix*, 520 U.S. at 527-28).

243. 438 U.S. 586 (1978).

244. *Beard*, 542 U.S. at 413-14.

245. *Id.* at 414.

246. *Id.* at 416.

247. *Id.*

allowing substantive rules, did not apply to Banks's case.²⁴⁸ Regarding the second exception, which allowed "watershed rules of criminal procedure," the Court has never held that any new rule fell under that category.²⁴⁹ Because the *Mills* rule applied narrowly and did not affect fundamental fairness, the Supreme Court concluded that it was not a "watershed" procedural rule.²⁵⁰ Holding that *Mills* did not apply retroactively, the Court reversed the judgment of the Third Circuit.²⁵¹

M. Tennard v. Dretke

During the penalty phase of his murder trial in *Tennard v. Dretke*,²⁵² mitigation testimony revealed that Tennard had an intelligence quotient ("IQ") of sixty-seven.²⁵³ Despite this evidence, the jury affirmatively answered two "special issues," deliberateness and future dangerousness, and handed down a death sentence.²⁵⁴ Tennard argued that under *Penry I*, his sentence violated the Eighth Amendment and sought postconviction relief.²⁵⁵ In *Penry I*, the Court held that "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence."²⁵⁶ The Texas Court of Criminal Appeals rejected Tennard's claim, finding that he did not present enough evidence to prove his mental retardation, but even if he had, Tennard still would not have prevailed under *Penry I* because no evidence existed that his low IQ made him unable to understand the wrongfulness of his actions.²⁵⁷ Tennard next sought federal habeas relief, but the district court denied his petition and a certificate of appealability ("COA").²⁵⁸

The Fifth Circuit Court of Appeals agreed that Tennard was not entitled to a COA, noting that his *Penry I* claim was not debatable among jurists of reason.²⁵⁹ Applying a "constitutionally relevant" test to the evidence of Tennard's mental retardation, the Fifth Circuit concluded that the IQ evidence alone did not establish mental retarda-

248. *Id.* at 416-17.

249. *Id.* at 417.

250. *Id.* at 419-20.

251. *Id.* at 420.

252. 542 U.S. 274 (2004).

253. *Id.* at 277.

254. *Id.* at 278.

255. *Id.*

256. *Id.* (quoting *Penry I*, 492 U.S. at 319).

257. *Id.* at 279.

258. *Id.* at 280-81.

259. *Id.* at 281 (citing *Tennard v. Cockrell*, 284 F.3d 591, 595 (5th Cir. 2002)).

tion and that no evidence showed the murder was attributable to his low IQ.²⁶⁰ Subsequently, the Supreme Court granted certiorari.²⁶¹

The Court noted that the Fifth Circuit uniformly applied its “constitutionally relevant” test to all *Penry I* claims, thus requiring that “the [mitigating] evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, . . . and (2) that the criminal act was attributable to this severe permanent condition.”²⁶² The Court commented that the requirement that Tennard’s low IQ bear a “nexus” to the crime was not founded on any prior decision of the Supreme Court.²⁶³ One problem with the test used by the Fifth Circuit was its failure to consider the positive aspects of a defendant’s character, as they are not considered “handicaps.”²⁶⁴ The Court explained that the correct standard to apply to mitigating evidence in a capital case was the general evidentiary standard requiring “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”²⁶⁵

The Fifth Circuit was also wrong not to consider the debatability of Tennard’s *Penry I* claim because he had not presented evidence that the crime was attributable to his low IQ.²⁶⁶ The Supreme Court based this conclusion on the reasoning that “impaired intellectual functioning is inherently mitigating.”²⁶⁷ Therefore, there was no requirement that a defendant must establish a nexus between his mental retardation and his crime.²⁶⁸

The Supreme Court held that the Fifth Circuit’s “uniquely severe permanent handicap” and “nexus” tests were incorrect and rejected them.²⁶⁹ The Court also stated that “reasonable jurists would find debatable or wrong the [d]istrict [c]ourt’s disposition of Tennard’s low-IQ-based *Penry [I]* claim, and that Tennard is therefore entitled to a

260. *Id.*

261. *Id.* at 282.

262. *Id.* at 283 (quoting *Tennard*, 284 F.3d at 595).

263. *Id.* at 284.

264. *Id.* at 285.

265. *Id.* at 284 (citing *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990); quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985)).

266. *Id.* at 287.

267. *Id.* (citing *Atkins*, 536 U.S. at 316).

268. *Id.*

269. *Id.* at 289.

certificate of appealability.”²⁷⁰ Based on these reasons, the Supreme Court reversed the judgment of the Fifth Circuit.²⁷¹

N. Smith v. Texas

During the sentencing phase of Smith’s death penalty case in *Smith v. Texas*,²⁷² defense counsel presented mitigating evidence that Smith had learning disabilities and an IQ of seventy-eight which resulted in him being placed in special education classes.²⁷³ The jury was instructed on the special issues of future dangerousness and deliberateness.²⁷⁴ A supplemental nullification instruction was also given to the jury members, informing them, after considering all the mitigating evidence, to answer “no” to one of the special issues if they believed Smith did not deserve a death sentence.²⁷⁵ The jury verdict form, however, did not mention nullification or consideration of mitigation evidence.²⁷⁶ The jurors answered “yes” to both of the special issues and sentenced Smith to death.²⁷⁷

Smith argued on direct appeal that his jury instructions were unconstitutional under *Penry I* because “the special issues did not allow the jury to give effect to his mitigation evidence.”²⁷⁸ The Texas Court of Criminal Appeals affirmed the death sentence, concluding that the nullification instruction allowed the jury to consider Smith’s mitigation evidence.²⁷⁹ Subsequently, the Supreme Court held in *Penry v. Johnson* (“*Penry II*”)²⁸⁰ that a similar nullification instruction was constitutionally inadequate because it did not allow the jury to give “full consideration and full effect to mitigating circumstances” in choosing the appropriate sentence.²⁸¹ Smith then argued that his jury instruction was unconstitutional under *Penry II*, but the Texas Court of Criminal Appeals denied Smith’s request for postconviction relief.²⁸²

The Texas Court of Criminal Appeals issued its decision just prior to the Supreme Court’s decision of *Tennard v. Dretke*, a holding that

270. *Id.*

271. *Id.*

272. 543 U.S. 37 (2004).

273. *Id.* at 41.

274. *Id.* at 38-89.

275. *Id.* at 39-40.

276. *Id.* at 41.

277. *Id.*

278. *Id.* at 42-43.

279. *Id.*

280. 532 U.S. 782 (2001).

281. *Smith*, 125 S. Ct. at 401 (quoting *Penry II*, 532 U.S. at 797 (2001)).

282. *Id.* at 404.

rejected the Fifth Circuit's threshold standard for "constitutionally relevant" mitigating evidence.²⁸³ In Smith's case, the Texas Court of Criminal Appeals relied on the same "screening test" held to be unconstitutional in *Tennard*.²⁸⁴ Using this test, the court concluded that Smith's low IQ and placement in special education classes were irrelevant because they did not show that he suffered from a "severe disability."²⁸⁵ The Supreme Court, however, reasoned that a jury might have considered this evidence as a reason to impose a lesser sentence than death.²⁸⁶ The Texas Court of Criminal Appeals also held that Smith had shown no "nexus" between his mental abilities and his crime, but the Supreme Court further noted that this "nexus" requirement was also rejected in *Tennard*.²⁸⁷

Having determined that the state court used an improper standard when assessing Smith's claim, the Supreme Court next considered whether the nullification instruction satisfied the Eighth Amendment's requirement that the trial court "empower the jury with a vehicle capable of giving effect to [the relevant mitigating] evidence."²⁸⁸ The Texas Court of Criminal Appeals held that "even if petitioner did proffer relevant mitigation evidence, the supplemental 'nullification instruction' provided to the jury adequately allowed the jury to give effect to that evidence," noting that the instructions stated that the jury "shall consider all mitigating evidence."²⁸⁹ In *Penry II*, the Supreme Court held that "the key under *Penry I* is that the jury be able to 'consider and give effect to [a defendant's mitigation] evidence in imposing sentence.'"²⁹⁰ Similar to *Penry II*, Smith's jury was required to answer a verdict form that did not mention mitigation evidence.²⁹¹ Concluding no principled distinction existed between the instruction in Smith's case and the instruction in *Penry II*, the Supreme Court reversed the judgment of the Texas Court of Criminal Appeals and held that the nullification instruction given to Smith's jury was constitutionally inadequate under *Penry II*.²⁹²

283. *Id.* (citing *Tennard*, 542 U.S. at 274).

284. *Id.* at 405 (quoting *Ex parte Smith*, 132 S.W.3d 407, 413 (Tex. Crim. App. 2004)).

285. *Id.* (quoting *Ex parte Smith*, 132 S.W.3d at 414).

286. *Id.* (citing *Tennard*, 542 U.S. at 274).

287. *Id.* (citing *Tennard*, 542 U.S. at 274).

288. *Id.*

289. *Id.*

290. *Id.* at 406 (quoting *Penry II*, 532 U.S. at 797).

291. *Id.* at 407.

292. *Id.*

O. *United States v. Booker*

In *United States v. Booker*,²⁹³ Booker was found guilty of possession with intent to distribute at least fifty grams of crack.²⁹⁴ Despite the jury hearing only evidence that Booker possessed 92.5 grams of crack, the district court judge, during a post-trial sentencing proceeding, found by a preponderance of the evidence that Booker had an additional 566 grams of crack.²⁹⁵ Instead of the “base” sentence of between 210 and 262 months in prison required by the Federal Sentencing Guidelines²⁹⁶ (“Sentencing Guidelines”), the new findings mandated that the judge choose a sentence between 360 months and life imprisonment.²⁹⁷ Based on the jury’s findings, the judge sentenced Booker to thirty years, instead of twenty-one years and ten months.²⁹⁸

The Seventh Circuit Court of Appeals held that the application of the Sentencing Guidelines conflicted with *Apprendi v. New Jersey*, a case holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”²⁹⁹ The Seventh Circuit decision relied on *Blakely v. Washington*, a case holding that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.”³⁰⁰

In *Booker* respondent Fanfan’s case revealed a similar situation wherein the trial judge made an additional finding by a preponderance of the evidence that Fanfan possessed more cocaine than the jury had found beyond a reasonable doubt.³⁰¹ Under the Sentencing Guidelines, those new findings would have required a sentence of fifteen to sixteen years instead of the five or six years authorized by the jury verdict.³⁰² Relying on *Blakely*, the trial judge concluded that he could not impose this increased sentence required by the Sentencing Guidelines without violating the Sixth Amendment.³⁰³

293. 125 S. Ct. 738 (2005).

294. *Id.* at 746.

295. *Id.*

296. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (Nov. 2004).

297. *Booker*, 125 S. Ct. at 746.

298. *Id.*

299. *Id.* (quoting *Apprendi*, 530 U.S. at 490).

300. *Id.* at 746-47.

301. *Id.* at 747.

302. *Id.*

303. *Id.*

In its analysis, the Supreme Court first determined whether the *Apprendi* line of cases applied to the Sentencing Guidelines.³⁰⁴ It has been settled that the Constitution protects every criminal defendant “against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”³⁰⁵ Also, the “Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.”³⁰⁶ These principles provided the basis for many recent decisions interpreting sentencing procedures, such as *Apprendi*, *Ring*, and *Blakely*.³⁰⁷

In *Apprendi* the Court held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.”³⁰⁸ In *Ring* the Court held that “it was impermissible for ‘the trial judge, sitting alone’ to determine the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty.”³⁰⁹ In *Blakely* the Court held that “application of Washington’s sentencing scheme violated the defendant’s right to have the jury find the existence of ‘any particular fact’ that the law makes essential to his punishment.”³¹⁰ The Court also noted that the Washington procedures at issue in *Blakely* were not constitutionally distinct from the Sentencing Guidelines at issue in the cases of *Booker* and *Fanfan*.³¹¹

The Supreme Court stated that no Sixth Amendment issue would exist if the Sentencing Guidelines were merely advisory, instead of mandatory and binding on all judges.³¹² The Court was also unpersuaded by the Government’s three arguments that the *Blakely* reasoning should not apply to the Sentencing Guidelines.³¹³ The Government argued:

Blakely is distinguishable because the Guidelines were promulgated by a commission rather than the Legislature; . . . principles of *stare decisis* require[d] [the Court] to follow four earlier decisions that are arguably inconsistent with *Blakely*; and . . . the application of *Blakely* to the

304. *Id.*

305. *Id.* at 748 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

306. *Id.* (quoting *United States v. Gaudin*, 515 U.S. 506, 511 (1995)).

307. *Id.*

308. *Id.* (quoting *Apprendi*, 530 U.S. at 490).

309. *Id.* at 748-49 (quoting *Ring*, 536 U.S. at 588-89).

310. *Id.* at 749.

311. *Id.*

312. *Id.* at 750.

313. *Id.* at 752.

Guidelines would conflict with the separation of powers principles reflected in *Mistretta v. United States*.^{314, 315}

Reaffirming its holding in *Apprendi*, the Supreme Court concluded that the *Blakely* holding applied to the Sentencing Guidelines.³¹⁶

The Supreme Court then determined what portions of the Sentencing Guidelines remained in effect and what portions were inapplicable.³¹⁷ Looking to the legislative intent, the Court concluded that the Sixth Amendment jury trial requirement was not compatible with 18 U.S.C. § 3553(b)(1) (the "Act"),³¹⁸ the statute making the Sentencing Guidelines mandatory.³¹⁹ The Court noted that, if the right to a jury trial added to the Sentencing Guidelines, it would transform the scheme to something that Congress did not intend, thus making it necessary to sever and excise portions of the Act.³²⁰ The Court determined that 18 U.S.C. § 3553(b)(1), requiring a sentencing court to impose a sentence within the Sentencing Guidelines range, and 18 U.S.C. § 3742(e),³²¹ setting forth standards of review on appeal, must be removed.³²² The Supreme Court held that the Act could still function as Congress intended without those two provisions.³²³

II. CONCLUSION

The United States Supreme Court death penalty decisions from June 1, 2004 through June 20, 2005, reveal some trends in the Court's decisions and significant differences or departures from prior cases. The Court addressed such varied issues as the international rights of foreign nationals sentenced to death in the United States, the retroactive application of the *Ring* procedural rule, the use of visible shackling in the sentencing phase, jury consideration of postcrime mitigation evidence, and narrow construction of a statutory aggravating circumstance. Additionally, the issues addressed during this time period concern discriminatory use of peremptory strikes, the constitutionality of applying the death penalty to juveniles, ineffective assistance of counsel, application of *Apprendi*, the retroactive application of the *Mills*

314. 488 U.S. 361 (1989).

315. *Booker*, 125 S. Ct. at 752.

316. *Id.* at 755-56.

317. *Id.* at 757.

318. 18 U.S.C. § 3553(b)(1) (West 2000 & Supp. 2004).

319. *Booker*, 125 S. Ct. at 758.

320. *Id.* at 758-59.

321. 18 U.S.C. § 3742 (West 2000 & Supp. 2004).

322. *Booker*, 125 S. Ct. at 764.

323. *Id.*

procedural rule, the applicability of a *Penry* claim, and the constitutionality of federal sentencing guidelines.

The Court handed down several landmark decisions during this time period. In *Schriro*, *Blakely*, and *Booker*, the Court addressed the scope and parameters of *Apprendi* and *Ring*. *Schriro* established that *Ring* was neither a substantive rule, nor a watershed procedural rule, thus barring its retroactivity. *Blakely* reiterated that *Apprendi* requires that the maximum sentence a judge may impose must be based exclusively on the facts admitted or found in the guilty phase. In *Booker* the Court applied the *Blakely* holding to find the Federal Sentencing Guidelines unconstitutional. These three cases reveal the Court's intent to maintain the principle of *Apprendi* and *Ring*, all while minimizing the possible destabilization resulting from *Ring*.

The Court also wrote notable opinions regarding peremptory strikes and *Batson* challenges in *Miller-El* and *Johnson*. *Miller-El* met the burden of showing by clear and convincing evidence that there was widespread racial discrimination during the jury selection process, despite the prosecution's pretextual reasons for using peremptory strikes. In *Johnson* the Court stated that the scope of the prima facie case required by *Batson* could not be expanded to a higher standard. *Johnson* succeeded in establishing the mere inference of discriminatory purpose in the prosecution's use of peremptory strikes. These two decisions show that, although *Batson* is somewhat flawed in that it allows prosecutors to easily use pretextual reasons for peremptory strikes, the Court is trying to eliminate those flaws without creating a whole new test.

Perhaps the most noteworthy opinion was the decision in *Roper* addressing the juvenile death penalty. The Court found that the application of the death penalty to persons under the age of eighteen was unconstitutional based on "evolving standards of decency." That decision was supported by evidence of both a national and international consensus against the death penalty for juveniles.

The decision in *Roper* follows the pattern the Court established in the 2002 decision in *Atkins* of revisiting major issues that many thought had been long-since resolved. This pattern indicates that the majority view of the Court is that the evolving standards of decency test truly can mean that the outcome of an issue, given the passage of time and the changing values of society, can be different. Further, the Court's decisions seem to indicate a willingness by the Court to address capital procedures, an area that had been left to lower courts. Finally, the Court continues to issue decisions that define the parameters of habeas corpus review by the lower federal courts and that address the issue of ineffectiveness of counsel, an issue that has occupied the attention of the Court for two decades without definite resolution.