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## **An Analysis of Death Penalty Decisions from the October 2006 Supreme Court Term**

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## An Analysis of Death Penalty Decisions from the October 2006 Supreme Court Term

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## AN ANALYSIS OF DEATH PENALTY DECISIONS FROM THE OCTOBER 2006 SUPREME COURT TERM

*Richard Klein*\*

The Supreme Court's death penalty jurisprudence over the last six years reflects the Court's increasing concerns about the imposition of the sentence of death. The Court has barred the death penalty for persons who were under eighteen years of age at the time of the murder,<sup>1</sup> overturned death sentences based on racial bias and jury selection,<sup>2</sup> reversed death sentences based on incompetence of defense counsel<sup>3</sup> and flawed instructions from the judge to the jury.<sup>4</sup> This context frames this Article's discussion of the death penalty decisions from the October 2006 Term.

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<sup>1</sup> *Roper v. Simmons*, 543 U.S. 551, 578, app. 579-80 (2005) (listing states that have set the minimum age for the death penalty at eighteen).

<sup>2</sup> *See Miller-El v. Dretke*, 545 U.S. 231, 266 (2005) (finding that race-based peremptory strikes constituted reversible error). *See also Turner v. Murray*, 476 U.S. 28, 37 (1986) (holding that capital defendants are entitled to question prospective jurors about racial prejudice when that defendant stands accused of an interracial crime).

<sup>3</sup> *See Wiggins v. Smith*, 539 U.S. 510, 519-20, 535-38 (2003) (holding that counsel's failure to offer mitigating evidence constituted ineffective assistance of counsel warranting remand). *See also Williams v. Taylor*, 529 U.S. 362, 398-99 (2000).

<sup>4</sup> *See Kelly v. South Carolina*, 534 U.S. 246, 257 (2002) (reversing petitioner's death sentence because he was entitled to a clearer jury instruction regarding "parole ineligibility"); *Shafer v. South Carolina*, 532 U.S. 36, 54, 55 (2001) (finding reversible error for failing to instruct the jury that a life sentence did not permit the possibility of parole).

# I. *UTTECHT V. BROWN*

*Uttecht v. Brown*<sup>5</sup> is an exception to this Supreme Court trend. To understand *Uttecht*, some background concerning death penalty jurisprudence will be helpful. In order for the death penalty to be imposed, the Supreme Court has required that there be a bifurcated jury trial. The first task for the jurors is to weigh whether or not they believe the defendant to be guilty of the crime of murder.<sup>6</sup> Then, if the jury determines that the defendant is guilty, that same jury continues to sit to determine whether or not the death penalty is the appropriate sentence.<sup>7</sup>

As part of this “penalty phase,” the Supreme Court requires the jury to consider aggravating and mitigating factors.<sup>8</sup> Aggravating factors are those which tend to call out for the death penalty;<sup>9</sup> the death penalty is not to be given routinely.<sup>10</sup> It is imposed, as has been said, for “the worst of the worst” murders.<sup>11</sup> Examples of aggravat-

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<sup>5</sup> 127 S. Ct. 2218 (2007).

<sup>6</sup> *Gregg v. Georgia*, 428 U.S. 153, 163 (1976) (“The capital defendant’s guilt or innocence is determined in the traditional manner, either by a trial judge or a jury, in the first stage of a bifurcated trial.”).

<sup>7</sup> *Jurek v. Texas*, 428 U.S. 262, 267 (1976) (“Texas law requires that if a defendant has been convicted of a capital offense, the trial court must conduct a separate sentencing proceeding before the same jury that tried the issue of guilt.”); *Proffitt v. Florida*, 428 U.S. 242, 248 (1976) (“[I]f a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence.”); *Gregg*, 428 U.S. at 163 (“After a verdict, finding, or plea of guilty to a capital crime, a presentence hearing is conducted before whoever made the determination of guilt.”).

<sup>8</sup> *Proffitt*, 428 U.S. at 248 (“Evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances.”); *Gregg*, 428 U.S. at 206 (“While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death.”).

<sup>9</sup> See *Gregg*, 428 U.S. at 165-66.

<sup>10</sup> See *id.* at 206-07 (“No longer can a jury wantonly and freakishly impose the death sentence . . .”).

<sup>11</sup> *Kansas v. Marsh*, 126 S. Ct. 2516, 2543 (2006) (Souter, J., dissenting) (citations omit-

ing factors include a defendant's having committed violent acts in the past, a defendant who has a long criminal record, the particularly brutal nature of the killing, or if several people were killed at the time that the defendant committed the murder or murders.<sup>12</sup> Mitigating factors include such facts as the defendant never having been convicted of a crime in the past or that the defendant's involvement in this particular murder might not have been as significant as should be required to impose the death sentence.

With regard to the bifurcated jury trial, the Supreme Court has also held that jurors who sit in any part of the death penalty case—that means to determine guilt or innocence as well as to determine whether the death sentence should be imposed or not—must be “death qualified.”<sup>13</sup> “Death qualified” means that the jurors are not ideologically or religiously opposed to the death penalty.<sup>14</sup> These jurors can, when instructed by the judge, consider the aggravating factors, the mitigating factors and, in the appropriate case, determine that the defendant should get the death penalty.<sup>15</sup>

*Uttecht* dealt with a Washington State statute, under which the jury's sentencing options post conviction was either to impose a

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ted).

<sup>12</sup> See *Gregg*, 428 U.S. at 195 n.44 (describing aggravating circumstances: “defendant was previously convicted of another murder or of a felony . . . [a]t the time the murder was committed the defendant also committed another murder . . . [t]he murder was especially heinous, atrocious or cruel” (citing MODEL PENAL CODE § 201.6(3)-(4) (Tentative Draft No. 9, 1959))).

<sup>13</sup> See *Lockhart v. McCree*, 476 U.S. 162, 165, 173 (1986) (upholding the constitutionality of a state's procedure for ensuring jurors are death qualified prior to sentencing).

<sup>14</sup> See *id.* at 165. Death qualifying involves “the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors . . . .” *Id.*

<sup>15</sup> *Gregg*, 428 U.S. at 206.

death sentence or to determine that the defendant should be sentenced to life without parole.<sup>16</sup> There was no possibility that the defendant was going to be paroled once the jurors came back with a conviction.<sup>17</sup> Under this statute, the judge would question each member of the jury in a one-on-one session in the judge's chambers as the voir dire process.<sup>18</sup> The jury selection process is of great import in these cases, and is typically done in the judge's chambers with no other jurors around.<sup>19</sup> The only people present are the one juror, the judge, defense counsel and the prosecutor.<sup>20</sup>

In *Uttecht*, one juror, called Juror Z, made certain comments when he was asked questions by the prosecutor and the defense counsel. He expressed concern about imposing the death penalty when there was the option of life without parole.<sup>21</sup> Since the defendant would not be getting back out on the street in either event, the juror initially queried whether or not the death sentence would be needed to properly provide protection for the citizenry.<sup>22</sup> Juror Z also commented that he did believe severe situations warranted the death penalty.<sup>23</sup> The prosecutor asked Juror Z if he indeed would choose to

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<sup>16</sup> *Uttecht*, 127 S. Ct. at 2226.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See *Trujillo v. Sullivan*, 815 F.2d 597, 606 (10th Cir. 1987) (discussing the benefit of individual and sequestered voir dire during the death qualification process).

<sup>20</sup> *Uttecht*, 127 S. Ct. at 2226 ("Under the *voir dire* procedures, the prosecution and defense alternated in commencing the examination.").

<sup>21</sup> *Id.* at 2227. The juror added that "it wasn't until today that I became aware that we had a life without parole in the state of Washington." *Id.*

<sup>22</sup> *Id.* When pressed as to when the death penalty would be appropriate, "the only example Juror Z could provide was when, 'a person is . . . incorrigible and would re-violate if released.'" When Juror Z was assured that there would be no possibility of parole Juror Z stated he was unsure if that fact would affect his ability to impose the death sentence. *Id.*

<sup>23</sup> *Uttecht*, 127 S. Ct. at 2226-27.

impose the death penalty even if the defendant was never going to be released,<sup>24</sup> to which the juror answered in the affirmative and explained, “I don’t think it should never happen, and I don’t think it should happen 10 times a week either. There [are] times when it would be appropriate.”<sup>25</sup>

The prosecutor challenged this juror and the judge agreed to strike the juror accordingly.<sup>26</sup> The trial proceeded, the defendant was convicted and sentenced to death. On appeal, Judge Alex Kozinski wrote a very strong decision overturning the death sentence because of the exclusion of that particular juror.<sup>27</sup> Thus, the issue before the Supreme Court was whether the defendant’s due process rights to a fair, impartial, unbiased jury were impacted because of the elimination of that Juror Z.<sup>28</sup>

*Uttecht*, and every single one of the death penalty cases this Article examines from the October 2006 Term, was a five-four decision.<sup>29</sup> There is a consistent block of four on the one hand: Justices Scalia, Thomas, Alito, and Chief Justice Roberts, and a consistent block of three on the other: Justices Breyer, Ginsburg, and Souter.

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<sup>24</sup> *Id.* at 2227.

<sup>25</sup> *Id.* at 2227 (quotations omitted).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 2222.

<sup>28</sup> *Uttecht*, 127 S. Ct. at 2222.

<sup>29</sup> *Panetti v. Quarterman*, 127 S. Ct. 2842, 2847, 2848 (2007); *Uttecht*, 127 S. Ct. at 2220; *Brewer v. Quarterman*, 127 S. Ct. 1706, 1709, 1714 (2007) (holding that the statute under which Brewer was sentenced improperly prevented the jury from considering “constitutionally relevant mitigating evidence”); *Smith v. Texas*, 127 S. Ct. 1686, 1689, 1699 (2007) (holding that Smith was entitled to relief under Texas’ “state harmless-error framework”); *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1659 (2007) (holding that the jury charge erroneously did not allow the jurors to consider “constitutionally relevant mitigating evidence”).

Justices Stevens and Kennedy were the swing votes.<sup>30</sup>

In an opinion authored by Justice Kennedy, the *Uttecht* Court reinstated the death sentence.<sup>31</sup> Justice Kennedy emphasized that the state has a strong interest in having trial jurors who are able to apply capital punishment; if a juror is impaired in his ability to impose the death penalty, he can and should be excused.<sup>32</sup>

*Uttecht* came to the Supreme Court under the Antiterrorism and Effective Death Penalty Act ("AEDPA"),<sup>33</sup> which requires federal courts to defer to determinations made by the state court as long as the state court has acted in a reasonable fashion.<sup>34</sup> In *Uttecht*, Justice Kennedy's decision emphasizes that the state court judge, who was there when Juror Z was being questioned, was in the best position to assess the juror's demeanor and credibility and to determine whether the juror could indeed impose the death sentence if found to be appropriate.<sup>35</sup>

Additionally, the Court was concerned that Juror Z's answers were confusing and equivocal at times.<sup>36</sup> In the beginning of voir dire, Juror Z indicated that he thought that prosecutor's burden was to

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<sup>30</sup> *Uttecht*, 127 S. Ct. at 2220; *Panetti*, 127 S. Ct. at 2847; *Brewer*, 127 S. Ct. at 1709; *Smith*, 127 S. Ct. at 1689; *Abdul-Kabir*, 127 S. Ct. at 1659.

<sup>31</sup> *Uttecht*, 127 S. Ct. at 2221, 2222.

<sup>32</sup> *Id.* at 2224.

<sup>33</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.); 28 U.S.C.A. § 2254 (West 1996). "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." *Id.* § 2254(b)(1)(A).

<sup>34</sup> *Id.* § 2254(d)(2) (stating that an application for a writ of habeas corpus shall only be granted if the decision followed from an unreasonable application of the facts).

<sup>35</sup> *Uttecht*, 127 S. Ct. at 2224.

<sup>36</sup> *Id.* at 2227 (discussing Juror Z's confusion and misunderstandings with regard to his duties as a juror and his possible inability to return a sentence of death).



prove the case “beyond a shadow of a doubt” instead of “beyond a reasonable doubt,” but that confusion was certainly cleared up during the voir dire process.<sup>37</sup>

Justice Stevens wrote a bitter dissent.<sup>38</sup> In virtually every case that this Article examines from this Term, the dissents are quite harsh when referring to the majority opinion of the Court.

Justice Stevens took the unusual path of reading part of the opinion publicly in court—something a Justice does when that Justice is particularly concerned about the decision and wants to emphasize his or her position. Justice Stevens maintained that the majority opinion can have the impact of limiting the appropriate representation of a cross-section of the community on the jury and stacks the deck in favor of the prosecution. To Stevens, the Court got things horribly backwards, and expressed concern that the impact of *Uttecht* will be that judges may disqualify jurors who harbor even some slight reservation in imposing the death penalty.<sup>39</sup>

The first footnote of Justice Stevens’ dissent is particularly noteworthy. It is routine in almost all criminal cases for the Court’s decision to recite the facts which formed the basis for the crime for which the defendant has been found guilty.<sup>40</sup> Nevertheless, Justice Stevens highlights the majority opinion’s description of the crime in

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 2238 (Stevens, J., dissenting). “Millions of Americans oppose the death penalty. A cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified.” *Id.*

<sup>39</sup> *Id.* at 2239, 2243.

<sup>40</sup> *E.g.*, *Brewer*, 127 S. Ct. at 1710 (stating that petitioner committed murder in the process of carrying out a robbery); *Abdul-Kabir*, 127 S. Ct. at 1659-60 (discussing the facts of the underlying murder for which petitioner was convicted).

this instance and questions the Court's motivation in doing such:

The Court opens its opinion with a graphic description of the underlying facts of respondent's crime, perhaps in an attempt to startle the reader or muster moral support for its decision. Given the legal question at issue, and the procedural posture of this case, the inclusion of such description is, in my view, both irrelevant and unnecessary.<sup>41</sup>

What is the foundation of Justice Stevens' depth of concern on the issue presented in *Uttecht*? Polls have shown that when asked whether they favor the death penalty when life without parole is an alternative, about half the population of this country simply says no.<sup>42</sup> If we continue to require death-qualified jurors and enable judicial discretion to be utilized as it was in *Uttecht*, then almost half of the country may not be able to sit on a capital case—not even to determine guilt or innocence.

A related concern is that those individuals who are supportive of the death penalty, even when life without parole is an option, tend to be pro-prosecutorial in perspective.<sup>43</sup> Such persons are more likely to convict, to believe police testimony, to disbelieve a defendant who testifies, and to disbelieve witnesses who testify on behalf of the defendant.<sup>44</sup> Also, it is important to note that women and minorities

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<sup>41</sup> *Uttecht*, 127 S. Ct. at 2239 n.1 (Stevens, J., dissenting).

<sup>42</sup> See e.g., Lydia Saad, *Support for Death Penalty Steady at 64%*, GALLUP NEWS SERVICE, Dec. 8, 2005, <http://www.gallup.com/poll/20350/Support-Death-Penalty-Steady-64.aspx?version=print> (finding that as of October 13, 2005, sixty-four percent of Americans favored the death penalty for individuals convicted of murder).

<sup>43</sup> See Monica K. Miller & Michelle N. Kazmar, *Psychology Research and Public Opinion Do Not Support Proposed Changes to the Jury System*, 30 HAMLINE L. REV. 285, 304 (2007) (detailing the biases of death-qualified jurors).

<sup>44</sup> See *id.* at 304-06 (stating that death-qualified jurors are inclined to favor the prosecu-

have been shown to be more likely to oppose the death penalty, and therefore, their representation as jurors in capital case trials is diminished.<sup>45</sup>

The issue, therefore, arises: how much of a cross-section of the community is the jury going to represent if we have minorities and women excluded from service on a capital case at a much higher rate than will be true for white men? The concern may be all the greater when the defendant is a member of a minority and is constitutionally entitled to be tried by a jury of his peers.<sup>46</sup> For these reasons, Justice Stevens concluded that *Uttecht* may well result in providing an unfair advantage to the prosecution.<sup>47</sup>

## II. THE TEXAS CASES

The next four cases this Article will examine all came to the Court on appeal from the State of Texas. Since the Supreme Court reinstated the death penalty in 1976, almost forty-percent of all of the individuals who have received the death sentence in this country have been executed in Texas.<sup>48</sup> The number of people who have been put

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tion).

<sup>45</sup> Lydia Saad, *Racial Disagreement Over Death Penalty Has Varied Historically*, GALLUP NEWS SERVICE, July 30, 2007, <http://www.gallup.com/poll/28243/Racial-Disagreement-Over-Death-Penalty-Has-Varied-Historically.aspx?version=print>. “The most notable distinction is between whites and blacks because a majority of whites (70%) favor capital punishment, while a majority of blacks (56%) oppose it. *Id.*”

<sup>46</sup> Jeremy W. Barber, Note, *The Jury Is Still Out: The Role of Jury Science in the Modern American Courtroom*, 31 AM. CRIM. L. REV. 1225, 1228-29 (1994) (detailing the history of the right to be tried by a jury of one’s peers as dating back to the First Continental Congress in 1774, and even as far back as the the Magna Carta).

<sup>47</sup> *Uttecht*, 127 S. Ct. at 2240 (Stevens, J., dissenting) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 523 (1968)).

<sup>48</sup> DEATH PENALTY INFO. CTR., STATE EXECUTION RATES (2007), <http://www.deathpenaltyinfo.org/article.php?did=477&scid=> (stating that as of March 27, 2007, 388 individuals have been executed in the state of Texas).

to death in that state is almost four times the number of those executed in the second highest jurisdiction—Virginia.<sup>49</sup> The Fifth Circuit, which governs Texas, has repeatedly been lectured-to by the Court.<sup>50</sup>

### A. *Abdul-Kabir v. Quarterman*

In *Abdul-Kabir v. Quarterman*,<sup>51</sup> the Supreme Court expressed criticism of the failure of the Texas state courts to have appropriately applied clearly established federal law when the courts have prevented the jury from being able to consider mitigating evidence.<sup>52</sup> The Court also faulted the Fifth Circuit for failing to follow the Supreme Court's requirements as to what a jury must conclude before it can determine that the death penalty is the appropriate sentence, especially as to the jury's failure to consider any and all mitigating evidence presented by the defendant.<sup>53</sup>

An examination of just what Texas courts had required of jurors in capital cases will help us understand what ultimately led the

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<sup>49</sup> *Id.* (stating as of March 27, 2007 ninety-eight individuals have been executed in the state of Virginia).

<sup>50</sup> *See, e.g., Abdul-Kabir*, 127 S. Ct. at 1674 (describing cases where the Court “repudiated several Fifth Circuit precedents”). *See also infra* note 52-53.

<sup>51</sup> 127 S. Ct. 1654, 1674 (2007).

<sup>52</sup> *Id.* at 1671, 1672. *See also Smith*, 543 U.S. at 45, 46 (rebuking the Texas court for its use of a nullification instruction as a mechanism to empower the jury to give effect to mitigating evidence).

<sup>53</sup> *Abdul-Kabir*, 127 S. Ct. at 1674 (discussing the Fifth Circuit's repeated misapplication of federal law with respect to mitigating evidence in capital cases). *See also Brewer*, 127 S. Ct. at 1713, 1714 (noting the Fifth Circuit has repeatedly failed to heed warnings issued by the Court on the extent to which a jury must be permitted to consider mitigating evidence in death penalty cases); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (holding that the Fifth Circuit assessed the mitigating evidence of the defendant's low I.Q. under the improper legal standard); Christopher Dunn, *Justice Kennedy: The Man in Control of the Death Penalty*, 238 N.Y. L.J. 3 (2007) (noting that in *Abdul-Kabir* and *Brewer* the Court's majority expressed disapproval of the Fifth Circuit's jurisprudence respecting capital jury instructions).

Supreme Court to overturn the death penalty, though for different reasons, in each of these cases.

The jurors in *Abdul-Kabir* were informed that the death penalty should be imposed if the following two questions were answered in the affirmative: (1) Did the defendant act deliberately and with a reasonable expectation that his conduct would cause the victim's death?;<sup>54</sup> (2) Is it probable that defendant would commit future violent acts and, therefore, represent an ongoing threat to society?<sup>55</sup> The first question is usually not an issue because if the jury has convicted the defendant, it is clear they have found the defendant acted in a deliberate and intentional manner.

The defendant was permitted to proffer mitigating evidence for the jury to consider.<sup>56</sup> Still, the jurors were instructed by the prosecutor (during the prosecutor's closing argument), as well as by the judge (during the judge's instructions to the jurors), that if their answer was "yes" to these two questions, then the death penalty must be imposed.<sup>57</sup> Jurors were advised to consider whether the facts objectively supported a finding of deliberateness and future dangerousness rather than whether the death penalty was an appropriate punishment in light of the defendant's personal history.

What was introduced here in terms of mitigation? First, the defense produced expert witness evidence to show that the defendant had suffered neurological damage to his central nervous system.<sup>58</sup>

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<sup>54</sup> *Abdul-Kabir*, 127 S. Ct. at 1660.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1660, 1661.

<sup>57</sup> *Id.* at 1661, 1662.

<sup>58</sup> *Id.* at 1661.

Second, the defendant had been physically abused by his parents as a child.<sup>59</sup> Lastly, he had been abandoned by his parents and was raised by alcoholic grandparents.<sup>60</sup> The defense essentially maintained that the defendant's life was shaped by circumstances beyond his control—that he had indeed been victimized and that what happened over the course of his life led him to be in a condition where, because of his neurological situation, he was not able to exercise the same control over his conduct that others found possible. Nevertheless, the jury was told to focus exclusively on the two questions cited above.<sup>61</sup>

Justice Stevens wrote the decision for the Court, and was joined by the block of three Justices—Breyer, Ginsburg and Souter—along with Justice Kennedy. The majority found that the sentencing process here was fatally flawed<sup>62</sup> and concluded that the jurors must be instructed that they are to assess all factors offered in mitigation when determining whether or not a sentence of less than the death penalty would in fact be appropriate.<sup>63</sup> The Court determined that since the jurors were told just to focus on those two questions, they were not focusing on the overall issue of what had been offered in mitigation.<sup>64</sup> Therefore, some sentence other than death may have

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<sup>59</sup> *Abdul-Kabir*, 127 S. Ct. at 1660.

<sup>60</sup> *Id.*

<sup>61</sup> *See supra* notes 54-55.

<sup>62</sup> *Abdul-Kabir*, 127 S. Ct. at 1675. The Court explained that a sentencing process is fatally flawed when either judicial interpretation or a statute prevent the jury from giving meaningful effect to a defendant's mitigating evidence. *Id.* *See also* Dunn, *supra* note 53 (noting that Justice Kennedy holds a pivotal role in the judicial debate on the death penalty since he joined the "anti-death penalty block").

<sup>63</sup> *Abdul-Kabir*, 127 S. Ct. at 1674 (noting that a jury must be permitted to decide whether death is an appropriate sentence in light of personal history, characteristics and the circumstances of the offense).

<sup>64</sup> *Id.* at 1673. ("[T]he State made jurors promise they would only look at the [two] questions [and put aside any mitigating evidence.]").

been appropriate but not considered by the jurors.<sup>65</sup>

Justice Scalia wrote an angry dissent which berated the majority for using their own value system and morality rather than adhering to the law.<sup>66</sup> The last two sentences of his dissent stated, simply: “This is not justice. It is caprice.”<sup>67</sup>

What impact did *Abdul-Kabir* have on the forty-seven similarly-situated people from Texas who were on death row?<sup>68</sup> Their sentences are now affected because they were sentenced in a similar manner to Abdul-Kabir—the jurors had to answer yes or no to these two questions and if the answer was yes, then the death sentence was going to be imposed.<sup>69</sup> The flawed model of jury instruction that had been used should lead to the resentencing of those who were similarly-situated to Abdul-Kabir.

### B. *Brewer v. Quarterman*

The next case in this group of three is *Brewer v. Quarter-*

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<sup>65</sup> *Id.* at 1673-74 (reasoning that the questions precluded jurors from giving meaningful effect to the defendant’s mitigating evidence and instead compelled a verdict for the death penalty).

<sup>66</sup> *Id.* at 1686 (Scalia, J., dissenting). Justice Scalia wrote:

[I]n my view the meaning of the Eighth Amendment is to be determined not by the moral perceptions of the Justices *du jour*, but by the understanding of the American people who adopted it—which understanding did not remotely include any requirement that a capital jury be permitted to consider all mitigating factors.

<sup>67</sup> *Id.*

<sup>68</sup> Maro Robbins, *Texas’ Old Death Penalty Jury Instructions Found Faulty*, SAN ANTONIO EXPRESS-NEWS, Apr. 26, 2007 (noting that Texas’ death row holds forty-seven inmates whose trials were governed by the flawed model of jury instructions not used since 1991).

<sup>69</sup> See Press Release, Univ. of Tex. at Austin School of Law, School of Law Capital Punishment Clinic Wins Three Cases at the U.S. Supreme Court (Apr. 25, 2007), [http://www.utexas.edu/law/news/2007/042507\\_clinic.html](http://www.utexas.edu/law/news/2007/042507_clinic.html) (noting that the decision in *Abdul-Kabir* will impact those sentenced under the pre-1991 sentencing scheme).

*man*.<sup>70</sup> The issue is the same—the two questions that the jurors are told to focus on.<sup>71</sup> Here, however, the defendant did not have an expert witness for his mitigating evidence.<sup>72</sup> Instead, he had other individuals who would testify about issues relating to mitigating factors, for example, that the defendant had an I.Q. of only seventy-eight, a very troubled childhood, and a number of other factors to be considered in mitigation. No expert witness had any involvement.<sup>73</sup>

The Supreme Court once again determined that those two questions that the jurors were told to focus on precluded the jurors from considering constitutionally required mitigating evidence as a basis for mercy. Even when there is no expert to substantiate the defendant's claims, there are issues which must be considered in mitigation.<sup>74</sup>

### C. *Smith v. Texas*

*Smith v. Texas*<sup>75</sup> is the third case in this group and also involved the same two questions.<sup>76</sup> Here, the Court rejected the state's claim that the error was harmless error.<sup>77</sup> Yes, those same questions

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<sup>70</sup> 127 S. Ct. 1706, 1709 (2007). Nathaniel Quarterman is the Director of the Texas Department of Criminal Justice in the Correctional Institutions Division.

<sup>71</sup> *Brewer*, 127 S. Ct. at 1712.

<sup>72</sup> *Id.* (rejecting the Fifth Circuit's emphasis on the lack of expert evidence as a basis for the denial of habeas corpus relief).

<sup>73</sup> *Id.* at 1710, 1711.

<sup>74</sup> *Id.* at 1713. The Court found that evidence presented could have had an aggravating effect, and because of the lack of an instruction on mitigation there was a reasonable likelihood that the jury would not give appropriate consideration to the evidence. *Id.*

<sup>75</sup> 127 S. Ct. 1686 (2007).

<sup>76</sup> *Smith*, 127 S. Ct. at 1690 (explaining that the two jury questions related to deliberateness and dangerousness).

<sup>77</sup> *Id.* at 1698-99. Harmless error is the doctrine by which courts "ignore errors that do not affect the essential fairness of [a] trial." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984). Essentially, the "test" is whether "it appears 'beyond a reasonable doubt



were used, but basically the state claimed that even if those questions were not the appropriate focus of what the jury was to consider, that the error was harmless.<sup>78</sup> The Supreme Court rejected that claim and, once again, overturned the imposition of the death penalty.<sup>79</sup>

So, the impact of these cases as a group is to, once again, re-emphasize the mandate that juries are required to carefully evaluate the factors that are submitted by the defense in mitigation.

#### D. *Panetti v. Quarterman*

*Panetti v. Quarterman*,<sup>80</sup> yet another Texas decision, addressed whether execution is appropriate when the defendant has no understanding of why he is being put to death.<sup>81</sup> In an earlier decision of the Court, *Ford v. Wainwright*,<sup>82</sup> the Court had held that to execute the insane “simply offends humanity.”<sup>83</sup> The Court, in *Ford*, declared that the Eighth Amendment certainly encompasses “those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.”<sup>84</sup> The intended scope of the Eighth Amendment at the time was intended to be simi-

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that the error complained of did not contribute to the verdict obtained.’ ” *Neder v. United States*, 527 U.S. 1, 15 (1999) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

<sup>78</sup> *Smith*, at 1696 (explaining that according to the Texas state court, the jury was likely to have considered mitigating evidence).

<sup>79</sup> *Id.* at 1698-99.

<sup>80</sup> 127 S. Ct. 2842 (2007).

<sup>81</sup> *Panetti*, 127 S. Ct. at 2859. “This brings us to the question petitioner asks the Court to resolve: whether the Eighth Amendment permits the execution of a prisoner whose mental illness deprives him of ‘the mental capacity to understand that [he] is being executed as a punishment for a crime.’ ” *Id.*

<sup>82</sup> 477 U.S. 399 (1986).

<sup>83</sup> *Id.* at 409.

<sup>84</sup> *Id.* at 405.

lar to that of English law which forbade the killing of incompetents.<sup>85</sup> The Court then proceeded to consider contemporary values in order to determine whether that perspective was still prevalent today.<sup>86</sup> The Court, in *Ford*, concluded that indeed such a view prevails across the nation<sup>87</sup> and that it would offend the concept of human decency to impose a death sentence on an individual who does not comprehend the reason for his execution.<sup>88</sup> The Court unambiguously determined that “the Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.”<sup>89</sup>

In *Panetti*, the defendant fired his lawyer shortly before his trial was about to begin. He represented himself, and, by all accounts, exhibited very bizarre behavior—including attempting to subpoena Jesus Christ as a witness to come forth and testify for him.<sup>90</sup> Panetti was convicted and the death penalty was imposed.<sup>91</sup> The Supreme Court twice denied certiorari.<sup>92</sup> Then the defendant’s mental condition worsened; he was hospitalized fourteen times for psychotic episodes, his attorney filed a motion to determine his mental competency.<sup>93</sup>

In response to the defendant’s motion, the state court ap-

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<sup>85</sup> *Id.* at 406.

<sup>86</sup> *Id.* at 409-10.

<sup>87</sup> *Ford*, 477 U.S. at 409.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 410.

<sup>90</sup> *Panetti*, 127 S. Ct. at 2849 (noting petitioner applied for several subpoenas including “John F. Kennedy, Pope John Paul II, and Jesus”). Panetti’s standby counsel described the defendant’s behavior as “scary” and trance-like.” *Panetti*, 127 S. Ct. at 2849.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 2849-50; Petition for Writ of Certiorari, *Panetti*, 2006 WL 3880284, at \* 3 (No. 06-6407).

pointed two mental health professionals to examine Panetti. The appointed doctors determined that the defendant was competent to be executed. The defendant was not provided with a hearing to challenge the findings, nor was he permitted to offer testimony from his own psychiatrists who would have testified contrary to the two state-appointed mental health professionals.<sup>94</sup>

The Fifth Circuit employs a three-prong test to determine mental competency for the purpose of imposing the death penalty. First, to be found competent, that person must be aware they caused the death of another. Second, that person must be aware that he is about to be executed by the state. Third, that person must be aware of the state's reason for seeking execution.<sup>95</sup> No defendant has ever failed this test; the Fifth Circuit has never found anyone to be not sufficiently competent to be executed.<sup>96</sup>

The Supreme Court, in overturning the death sentence, found that the defendant was delusional. His four experts had testified that he was schizophrenic, that he thought that life was a battle between demons and darkness on the one hand, and God and angels on the other. Panetti believed the reason that the state wanted to put him to death was to persecute him for his beliefs and to stop him from preaching his religion.<sup>97</sup>

So, even though Panetti passed the Fifth Circuit's test because he knew that the state was *claiming* to intend to put him to death be-

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<sup>94</sup> *Panetti*, 127 S. Ct. at 2851.

<sup>95</sup> *See Panetti v. Dretke*, 448 F.3d 815, 821 (5th Cir. 2006).

<sup>96</sup> *See, e.g., id.* *See also Woods v. Quarterman*, 493 F.3d 580, 587 (5th Cir. 2007).

<sup>97</sup> *Panetti*, 127 S. Ct. at 2859.

cause he had killed someone, he thought that contention was a pretext. He thought that was a sham. He thought the reason he was being put to death had nothing to do with the murder that he had committed, rather that the state wanted to shut him up and stop him from continuing to tell others the truth of the battle in the world.<sup>98</sup>

The Supreme Court analyzed the purpose of the death penalty, its primary and most important function being retribution.<sup>99</sup> The convicted individual is supposed to understand that he must lose his own life because he took the life of someone else.<sup>100</sup> Retribution was designed to ensure that the inmate recognizes the gravity of his crime.<sup>101</sup> In this instance, the Court concluded that Panetti did not understand the connection between his crime and his sentence of execution.<sup>102</sup>

*Panetti* came before the Court pursuant to the AEDPA,<sup>103</sup> so

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<sup>98</sup> *Id.*

<sup>99</sup> Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313 (2000). "Retribution supposes that crime inherently merits punishment. Other terms which this idea is expressed include 'just deserts,' the use of the words 'punish' and 'punishment' as ends rather than means, and 'condemnation' or denunciation of the criminal (sometimes called the expressive' aspect of retribution." *Id.* at 1315-16.

<sup>100</sup> Justice Powell's concurring opinion in *Ford* noted that "[i]f the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing." *Panetti*, 127 S. Ct. at 2873 n.11 (Thomas, J., dissenting) (citing *Ford*, 477 U.S. at 422 (Powell, J., concurring)).

<sup>101</sup> *Id.* at 2861. The Court reasoned that the purpose of capital punishment is to "make the offender recognize . . . the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability . . . is so serious that the ultimate penalty must be sought and imposed." *Id.* See also Jack B. Weinstein, *Does Religion Have a Role in Criminal Sentencing?*, 23 TOURO L. REV. 539 (2007) (examining the religious origins of the four theories of punishment).

<sup>102</sup> *Id.* at 2862.

<sup>103</sup> See *supra* note 33.

deference to the findings of the state courts was required.<sup>104</sup> But the Court noted that reasonable deference is what is required and that here the lower court abused its discretion when it did not give Panetti a hearing at which he would have had the opportunity to call his own witnesses. The impact of this abuse of discretion led the Court to determine that the state was not entitled to receive the deference that would normally be given in a case arising under the AEDPA.<sup>105</sup> Rather than defer to the state court, Justice Kennedy's opinion states that there is "a strong argument the court violated state law by failing to provide a competency hearing."<sup>106</sup>

Justice Thomas was sharply critical of the Court in his dissent. He emphasized that the Court should have deferred to the state. "[T]he Court bends over backwards" to reach its holding "without resort to the law" and therefore acted in violation of its role.<sup>107</sup>

The impact of *Panetti* is that the number of mentally ill individuals who will be deemed insane will be significantly expanded. Those persons who do not have the mental competence to appreciate and understand the reason why they are about to be executed are, simply, not to be executed.

### III. THE OCTOBER 2007 TERM

The October 2007 Term will be a particularly interesting one.

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<sup>104</sup> See *id.* at 2855.

<sup>105</sup> *Id.* (stating that the normal deference that the AEDPA requires is not applicable in this case due to the "state court's failure to provide the procedures mandated by *Ford* [*v. Wainwright*]").

<sup>106</sup> *Id.* at 2857.

<sup>107</sup> *Id.* at 2864, 2874 (Thomas, J., dissenting). Justice Thomas added that the approach is "foreign to the judicial role as I know it." *Id.*

The Supreme Court has granted certiorari in *Baze v. Rees*,<sup>108</sup> a case from Kentucky that challenges the constitutionality of the manner in which lethal injection is given to an individual who is being put to death.<sup>109</sup> Since the Supreme Court has taken this case, a number of state courts have ceased imposing the death penalty because of the possibility that the Supreme Court might find that the use of lethal injection constitutes cruel and unusual punishment. Every state, except for Nevada, which provides for the death penalty, utilizes some form of lethal injection as the mode to cause death. The Court in *Baze*, while not finding the use of lethal injection *per se* to be unconstitutional, may prohibit the use of specific combinations of the drugs which, in some instances, can lead to great suffering in the minutes preceding death.

In *Emmett v. Kelly*,<sup>110</sup> the Supreme Court stayed the execution of the defendant within hours of a decision by a Virginia court that the execution should proceed. The Supreme Court determined that the constitutionality of the procedures utilizing the lethal injection must be examined before that person could be put to death.<sup>111</sup> Even the highest criminal appeals court in the State of Texas has banned further executions until the spring or early summer when the Supreme Court delivers its decision in *Baze v. Rees*.<sup>112</sup>

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<sup>108</sup> 128 S. Ct. 372 (2007).

<sup>109</sup> Brief for the United States as Amicus Curiae Supporting Respondents, at 1, *Baze v. Rees*, No. 07-5439 (Dec. 10, 2007).

<sup>110</sup> *Emmett v. Kelly*, 127 S. Ct. 2970 (2007).

<sup>111</sup> *Emmett v. Kelly*, 128 S. Ct. 1 (2007).

<sup>112</sup> See *Ex Parte Bridgers*, 2007 WL 3015697, at \*1 (Tex. Crim. App. Oct. 15, 2007) ("We will consider a stay of execution only to preserve our jurisdiction over a specific proceeding pending in this Court."). See also *In re Chi*, 2007 WL 2852629, at \*1 (Tex. Crim. App. Oct. 2, 2007) ("Respondent . . . shall address the question of whether the current method of ad-

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Whether there will be a complete cessation of the death penalty, a moratorium on the imposition of the death penalty until the spring, or a sharp reduction in the number of people who are actually put to death, is somewhat unclear. What is clear is that a major decision will emerge from the Court in the Spring of 2008, and a number of individuals on death row throughout the country are anxiously awaiting the Court's decision in *Baze v. Rees*.<sup>113</sup>

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ministering lethal injection in Texas constitutes cruel and unusual punishment such that the respondent would violate the Eighth Amendment if he complied with the Warrant of Execution.”).

<sup>113</sup> 128 S. Ct. 372 (2007).

