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Recommended Citation

22 Touro L. Rev. 1003 (2006-2007)

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DEATH PENALTY AND RIGHT TO COUNSEL DECISIONS IN THE OCTOBER 2005 TERM

*Richard Klein**

This Article will analyze the death penalty, the opportunity to present a defense, and the right to counsel cases decided by the Supreme Court this past Term.

I. DEATH PENALTY DECISIONS

The death penalty exists in this country in thirty-eight states.¹ In thirty-seven of those states, the form of punishment for the administration of the death penalty is lethal injection.² One state,

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¹ The states without the death penalty include: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, and the District of Columbia. See Death Penalty Information Center, State by State Information, <http://www.deathpenaltyinfo.org/state> (last visited Feb. 21, 2007). The New York Court of Appeals declared New York's death penalty statute unconstitutional in 2004. See *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004). In addition, the federal government has capital sentencing statutes providing for the death penalty for certain crimes, all of which require a life to be taken to qualify a defendant for a capital sentence. See, e.g., 18 U.S.C. § 1111 (2000) (authorizing capital punishment for first-degree murder); 18 U.S.C. § 1958 (authorizing capital punishment for murder for hire); 18 U.S.C. § 2245 (authorizing capital punishment for murder related to rape or child molestation).

² See Death Penalty Information Center, *supra* note 1. The states authorizing death by injection are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York (although declared unconstitutional in 2004), North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *Id.* Electrocutation is authorized in 10 states: Alabama,

Nebraska, still uses the electric chair.³

A. Hill v. McDonough

The manner in which we impose the death penalty in this country is one of the issues that the Supreme Court dealt with in the case of *Hill v. McDonough*.⁴ On January 24, 2006, Clarence Hill was sitting in the chair on a gurney. He was awaiting his execution for a murder for which he had been convicted; a murder that went back twenty-four years, to 1982. There were needles in his arm and the chemicals were in the intravenous tubes that were about to be hooked up to his arm. He was to be executed at six o'clock.⁵

Justice Kennedy, however, granted a stay in the execution⁶ and the very next day the Supreme Court decided to review the case.⁷ The issue before the Court was whether or not Clarence Hill had a

Arkansas, Florida, Illinois, Kentucky, South Carolina, Virginia, Oklahoma, Tennessee, and Nebraska. Arizona, California, Maryland, Missouri, and Wyoming all authorize the use of the gas chamber, although these five states allow for lethal injection as an alternative. *Id.* New Hampshire and Washington authorize hanging, however, lethal injection is allowed as an alternative. Both Idaho and Oklahoma authorize the use of a firing squad, but Idaho allows lethal injection as an alternative, and Oklahoma only allows the use of a firing squad if lethal injection and electrocution are ruled unconstitutional. *Id.*

³ Nine other states have methods of execution by electrocution; however, Nebraska is the only state where electrocution is the sole method. *Id.*

⁴ 126 S. Ct. 2096 (2006).

⁵ Tom Baldwin, *Killer's Stay of Execution Just Seconds from Death*, THE TIMES (London), Jan. 27, 2006, at 42. Clarence Hill's death sentence was twice vacated in state and federal courts. See Brief for Petitioner at 4, *Hill*, 126 S. Ct. 2096 (No. 05-8794). The Florida Supreme Court invalidated Hill's death sentence in 1985. *Id.* at n.1 (citing *Hill v. State*, 477 So. 2d 553 (Fla. 1985)). In 1986, Hill received the death sentence in a resentencing proceeding which was affirmed by the Florida Supreme Court. *Id.* (citing *Hill v. State*, 515 So. 2d 176 (Fla. 1987), *cert. denied*, 485 U.S. 993 (1998)). After this ruling, Hill's post-conviction relief was granted on the ground that the Florida Supreme Court failed to conduct a proper harmless error inquiry when re-weighing the aggravating factors supporting a death sentence. *Id.* In 1995, The Florida Supreme Court reweighed the aggravating factors and again sentenced Hill to death. *Id.* (citing *Hill v. State*, 643 So. 2d 1071 (Fla. 1995)).

⁶ Baldwin, *supra* note 5.

⁷ *Id.*

viable § 1983⁸ claim. Section 1983 actions occur when an individual maintains that the state has or is about to violate his constitutional rights.⁹

In *Hill*, the defendant claimed that his Eighth Amendment¹⁰ protection against cruel and unusual punishment would be violated if the State of Florida executed him in the manner in which Florida had been executing other prisoners—the three-chemical cocktail they were about to use.¹¹ The issue before the Supreme Court was

⁸ 42 U.S.C. § 1983 (2000) states in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress

⁹ A stay of execution by state prisoners can only be sought by habeas corpus under 28 U.S.C. § 2254 (2000). See *Moody v. Rodriguez*, 164 F.3d 893 (5th Cir. 1999). But, if the challenge is to the method of execution which violates a constitutional protection, namely the Eighth Amendment protection against cruel and unusual punishment, the use of a § 1983 claim will be valid. See *Hill*, 126 S. Ct. at 2100; see also *Sims v. Artuz*, 230 F.3d 14, 24 (2d Cir. 2000) (holding a former inmate is allowed to bring a § 1983 claim challenging excessive force in a disciplinary proceeding).

¹⁰ U.S. CONST. amend. VIII provides in pertinent part: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

¹¹ Florida, using a procedure similar to every other death penalty state except Nebraska, executes by lethal injection with a combination of three chemicals. First, sodium pentothal, is used to anesthetize; second, pancuronium bromide, is used to paralyze the muscles; and, third, potassium chloride, is used to stop the heart of the inmate. See Linda Greenhouse, *Supreme Court Hears Case Involving Lethal Injection*, N.Y. TIMES, Apr. 27, 2006, at A18; see also Sylvia Hsieh, *Missouri Attorney Saves Convicted Murderer from Lethal Injection*, MO. LAW WKLY., Aug. 7, 2006. Florida’s execution process is described as follows:

[T]he inmate will be . . . strapped to a gurney and placed on a heart monitor. The inmate will then be injected with two IV’s containing saline solution. . . . [A] total of eight syringes will be used, each of which will be injected in a consecutive order into the IV tube attached to the inmate. The first two syringes will contain “no less than” two grams of sodium pentothal, an ultra-short-acting barbiturate which renders the inmate unconscious. The third syringe will contain a saline solution to act as a flushing agent. The fourth and fifth syringes will contain no less than fifty milligrams of pancuronium bromide, which paralyzes the muscles. The sixth syringe will contain saline, again as a flushing agent. Finally,

whether Hill had a valid § 1983 action or whether his claim should more appropriately be deemed a habeas corpus petition.¹² The distinction is critical. In 1986, Congress passed the Antiterrorism and Effective Death Penalty Act¹³ (“AEDPA”), limiting an individual who has been sentenced to the death penalty to one habeas corpus petition proceeding.¹⁴ Clarence Hill had already sought federal habeas corpus relief,¹⁵ and Florida maintained that the current claim

the seventh and eighth syringes will contain no less than one-hundred-fifty milliequivalents of potassium chloride, which stops the heart from beating. Each syringe will be numbered to ensure that they are injected into the IV tube in the proper order. A physician will stand behind the executioner while the chemicals are being injected. The physician's assistance [sic] will also observe the execution and will certify the inmate's death upon completion of the execution.

Sims v. State, 754 So. 2d 657, 665 n.17 (Fla. 2000); *see also*, Respondent's Brief on the Merits at 6-7, *Hill*, 126 S. Ct. 2096 (No. 05-8794). However, it is noted that because the Department of Corrections does not publish the “Execution Day Procedures,” it therefore retains complete discretion to change these lethal injection methods at any time. *See* Brief for Petitioner, *supra* note 5, at 5.

¹² Habeas corpus is a civil collateral remedy or proceeding. 39 C.J.S. *Habeas Corpus* § 2 (2006). The primary function of a writ of habeas corpus is to relieve a person from unlawful imprisonment. *Id.* § 7. A writ of habeas corpus is “employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal.” BLACK'S LAW DICTIONARY (8th ed. 2004). The writ provides a prisoner with an immediate hearing where a court will decide if the detention is legal. 39 C.J.S. *Habeas Corpus* § 6. If the court decides a detention is illegal it may order the prisoner to be released. *Id.*

¹³ Antiterrorism and Effective Death Penalty Act, 28 U.S.C. §§ 2261 et seq. Where a state prisoner under capital sentence brings a habeas corpus proceeding in federal court under 28 U.S.C. § 2254, the prisoner must follow the AEDPA's specific provisions. The AEDPA declares in pertinent part that even if a stay of execution is granted under the act and the state prisoner files a timely habeas petition, it will expire if the prisoner “fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.” *Id.* § 2262 (B)(3).

¹⁴ *See* 28 U.S.C. § 2244(b)(1). A second or successive habeas corpus petition will only be granted if the prisoner can demonstrate that the claim is: based on a “new rule of constitutional law, made retroactive . . . by the Supreme Court;” or “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence” and tends to show actual innocence. *Id.* § 2244 (b)(2)(A)-(B).

¹⁵ In 1995, Hill first sought federal habeas corpus relief from his reimposed sentencing on numerous grounds, including, but not limited to: (1) failure of the trial court to grant a change of venue; (2) denial of a fair trial based on the prosecutor's comments during the guilt and sentencing trials; (3) during the guilt phase of the trial the prosecutor knowingly presented false testimony to the jury; (4) error by the trial court in refusing to disclose

was in reality just another attempt to pursue a habeas claim. If the Court were to decide that Hill's action was an *inappropriate* § 1983 action, then the Court would not review the sentence, and the death penalty for Hill would be imposed.

1. *The History of Florida's Death Penalty*

Florida's death penalty history is a notable one. In the year 2000, when Florida's prescribed mode of execution was electrocution, Florida's Supreme Court in *Sims v. State*¹⁶ considered a challenge to the use of the electric chair. Florida had utilized an execution chair that was often referred to as Old Sparky, an "affectionate" name for a chair that would on occasion lead to flames shooting out of the head of the person who was being executed, causing the person to catch on fire. There were some instances when it was necessary to electrocute the inmate three times before the person would finally die.¹⁷ In the *Sims* matter, however, before the

questions submitted by the jury to the court during deliberations in the sentencing phase of trial; (5) ineffective assistance of trial counsel during both trial phases; (6) error by the trial court in refusing to provide the jury with non-statutory mitigating evidence relating to Hill's background; and (7) error by the trial court in considering non-statutory mitigating evidence concerning Hill's background. *Hill v. Moore*, 175 F.3d 915, 919-20 (11th Cir. 1999), *cert. denied*, 528 U.S. 1087 (2000).

Notably, the district court partially granted relief based on the seventh ground, with respect to the death sentence, but not the murder conviction. *Id.* at 919-920. Yet, "[w]hile appeal was pending, the State dismissed its appeal" and Hill moved before the Florida Supreme Court for it to reopen his direct appeal. *Id.* at 920. The Florida Supreme Court reopened Hill's earlier appeal from sentencing, to consider whether its previous affirmation of Hill's death sentence was conducted under the proper harmless error analysis. *Id.* The supreme court affirmed the sentence and Hill filed an amended habeas petition with the federal district court, challenging the supreme court's decision. *Id.* The district court held that the supreme court conducted a proper analysis and denied habeas relief, and the Eleventh Circuit Court affirmed. *Hill*, 175 F.3d at 920, 930.

¹⁶ *Sims*, 754 So. 2d 657.

¹⁷ During Jesse Tafero's execution in 1990 his head caught on fire and the executioner had to turn the electric chair on and off three times to finally kill the convict. At the time, a

Florida Supreme Court could actually issue a decision, Florida changed the law to provide for lethal injection,¹⁸ and it is that form of execution which was partially before the Court in the *Hill* case.

2. *The Three-Drug Injection Process*

Let us examine what the lethal injection process—a three-drug cocktail—actually is.¹⁹ The first injection that the defendant receives is sodium pentothal, and that basically is the anesthetic. Sodium pentothal is supposed to keep the inmate anesthetized and unconscious for the remainder of the proceeding so that he does not feel anything—namely the heart attack which is going to be instigated by the third injection. The second injection is bromide, which paralyzes the inmate, preventing him from being able to move and preventing him from showing that he is in great pain. Finally,

synthetic sponge placed on Tafero's head was blamed for the flames. Ellen McGarrah, *Florida Juice*, SLATE MAG., July 22, 1999 ("The executioner turns the power on and off, three times in all, and in between the jolts Tafero is moving, he's nodding, his chest rises and falls. He looks like he's still alive. Then the electricity hits him again, and the fire rises from his head, from the black leather mask, and he shudders forward and is slammed back against the chair."). Additionally, in 1997 Pedro Medina's head was also set on fire due to an alleged malfunction of the electric chair. *See id.* Furthermore, in 1999 another convict, Bud Davis, started to bleed profusely during his execution in the electric chair, soaking his shirt with blood. *Id.*

¹⁸ At the time of Sims' conviction, the method of execution then prescribed by Florida law was electrocution. *See* FLA. STAT. ANN. § 922.10 (West 1987). The *Sims* case was taken by the Florida Supreme Court, and shortly thereafter Governor Jeb Bush signed a bill changing Florida's primary method of execution to lethal injection. *See Sims*, 754 So. 2d at 663 n.11. Florida's new execution law states that "A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution." FLA. STAT. ANN. § 922.105(1) (2006).

¹⁹ *See supra* note 11 and accompanying text (describing the three drugs administered to the condemned). The majority of jurisdictions in the United States that execute by lethal injection use a similar three-chemical protocol. *See* Casey Lynne Ewart, *Use of the Drug Pavulon in Lethal Injections: Cruel and Unusual?*, 14 WM. & MARY BILL RTS. J. 1159, 1173 (2006). There is a great risk when using the three-chemical protocol that the anesthesia can wear off, in which case the condemned would be able to feel his body shutting down, yet would be unable to communicate, thus encapsulating the condemned in what is referred to as

the third chemical, potassium chloride, enters his body and causes the massive heart attack. The problem with this procedure is that very often the first anesthetic is not given in sufficient amounts to anesthetize the person. Hence, the condemned person might well be feeling the pain; the horrible, excruciating pain that comes about from that massive heart attack that is caused by the potassium chloride.

The insufficient usage of anesthetics is not just an unsubstantiated theory. A medical study was done in 2005,²⁰ and was published in *Lancet*, a British medical journal. The research revealed that in a number of instances, that were similar to the procedure utilized by Florida, the anesthesia wore off before the chloride that caused the heart attack was injected; therefore, the person had suffered horrific pain.²¹ Autopsies had been conducted on forty-nine deceased inmates, and the study concluded that twenty-one of those prisoners had, in fact, still been conscious at the time that the last chemical was injected into their bodies and caused the massive heart attack.²²

Some states chose to respond to the *Lancet* study before the Supreme Court rendered the *Hill* decision. In California, a federal

an excruciatingly painful "chemical tomb." *Id.* at 1189.

²⁰ See Leonidas G. Koniaris ET AL., *Inadequate Anesthesia in Lethal Injection for Execution*, 365 *Lancet* 1412 (2005).

²¹ *Id.* Autopsy toxicology reports from Arizona, Georgia, North Carolina, and South Carolina, showed that the post-mortem concentration of anesthetic in the blood were lower than that required for surgery in 88% of inmates; 43% of inmates had concentrations consistent with awareness which might have led to the unnecessary suffering of some of those executed. *Id.*

²² *Id.* at 1414. "Most worryingly, 21 inmates had concentrations less than the Cp50 for repression of movement in response to a vocal command. In view of these data, we suggest that it is possible that some of these inmates were fully aware during their executions." *Id.*

district court judge stopped any imposition of the death penalty until such time as the State of California would be able to provide an assurance that there would be an anesthesiologist present when the inmate is injected with the different chemicals to ensure that the amount of anesthesia given is enough to keep the person unconscious at the time that the massive heart attack occurred.²³

3. *The Supreme Court's Holding*

The Court unanimously held in *Hill*, in an opinion written by Justice Kennedy, that it was appropriate for the defendant to pursue a § 1983 action.²⁴ If the claim were merely that the death penalty is unconstitutional, or that the death penalty is inherently cruel and unusual punishment, then there would be a habeas action rather than a § 1983 claim,²⁵ and it would be unavailable to this defendant who had already pursued one habeas writ.²⁶ The Court emphasized that the defendant was only challenging the *manner* in which he was going to be put to death, not the state's right to put him to death.²⁷ Since the challenge was to the means that were going to be used, it

²³ John Gibeaut, *A Painful Way to Die?: Once Called Humane, Lethal Injection Is Now Claimed to Be Cruel and Unusual*, 92 A.B.A. J. 20 (2006). The Judge, U.S. District Judge Jeremy Fogel of San Jose, California, was presiding over the case of convicted murderer-rapist Michael Angelo Morales. *Id.* Morales argued not that the death penalty was unconstitutional but that the three drug lethal injection could cause excruciating pain and it therefore violated the Eighth Amendment's proscription against cruel and unusual punishment. *Id.* Judge Fogel "gave California a choice of posting two anesthesiologists in the execution chamber to monitor Morales or of having some other licensed medical provider administer the deadly dose, a duty normally handled by prison officials." *Id.*

²⁴ *Hill*, 126 S. Ct. at 2100.

²⁵ *Id.* at 2101.

²⁶ *Id.* (explaining that 28 U.S.C. § 2244(b)(2) would bar Hill's second habeas petition if the § 1983 action was considered a habeas action); see also *supra* note 14 and accompanying text.

²⁷ *Id.* at 2102.

was not exclusively a habeas petition and could properly form the basis of a § 1983 suit.²⁸

The impact of this case is significant because there are twenty-five states that utilize a similar lethal injection process to that which Florida uses.²⁹ The Court's holding that there could be a § 1983 civil rights claim based on a claim asserting that the lethal injection process constitutes cruel and unusual punishment,³⁰ is certain to lead to such litigation.

Several months after the Court's decision, an article appeared in the American Bar Association Journal entitled "Prosecutors Fear Limitless Civil Rights Complaints Over Lethal Injection Procedures."³¹ In August of this year, in *Taylor v. Crawford*,³² a federal district court judge sitting in Missouri concluded that the use of legal injections to inflict a death sentence cannot be utilized on individuals unless there were to be a doctor present to monitor the use of the anesthesia.³³ The State of Missouri, like the State of

²⁸ *Id.* at 2101-02.

²⁹ In fact "In 2003, thirty-seven (seventy-four percent of all states) of the thirty-eight death penalty states authorized lethal injection as a method of execution. . . . Of the thirty-seven lethal injection states, twenty-seven have lethal injection as the sole method of execution." Colin Miller, *A Death By Any Other Name: The Federal Government's Inconsistent Treatment of Drugs Used in Lethal Injections and Physician-Assisted Suicide*, 17 J.L. & HEALTH 217, 225 (2002-03).

³⁰ *Hill*, 126 S. Ct. at 2101-02.

³¹ John Gibeaut, *It's All in the Execution: Prosecutors Fear Limitless Civil Rights Complaints Over Lethal Injection Procedures*, 92 A.B.A. J. 17 (2006).

³² No. 05-4173-CV-C-FJG, 2006 WL 1779035, at *8 (W.D. Mo. June 26, 2006).

³³ *Id.*, at **8-9. The court provided that lethal injections can continue as long as the Missouri Department of Corrections complies with the following requirements: a board certified anesthesiologist must mix all drugs used in the lethal injection; not less than five grams of thiopental can be injected and "Pancuronium Bromide and Potassium Chloride will not be administered until the anesthesiologist certifies that the inmate has achieved sufficient anesthetic depth"; monitoring procedures for the anesthesiologist must be used; a contingency plan must exist if problems arise; an auditing process must ensure the procedure is being complied with; and "no further changes will be made to the lethal injection protocol

California, are unable at this time to proceed because anesthesiologists have refused to get involved.³⁴ The lack of available doctors is partly attributable to claims made by the American Medical Association and the American Society of Anesthesiologists that the objective of the profession of medicine is to aid, not harm people.³⁵ There is, moreover, a concern that the public image of doctors would be diminished if they were to partake in such a death penalty process. According to the President of the American Medical Association, "The AMA's policy is clear and unambiguous—requiring physicians to participate in executions

without seeking the prior approval of this Court." *Id.*

³⁴ Henry Weinstein, *Missouri Says It Can't Find Execution Doctor*, L.A. TIMES, July 16, 2006, at 32. In response to the Taylor case, the Department of Corrections and the state of Missouri has tried to find anesthesiologists to assist in the lethal injection executions to no avail. *Id.* In fact "Missouri officials sent letters to 298 board-certified anesthesiologists in Missouri and southern Illinois 'inquiring of their willingness to participate in execution,' . . . [t]o this date, no one has accepted." *Id.*

³⁵ See, e.g., Orin F. Guidry, M.D., *Message from the President: Observations Regarding Lethal Injection*, <http://www.asahq.org/news/asanews063006.htm> (last visited Jan. 12, 2006) ("Opinions on Social Policy Issues are part of the AMA's Code of Ethics. One of these, E-2.06, addresses capital punishment. It begins by saying, 'An individual's opinion on capital punishment is the personal moral decision of the individual. A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution.' "); Priscilla Ray, M.D., *AMA Opposes Physical Involvement in Executions*, Feb. 17, 2006, available at <http://www.ama-assn.org/ama/pub/category/16007.html> (last visited Jan. 12, 2006) (explaining that physicians violate their ethical obligations if they use their medical knowledge for purposes other than promoting an individual's health and welfare); Maura Dolan & Henry Weinstein, *Sedation May Fail in California Executions, Doctor Testifies*, L.A. TIMES, Sept. 28, 2006. Dr. Mark Heath, a professor of anesthesiology at Columbia University Medical School, explained that "the [state execution] logs showed that inmates were still breathing several minutes after prison personnel administered pancuronium bromide, a paralytic and the second of three drugs used in lethal injections in California and three dozen other states." Dolan & Weinstein, *supra* note 35. Heath went on to comment that such inmates may be conscious when the cardiac arresting third drug is administered, execution teams were poorly trained or ignorant of the drugs' properties and dosage amounts, and without experienced doctors there is no "guarantee that an inmate is adequately anesthetized." *Id.* Presently, no doctor is required to be present under California law and it's unlikely doctors, even if required, would participate given that "the American Medical Assn. and the American Society of Anesthesiologists have urged their members not to participate in executions . . . [based on the] [m]edical professionals' oaths." *Id.*

violates their oath to protect lives and erodes public confidence in the medical profession.”³⁶

B. *Kansas v. Marsh*

The issue in *Kansas v. Marsh*³⁷ was what findings must be made by a jury before it can be determined that an individual should receive the death penalty as a sentence. Prior to analyzing *Marsh*, we must first discuss the history of the Supreme Court’s capital punishment decisions.

In 1972, the Supreme Court in *Furman v. Georgia*,³⁸ held that Georgia’s death penalty statute was unconstitutional.³⁹ The Court held that the imposition of the death penalty constituted cruel and unusual punishment—it was found to be arbitrary that some individuals received the death penalty and other individuals did not receive the death penalty and hence, the Georgia statute was unconstitutional.⁴⁰ There were, therefore, no executions at all taking place in this country until 1976, when in *Gregg v. Georgia*,⁴¹ the Supreme Court held that the death penalty statute at issue was constitutional.⁴² The death penalty statute reviewed in *Gregg*

³⁶ American Medical Association: Physician Participation in Lethal Injection Violates Medical Ethics (Jul. 17, 2006) <http://www.ama-assn.org/ama/pub/category/16556.html> (last visited Jan. 12, 2007). The American Society of Anesthesiologists also believes that anesthesiologists should refrain from participating in lethal injections. See Guidry, *supra* note 35 (“This is a complex subject and anesthesiology is being reluctantly thrust into the middle of it. My advice would be to be well informed on the subject and steer clear.”).

³⁷ 126 S. Ct. 2516 (2006).

³⁸ 408 U.S. 238 (1972).

³⁹ *Id.* at 239-40.

⁴⁰ *Id.*

⁴¹ 428 U.S. 153 (1976).

⁴² *Id.* at 207

required the jury to consider aggravating factors and mitigating factors when determining which individuals should receive the death penalty.⁴³ Aggravating factors are those which call out for the imposition of the death penalty.⁴⁴ Examples of aggravating factors are as follows: the defendant had committed multiple murders, the victim was a police officer, the manner in which the defendant killed the victim was particularly heinous, or the defendant had been convicted of many violent acts in the past. The jury also had to consider mitigating factors, factors which would be used to show that the death penalty in this case for this individual is inappropriate.⁴⁵ Mitigating factors may include a consideration of whether the defendant had been subjected as a child to sexual abuse or to physical abuse or had become addicted to drugs, or had been neglected by his parents and resided in a series of foster home settings.

In the Scott Peterson case,⁴⁶ the primary mitigating evidence was that the execution of Scott would destroy his mother's life as well. As Scott Peterson's mother explained, "[I]f you were to take Scott away from us . . . it would be like a whole family wiped off the face of the earth."⁴⁷ Therefore, the argument was that the jurors should not compound the crime of the murder of Peterson's pregnant

⁴³ *Id.* at 161, 164-66 ("In the assessment of the appropriate sentence to be imposed the judge is also required to consider or to include in his instructions to the jury 'any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of [10] statutory aggravating circumstances which may be supported by the evidence.' "(quoting GA. CODE ANN. § 27-2534.1 (b) (Supp. 1975))).

⁴⁴ See BLACK'S LAW DICTIONARY 259 (8th ed. 2004).

⁴⁵ See *id.* at 260.

⁴⁶ *People v. Peterson*, No. 1056770 (Cal. Super. Ct. filed Apr. 21, 2003).

⁴⁷ See Harriet Ryan, *Peterson's Mother Begs Jury to Spare Her Son the Death Penalty*, COURTTVNEWS, Jan. 7, 2007.

wife by harming Peterson's mother as well. The Supreme Court held in *Lockett v. Ohio*⁴⁸ that both "the Eighth and Fourteenth Amendments require the sentencer" to consider as a mitigating factor "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."⁴⁹

Most states require a jury to consider aggravating and mitigating factors before it can decide that the death penalty is appropriate.⁵⁰ The jury assesses the aggravating factors and compares them to the mitigating factors; the death penalty is appropriate only if the jury determines that the aggravating factors outweigh the mitigating factors.⁵¹

The problem presented in *Marsh*, however, was that the Kansas statute provided that if the jury could not decide whether the aggravating factors did indeed outweigh the mitigating factors, if the jury finds that the mitigating factors are equal in weight to the aggravating factors, the jury could still impose the death penalty as long as it determined that the mitigating factors did not outweigh the aggravating factors.⁵² If the mitigating factors were of the same gravity as the aggravating factors, the jury could go ahead and sentence the defendant to death. The Kansas Supreme Court found

⁴⁸ 438 U.S. 586 (1978).

⁴⁹ *Id.* at 604.

⁵⁰ Ingrid A. Holewinski, Note, "*Inherently Arbitrary and Capricious*": *An Empirical Analysis of Variations Among State Death Penalty Statutes*, 12 CORNELL J.L. & PUB. POL'Y 231, 233 (2002).

⁵¹ *Id.*

⁵² *Marsh*, 126 S. Ct. at 2520.

that the statute violated the Fourteenth Amendment⁵³ and the Eighth Amendment, and was therefore unconstitutional.⁵⁴ Justice Thomas wrote the decision for the Supreme Court and was joined by Justices Roberts, Alito, Scalia, and Kennedy.

Interestingly, *Marsh* was argued before the Supreme Court twice.⁵⁵ The first time, the case was argued before Justice Alito was sitting as a judge,⁵⁶ and the eight member Court apparently could not reach a decision. There was, therefore, a second oral argument and the Supreme Court held that it was permissible to have legislation enabling a jury to impose the death penalty even though aggravating and mitigating factors were equally balanced.⁵⁷ It was held to be within the discretion of the state to determine how to allocate the burden of aggravating factors and mitigating factors—as long as the jury considers the individual nature of the defendant by an examination of claimed mitigating factors.⁵⁸

⁵³ U.S. CONST. amend. XIV, § 1 states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

⁵⁴ *Marsh*, 126 S. Ct. at 2520-21.

⁵⁵ The first oral argument occurred on December 7, 2005. Transcript of Oral Argument, *Marsh*, 126 S. Ct. 2516 (No. 04-1170), 2005 WL 3416247. The second oral argument occurred on April 25, 2006. Transcript of Oral Argument, *Marsh*, 126 S. Ct. 2516 (No. 04-1170), 2006 WL 1194315.

⁵⁶ Justice Alito was sworn in on February 1, 2006 and thus, was not present for the original oral arguments in 2005. David D. Kirkpatrick, *Alito Sworn In as Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 1, 2006, at A.21.

⁵⁷ *Marsh*, 126 S. Ct. at 2529.

⁵⁸ *Id.* at 2525. The Court stated that:

[O]ur precedents establish that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating

What is particularly interesting here is the discourse between the Justices that were part of the opinion. Justice Souter noted in his dissenting opinion that “death is different,” a quote which has been used by the Court a number of times in previous cases.⁵⁹ According to Justice Souter, the Court must be especially careful in death penalty cases to make certain that the death penalty is warranted.⁶⁰ When the jury finds that there is a balance between aggravating and mitigating factors, that should indicate that the death penalty in that instance is not warranted.⁶¹ The dissent proceeded to discuss the DNA evidence that has come to light in recent years which has exonerated a number of death row prisoners,⁶² and the fact that the Governor of Illinois had declared a moratorium in that state’s use of the death penalty because he could not have enough confidence in the certainty of the convictions that had led to the death sentence.⁶³

Scalia’s concurring opinion responded to Justice Souter by maintaining that such claims gave ammunition to those in other countries that want to bad-mouth America and to argue that America

and mitigating circumstances are to be weighed. . . . “We have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.”

Id. (quoting *Franklin v. Lynaugh*, 487 U.S. 164 (1988)).

⁵⁹ *Id.* at 2545 (Souter, J., dissenting) (quoting *Gregg v. Georgia*, 428 U.S. at 188); *see also* *Schiro v. Summerlin*, 542 U.S. 348, 357 (2004); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

⁶⁰ *Marsh*, 126 S. Ct. at 2543-44 (Souter, J., dissenting) (“[T]he death penalty must be reserved for ‘the worst of the worst.’”).

⁶¹ *Id.* at 2543 (“The statute produces a death sentence exactly when a sentencing impasse demonstrates as a matter of law that the jury does not see the evidence as showing the worst sort of crime committed by the worst sort of criminal, in a combination heinous enough to demand death.”).

⁶² *Id.* at 2544.

⁶³ *Id.*

executes innocent people.⁶⁴ Scalia further maintained that the dissent was influenced by abolition lobbyists, individuals who spend a good deal of their time calling for the abolition of the death penalty.⁶⁵ Justice Scalia asserted that the dissenters were clearly affected by professors who have paraded death row inmates who had been exonerated and accused the dissent of merely “parrot[ing] articles or reports that support[ed] its attack on the American criminal justice system.”⁶⁶ The Kansas statute was held to be constitutional.⁶⁷

II. THE OPPORTUNITY TO PRESENT A DEFENSE: HOLMES V. SOUTH CAROLINA

Holmes v. South Carolina,⁶⁸ as stated most succinctly in one of the amicus briefs in the case,⁶⁹ dealt with federalism—the rights of the states to enact whatever rules of evidence they wish.⁷⁰ Since most crimes involve a violation of state statutes and the prosecution occurs in state courts, it is within the authority of the state courts to determine what rules of evidence they wish to use in assessing the guilt or innocence of an individual. The rule of evidence developed by the South Carolina Supreme Court which was at issue in *Holmes*, was that if the prosecution’s case is strong and based on forensic

⁶⁴ *Id.* at 2532-33 (Scalia, J., concurring) (“There exists in some parts of the world sanctimonious criticism of America’s death penalty, as somehow unworthy of a civilized society.”).

⁶⁵ *Marsh*, 126 S. Ct. at 2533 (discussing the Roger Coleman case, who became the “poster-child for the abolitionist lobby” and was shortly thereafter executed).

⁶⁶ *Id.* at 2536.

⁶⁷ *Id.* at 2529 (majority opinion).

⁶⁸ 126 S. Ct. 1727 (2006).

⁶⁹ Brief for the States of Kansas et al. as Amici Curiae Supporting Respondents, *Holmes*, 126 S. Ct. 1727 (No. 04-1327), 2006 WL 123766.

⁷⁰ *Id.*, at *1 (“This Court . . . has traditionally deferred to the States’ efforts to fashion

evidence, then there is no need to permit the defendant to raise the alternative perpetrator defense—where a defendant asserts that someone other than the defendant committed the crime—in front of the jury.⁷¹ In *Holmes*, the forensic evidence was as follows: there were fibers consistent with the defendant's clothing found on the victim's bed,⁷² the defendant's palm-print was found on the door of the house,⁷³ and the victim's underwear contained the defendant's DNA.⁷⁴ The defendant, however, had obtained expert witnesses prepared to show that the evidence was contaminated and that the police used faulty procedures to identify the defendant. The defense claims as well that the police wanted to frame the defendant.⁷⁵

Most significantly, the defense argued that it was not Holmes who had committed the murder, it was someone named White.⁷⁶ At a pretrial hearing, the defense provided the following information. There were four witnesses who testified that Holmes did not commit

criminal trial procedures aimed at establishing guilt or innocence . . .").

⁷¹ *State v. Holmes*, 605 S.E.2d 19, 24 (S.C. 2004) ("[W]here there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third-party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.").

⁷² *Holmes v. South Carolina*, 126 S. Ct. 1727, 1730 (2006). The prosecution focused its presentation of the evidence on fibers found on the victim's bed sheets which were consistent with a black sweatshirt owned by the defendant, blue fibers found on both the victim's nightgown and the defendant's clothing, and consistent fibers found on both the victim's nightgown and the defendant's underwear. *Id.*

⁷³ *Id.*

⁷⁴ *Id.* (stating that the petitioner's "underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than [petitioner's] and the victim were excluded as contributors to that mixture.").

⁷⁵ *Id.*

⁷⁶ *Holmes*, 126 S. Ct. at 1730. The defense put forth several witnesses who testified that White was in the neighborhood the morning of the victim's assault, and others who testified that he had actually admitted to committing the crime and proclaimed the defendant's innocence. *Id.*

the murder, but that White had committed the murder.⁷⁷ There was, in addition, an inmate who was in the cell next to White who claimed that White had told him that he was the one who killed the victim in the case for which Holmes was to be tried. The inmate also maintained that White had told him that a police officer had told White to lie about his testimony.⁷⁸ Furthermore, the defense presented evidence in the pretrial hearing that showed that the alibi offered by White was indeed false,⁷⁹ and four witnesses testified that White was seen in the proximity of the victim's house within an hour of the murder.⁸⁰ The trial court, however, held none of this evidence would be admissible at trial because the strength of the prosecutor's case, based on the forensic evidence, barred the admission of third-party perpetrator evidence.⁸¹

If one were to cast the most favorable light on the South Carolina rule of evidence, what the court would be saying is, "If there is a real strong case against the defendant, if there is forensic evidence against the defendant, we do not want the jurors to be confused by hearing that someone else might have committed the crime. Here, although there is evidence which shows that someone else might have perpetrated the crime, the District Attorney's

⁷⁷ *Id.*

⁷⁸ *Id.* at 1730-31.

⁷⁹ *Id.* at 1731. One witness was provided who refuted White's previous alibi. *Id.*

⁸⁰ *Id.* at 1730.

⁸¹ *Holmes*, 126 S. Ct. at 1731 (stating that the trial court withheld the defendant's third-party guilt evidence by relying on an earlier decision of the South Carolina Supreme Court, "which held that such evidence is admissible if it 'raise[s] a reasonable inference or presumption as to [the defendant's] own innocence' but is not admissible if it merely 'cast[s] a bare suspicion upon another' or 'raise[s] a conjectural inference as to the commission of the crime by another.'" (quoting *State v. Gregory*, 16 S.E.2d 532 (S.C. 1941))).

evidence was so strong that the defendant's evidence would only confuse the issue." To further complicate matters, the prosecutor exploited the fact that the defendant never pointed to any alternative individual as the person who did the crime.⁸² The prosecutor made numerous references to the defendant's failure to introduce evidence that a third-party committed the crime.⁸³ In closing arguments, the prosecutor summed up his case by turning to the jurors and saying sarcastically, "So where is the evidence of the raping, murdering, beating fellow that allegedly did this crime?"⁸⁴ In other words, where is the evidence that someone other than Holmes committed this crime?

The jury convicted the defendant and sentenced him to death.⁸⁵ While Holmes was on death row, the Supreme Court granted certiorari and Justice Alito, in his first written opinion, stated for the unanimous Court that the rule of evidence was unconstitutional, and was violative of the Sixth Amendment⁸⁶ and the Fourteenth Amendment for three basic reasons.⁸⁷

⁸² Petition for Writ of Certiorari at 13, *Holmes*, 126 S. Ct. 1727 (No. 04-1327), 2005 WL 770655.

⁸³ *Id.*, at *13.

⁸⁴ *Id.*, at **13-14.

⁸⁵ *Holmes*, 126 S. Ct. at 1730.

⁸⁶ U.S. CONST. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

⁸⁷ *Holmes*, 126 S. Ct. at 1734-35 (explaining that South Carolina's procedure was arbitrary, only the jury should make all determinations concerning witness credibility, and a defendant must have a meaningful opportunity to present a complete defense).

First of all, the rule of evidence first established by the Supreme Court of South Carolina in *State v. Gay*⁸⁸ prohibited the defense, in certain instances, from effectively challenging the prosecutor's case.⁸⁹ The trial court permitted the prosecutor to present the state's forensic evidence, and if the court were then to determine that the prosecutor's case was a very strong one, the defendant would not be permitted to raise his alternative perpetrator's defense. In *Holmes*, the court even prohibited evidence to support the defendant's claim that the evidence was faulty, planted, or based on improper procedures that led to contamination. The United States Supreme Court held that the established procedure used by the South Carolina's Supreme Court was arbitrary.⁹⁰

Secondly, the Court found that it should be left to the jury to make any determination regarding the credibility of the witnesses, such as those witnesses who testified it was White who had committed the crime.⁹¹ Credibility issues are not for a judge to make,

⁸⁸ 541 S.E.2d 541 (S.C. 2001), *overruled by Holmes*, 126 S. Ct. 1727. The South Carolina Supreme Court applied the rule that when strong evidence of a defendant's guilt exists, particularly strong forensic evidence, proffered evidence concerning an alleged third-party's guilt may be excluded by the court. *See Holmes*, 126 S. Ct. at 1734.

⁸⁹ *Holmes*, 126 S. Ct. at 1734. The rationale for this evidentiary rule was that where it was clear that there could only have been one perpetrator of a particular crime, and the evidence strongly suggested that the defendant was that perpetrator, any evidence that pointed to the possible guilt of a third-party must have been so weakly connected to the central issues of the trial that its exclusion was appropriate. *Id.*

⁹⁰ *Id.* at 1735 ("[T]he rule is 'arbitrary' in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third-party guilt rules were designed to further."). Specifically, the *Gregory* rule held that evidence of a third-party's guilt is "admissible if it raises a reasonable inference or presumption as to the defendant's own innocence but is not admissible if it merely 'casts a bare suspicion upon another' or 'raises a conjectural inference as to the commission of the crime by another.'" *Id.* at 1731; *see also State v. Gregory*, 16 S.E.2d 532, 534 (S.C. 1941).

⁹¹ *Holmes*, 126 S. Ct. at 1734. The Court explained that the reliability of the prosecution's evidence and the credibility of its witnesses are assessments that are reserved for determination by the trier of fact. *Id.*

they should be heard before a jury which would then be in the best position to determine whether such testimonial evidence is credible.⁹²

Thirdly, the Court reiterated what it had stated in a number of other decisions, that the defendant must have a meaningful opportunity to present a complete defense.⁹³ The evidentiary rules that had been established in South Carolina improperly impacted upon and restricted the defendant's ability to offer his defense for evaluation by the jury. The Supreme Court's decision in *Holmes* emphasized the fact that the Court will review a state's evidentiary rules and if those rules were found to violate an individual's constitutional rights, they will be struck down.⁹⁴

III. THE RIGHT TO COUNSEL: UNITED STATES V. GONZALEZ-LOPEZ

Finally, I would like to analyze a right to counsel case, *United States v. Gonzalez-Lopez*.⁹⁵ Gonzalez-Lopez was a defendant in Missouri who was charged with selling one hundred kilograms of marijuana. He wanted an experienced criminal defense attorney named Joseph Low, a California lawyer, to represent him. The

⁹² *Id.* at 1734-35. To illustrate the prejudicial effect on the defendant, the Court pointed out that the rule is just as illogical as its converse, "a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty." *Id.*

⁹³ *Id.* at 1735 (explaining that the rule impedes a defendant's right to a " 'meaningful opportunity to present a complete defense' " because he is barred from arguing someone else committed the crime simply because the great strength of the prosecution's evidence prohibits the admission of contrary evidence (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986))).

⁹⁴ *Id.* at 1732 (explaining that rules excluding defense evidence violate the Constitution where they fail to serve a legitimate purpose or are disproportionate to the ends that such rules are designed or asserted to promote).

⁹⁵ 126 S. Ct. 2557 (2006).

defendant contacted Low and Low agreed to take the case. Low had previously prevailed in a similar, though unrelated, drug sale case.⁹⁶

Joseph Low contacted a local attorney in the State of Missouri, Karl Dickhaus, and asked Dickhaus if he would be his local lawyer. And Dickhaus, thinking that he would primarily be carrying the bags of Joseph Low back and forth to the courtroom,⁹⁷ agreed to be the local counsel. Dickhaus had never tried a criminal case in the federal courts, but believed that Low would be the lead attorney and he would merely be a secondary lawyer in Missouri that would assist Low in the case.⁹⁸

The problem was that the federal district court judge in Missouri refused to grant Low's *pro hac vice* motion on three separate occasions.⁹⁹ The result of the denial of the *pro hac vice* motion was that Joseph Low could not appear in court to represent Gonzalez-Lopez. The trial, therefore, proceeded with Karl Dickhaus, the local attorney who initially thought he would only be carrying the bags of Joseph Low, going forward and conducting the trial.

⁹⁶ United States v. Gonzalez-Lopez, 399 F.3d 924, 927 (8th Cir. 2005). The defendant sought to hire Low after learning of his reputation for providing aggressive criminal defense for defendants in a previous drug case in the Eastern District of Missouri. *Id.* See also Scott Lauck, *The Accidental Jurist*, MO. LAW. WKLY, July 31, 2006.

⁹⁷ Lauck, *supra* note 96.

⁹⁸ *Id.*

⁹⁹ *Gonzalez-Lopez*, 126 S. Ct. at 2560. The Magistrate Judge first permitted Low to participate in an evidentiary hearing with the condition that he file a motion for admission *pro hac vice*, but revoked the acceptance during the hearing claiming Low violated a court rule. *Id.* The District Court then denied Low's applications for admission *pro hac vice* the following week and again a month later, despite the defendant's insistence that he wanted Low, and only Low, to represent him. *Id.* Low moved for *pro hac vice* admission again when the case proceeded to trial and his request for admission was denied, as well as his request to sit at the defense table. *Id.* The District Court ordered Low to sit in the audience accompanied by a U.S. Marshall throughout the proceedings to ensure he had no contact with the defendant's attorney. *Id.*

Two very important issues were agreed upon and were stipulated to by the parties by the time the appeal of the conviction had reached the Supreme Court. First, both parties agreed that the federal district court judge had committed error in denying Joseph Low's application to appear for the defendant.¹⁰⁰ That issue was not contested; the state did not maintain that the judge had properly used his discretion in barring Joseph Low from representing Gonzalez-Lopez. It was clear to all parties that Joseph Low had the right to represent and appear in court for this defendant.¹⁰¹ Secondly, it was agreed that Gonzalez-Lopez was indeed afforded a fair trial.¹⁰² The lawyer who did represent Gonzalez-Lopez, Karl Dickhaus, did not commit errors, he did not provide ineffective assistance of counsel, and he was not incompetent.¹⁰³ He provided effective representation and therefore, the trial was a fair one. The Fourteenth Amendment was not violated and due process was afforded to the defendant.¹⁰⁴

The issue in *Gonzalez-Lopez* focused on what precisely the Sixth Amendment right to counsel provides. Does it stand by itself or is it merely a means to ensure a fair trial? If a fair trial results, does it matter if the right to counsel was violated? Why does it

¹⁰⁰ *Id.* at 2563 (explaining that a defendant is deprived of the right to counsel when "erroneously prevented from being represented by the lawyer he wants, regardless of the quality of representation he received.").

¹⁰¹ *Id.* at 2561 (stating that even the government did not dispute the fact that the trial court's decision to prevent Low from representing the defendant was erroneous, and deprived the defendant of counsel of his choosing).

¹⁰² *Id.* at 2562 ("[T]he right at stake here is the right to counsel of choice, not the right to a fair trial."). During oral argument, Justice Scalia stated "It's a fair trial. Nobody is saying it wasn't a fair trial." Transcript of Oral Argument at **21-22, *Gonzalez-Lopez*, 126 S. Ct. 2557 (No. 05-352), 2006 WL 1134467.

¹⁰³ Transcript of Oral Argument, *supra* note 102, at **21-22.

¹⁰⁴ *Gonzalez-Lopez*, 126 S. Ct. at 2562.

matter if the defendant was denied his counsel of choice as long as the lawyer who did represent the defendant was competent and did an effective job? Are the criminal procedure guarantees under the Bill of Rights the only *means* to provide a fair trial or are they the *ends* that have to be valued separately?

The Eighth Circuit reversed the conviction, holding that there was a constitutional violation of the right to assistance of counsel by not permitting the counsel of choice, Joseph Low, to represent the defendant.¹⁰⁵ There had been no immediate appeal from the Eighth Circuit's decision, rather, the case was remanded and pretrial hearings began.¹⁰⁶ Joseph Low represented the defendant and he conducted the pretrial hearing. He cross-examined the main witness against Gonzalez-Lopez, and it became quite clear during that cross-examination that the witness had lied during the course of the first trial.¹⁰⁷ During the pretrial hearing the witness admitted that the defendant, Gonzalez-Lopez, did not participate in the one hundred kilogram sale of marijuana.¹⁰⁸ At that point, the U.S. Government, faced with a subsequent trial that would likely result in a verdict of not guilty, decided to appeal the Eighth Circuit's decision that the right to counsel had been violated at the trial.¹⁰⁹ The trial court granted a stay of the proceedings and the Supreme Court granted certiorari to consider whether the right to counsel was violated when

¹⁰⁵ *Id.* at 2561; *Gonzalez-Lopez*, 399 F.3d at 932 (“[T]he district court erred in denying Low’s application pro hac vice.”).

¹⁰⁶ *Gonzalez-Lopez*, 399 F.3d at 935.

¹⁰⁷ Lauck, *supra* note 96.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

the trial court denied Gonzalez-Lopez's counsel of choice from representing him.¹¹⁰

The government's position was that no constitutional violation existed because the defendant had effective counsel.¹¹¹ In *Strickland v. Washington*,¹¹² a 1984 decision, the Supreme Court specified what is required to be considered in assessing whether there was the constitutionally mandated effective assistance of counsel at trial.¹¹³ First, it has to be shown that the counsel was not competent in his representation.¹¹⁴ Second, it has to be shown that the defendant was prejudiced because of that incompetence.¹¹⁵ In *Gonzalez-Lopez*, the government argued that the *Strickland* test for reversing a conviction based on a denial of the Sixth Amendment right to counsel was not met both because the representation provided was competent and that there was no prejudice to the defendant since the lawyer who conducted the trial provided effective assistance. The government argued it was not the *identity* of the lawyer who represented the defendant that was critical, but rather whether or not the defendant actually received effective assistance of counsel.¹¹⁶

The oral argument was fascinating because it focused on the

¹¹⁰ *Gonzalez-Lopez*, 126 S. Ct. at 2566.

¹¹¹ *Id.* at 2561.

¹¹² 466 U.S. 668 (1984).

¹¹³ *Id.* at 687 ("A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components.").

¹¹⁴ *Id.* The Court explained that the defendant must make a "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*

¹¹⁵ *Id.* "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.*

¹¹⁶ *Gonzalez-Lopez*, 126 S. Ct. at 2561-62.

fundamentally different perceptions of the Justices regarding the individual's right to choose his or her own lawyer. Justice Scalia commented, while questioning one counsel, "I want to have a lawyer who will invent the Twinkie defense. . . . I want a lawyer who's going to win for me."¹¹⁷ The Twinkie defense was used years ago by someone who claimed that it was the eating of Twinkies, which are very rich and sugary, which led to the commission of the violent act.¹¹⁸ Justice Roberts, on the other hand, downplayed the unique abilities of a given attorney and observed that there are "hundreds of thousands of lawyers."¹¹⁹ Justice Roberts explained, "It's not like [the defendant] . . . wants a Rolls Royce and he gets . . . a Yugo or something."¹²⁰

In a very unlikely combination of Justices, the Court decided five-four—with Justices Ginsberg, Breyer, Stevens, Souter, and Scalia making up the majority—that the conviction must be overturned because the court denied the defendant's right to the counsel of his choice.¹²¹ The Court explained that the right is to a counsel of one's choice, and this fundamental right existed independent of whether or not a fair trial ensued.¹²² There is no need

¹¹⁷ Transcript of Oral Argument, *supra* note 102, at **16-17. The "Twinkie Defense" originated in the 1979 trial of Dan White, who asserted a diminished capacity defense to allegations in San Francisco that he had killed Mayor George Moscone and Supervisor Harvey Milk, attributing his mental state in part to poor dietary habits, consisting mostly of junk food, which he claimed led him into a deep state of depression. See Carol Pogash, *Myth of the "Twinkie Defense": The Verdict in the Dan White Case Wasn't Based on His Ingestion of Junk Food*, S.F. CHRON., Nov. 23, 2003, at D-1.

¹¹⁸ Pogash, *supra* note 117.

¹¹⁹ Transcript of Oral Argument, *supra* note 102, at **36-37.

¹²⁰ *Id.*

¹²¹ *Gonzalez-Lopez*, 126 S. Ct. at 2559, 2566.

¹²² *Id.* at 2563 n.3 (explaining that the instant case is distinguishable from *Wheat v. United States*, 486 U.S. 153 (1988), where the Court held that limitations may be placed on the right

to show that the defendant was prejudiced by going to trial with a counsel who was not his first choice to represent him.¹²³ It was at the moment that counsel of choice is denied to the defendant that the Sixth Amendment right is violated regardless of what actually occurs at the trial.¹²⁴ The Court found that the only proper remedy for the denial of counsel of choice is to overturn the conviction and have another trial where the defendant has a right to the counsel of choice.¹²⁵

One must emphasize, however, because it is clear in the *Gonzalez-Lopez* decision, that indigents with court-appointed counsel are not affected by the Court's holding. Justice Scalia made it a point to emphasize there is no right to counsel of choice for defendants who require appointed counsel.¹²⁶ The *Gonzalez-Lopez* decision only applied to those instances where someone can afford to have private counsel. For other individuals, the Court's five-four decision in *Morris v. Slappy*¹²⁷ holds: the Sixth Amendment does not guarantee a meaningful relationship between an accused and his counsel.¹²⁸

to counsel of one's choice where a conflict of interest may impair the defendant's right to a fair trial). According to the Court, "[i]t is one thing to conclude that the right to counsel of choice may be limited by the need for fair trial, but quite another to say that the right does not exist unless its denial renders the trial unfair." *Id.*

¹²³ *Id.* at 2562 (holding that because the right at stake here is the right to choose counsel, the right is not violated whenever the deprivation was erroneous, and no further showing of prejudice is required).

¹²⁴ *Id.* at 2566. The Court explained that it has "an 'independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'" *Id.* (quoting *Wheat*, 486 U.S. at 160).

¹²⁵ *Id.* at 2565-66 (holding that the defendant's Sixth Amendment right to counsel of his choice has been violated and that such a violation is not subject to a harmless-error analysis).

¹²⁶ *Gonzalez-Lopez*, 126 S. Ct. at 2565 (explaining that there are limits on the right to choose counsel).

¹²⁷ 461 U.S. 1 (1983).

¹²⁸ *Id.* at 13.

We are left here with a situation, as pointed out by Justice Alito in his dissent, where if an indigent is appointed counsel and that counsel is ineffective but still no prejudice can be shown, the conviction will stand.¹²⁹ The conviction is not overturned even though the counsel may not have been competent during the course of the trial.¹³⁰ However, for one who has the money to go ahead and retain his own counsel but is denied his counsel of choice, any conviction will be overturned even when the substitute counsel provided an absolutely brilliant, flawless defense.¹³¹

What are the ramifications of this holding? I think we can see its importance in the Eastern District of New York case of *United States v. Liszewski*.¹³² The United States Attorney's Office had attempted to get defendant's counsel removed based on the claim that there was a conflict of interest.¹³³ Judge Garaufus' holding reflected the Supreme Court's decision in *Gonzalez-Lopez*: "I am acutely aware of my obligation to permit Liszewski to proceed with counsel of choice if at all possible. . . . To do otherwise would be to risk automatic reversal of any conviction that might ensue."¹³⁴

¹²⁹ *Gonzalez-Lopez*, 126 S. Ct. at 2570 (Alito, J., dissenting). "Under the majority's holding, a defendant who is erroneously required to go to trial with a second-choice attorney is automatically entitled to a new trial even if this attorney performed brilliantly. By contrast, a defendant whose attorney was ineffective in the constitutional sense . . . cannot obtain relief without showing prejudice." *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 2570.

¹³² No. 06-CR-130, 2006 WL 2376382 (E.D.N.Y. 2006).

¹³³ *Id.*, at *1.

¹³⁴ *Id.*, at *10.

IV. CONCLUSION

The 2005-06 Term of the Court was one which honored the need to ensure fairness and equity in the imposition of the death penalty in this country. The all-important ability of an individual to go forward with a § 1983 claim challenging the manner in which he was to be executed was strengthened by the decision in *Hill v. McDonough*.¹³⁵ A state's rule of evidence which has strongly impacted upon and restricted a defendant's right to present a defense based on a claim that an alternate perpetrator had committed the crime for which the defendant had been charged, was found to be unconstitutional because it interfered with the vital need of the defendant to have a meaningful opportunity to present a defense.¹³⁶ The right to have the counsel of choice represent one at trial was deemed to be of such import that once it had been improperly denied, a subsequent conviction will be overturned independent of how effective the representation by the substitute counsel had been.¹³⁷ In *Kansas v. Marsh*,¹³⁸ however, the Court failed to emphasize the need to ensure, to whatever extent possible, that the sentence of death occurs only in those extraordinary circumstances where a jury has been certain that the punishment of death is warranted. The Court held that even when the jury does *not* find that the aggravating factors in a specific case outweigh the mitigating circumstances, a sentence of death can nevertheless be imposed.

¹³⁵ See *supra* notes 4-36 and accompanying text (discussing the *Hill* case).

¹³⁶ See *supra* notes 68-94 and accompanying text (discussing the *Holmes* case).

¹³⁷ See *supra* notes 95-134 and accompanying text (discussing the *Gonzalez-Lopez* case).

¹³⁸ See *supra* notes 37-67 and accompanying text (discussing the *Marsh* case).

