



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 21
Number 4 *Seventeenth Annual Supreme Court
Review*

Article 10

December 2014

Supreme Court's Analysis of Issues Raised by Death Penalty Litigants in the Court's 2004 Term

Richard Klein
Touro Law School

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Evidence Commons](#)

Recommended Citation

Klein, Richard (2014) "Supreme Court's Analysis of Issues Raised by Death Penalty Litigants in the Court's 2004 Term," *Touro Law Review*. Vol. 21: No. 4, Article 10.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol21/iss4/10>

This Annual Supreme Court Review is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

Supreme Court's Analysis of Issues Raised by Death Penalty Litigants in the Court's 2004 Term

Cover Page Footnote

21-4

THE SUPREME COURT'S ANALYSIS OF ISSUES RAISED BY DEATH PENALTY LITIGANTS IN THE COURT'S 2004 TERM

*Richard Klein**

This Article will analyze the five death penalty cases that the Supreme Court reviewed in its 2004 Term. In four of these cases, the Supreme Court determined that the death penalty was inappropriate.¹

I. FLORIDA V. NIXON

The first death penalty case decided by the Supreme Court in the 2004 Term was *Florida v. Nixon*.² This was an eight-to-zero decision;³ the Supreme Court concluded that the trial which resulted in a death sentence for Mr. Nixon did not violate his constitutional rights.⁴

Death penalty proceedings typically consist of two stages. The first is the trial which concludes in a jury finding that the defendant was guilty or not guilty; if there is a guilty verdict, the case

* Professor of Law, Touro Law Center; J.D., Harvard, 1972. This Article is based, in part, on remarks from the Seventeenth Annual Supreme Court Review Program presented at Touro Law Center, Huntington, New York.

¹ *Rompilla v. Beard*, 125 S. Ct. 2456, 2469 (2005); *Miller-El v. Dretke*, 125 S. Ct. 2317, 2340 (2005); *Deck v. Missouri*, 125 S. Ct. 2007, 2016 (2005); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 1189-90 (2005).

² 543 U.S. 175 (2005).

³ *Id.* at 177. Chief Justice Rehnquist did not take part in the decision. *Id.*

⁴ *Id.* at 178.

progresses to the penalty stage where the jury considers whether or not a death sentence is appropriate for this individual defendant's commission of this particular crime.⁵ In *Nixon*, the lawyer, in an effort to evade the death penalty for his client, admitted his client's guilt to the jury.⁶ According to the defense attorney, the best strategy for his client was to first admit guilt and to then build the most persuasive case possible to convince the jurors not to impose the death penalty.⁷ Counsel attempted on three separate occasions to seek his client's agreement with this approach, but on all of those instances the client was unresponsive.⁸

In his opening statement at trial, the lawyer stated to the jury that there would be no dispute as to whether or not his client caused the death of the victim.⁹ The lawyer explained that the case was really about the death of his client and whether or not it should occur by electrocution or by its natural expiration after a lifetime of confinement.¹⁰ The lawyer did, nonetheless, participate somewhat at the trial phase.¹¹ He engaged in some cross-examination,¹² and objected to the introduction of photographs which were highly inflammatory and prejudicial.¹³ He also responded to, and attempted to influence the judge's proposed charge to the jury.¹⁴ Not

⁵ See *id.* at 183.

⁶ *Id.* at 181.

⁷ *Nixon*, 543 U.S. at 181.

⁸ *Id.*

⁹ *Id.* at 182.

¹⁰ *Id.* at 182-83.

¹¹ *Id.* at 183.

¹² *Nixon*, 543 U.S. at 183.

¹³ *Id.*

¹⁴ *Id.*

surprisingly, the jury found the defendant guilty.¹⁵

Counsel then did wage an extensive defense for the penalty phase.¹⁶ He called eight witnesses to the stand, including a psychiatrist and a psychologist.¹⁷ Nevertheless, after deliberating for three hours, the jury found that the death penalty was the appropriate sentence.¹⁸ The defendant appealed, claiming that he was denied effective assistance of counsel.¹⁹ The contention was that the lawyer, in effect, entered a plea of guilty on behalf of the defendant; a plea to which the defendant never agreed, thereby denying him the effective assistance of counsel.²⁰

The standard for evaluating an attorney's effectiveness when a plea of guilty has been entered was established in *McMann v. Richardson*.²¹ The validity of the plea was to be determined by assessing whether the representation that was provided by the attorney was "within the range of competence demanded by attorneys in criminal cases."²² However, the Supreme Court, fifteen years later in *Hill v. Lockhart*,²³ imposed the additional requirement that the

¹⁵ *Id.*

¹⁶ *Id.* at 183-84.

¹⁷ *Nixon*, 543 U.S. at 184.

¹⁸ *Id.*

¹⁹ *Id.* at 185.

²⁰ *Id.*

²¹ 397 U.S. 759 (1970).

²² *Id.* at 771. It is, unfortunately, the reality that imprecise and vague standards such as this have been the norm for courts to use when assessing effective representation. *See, e.g.*, *Cooper v. Fitzharris*, 586 F.2d 1325, 1330 (9th Cir. 1978) (stating that the assistance by counsel should be that of a "reasonably competent attorney acting as a diligent conscientious advocate"); *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976) (requiring counsel to "exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances").

²³ 474 U.S. 52 (1985).

defendant demonstrate on appeal that “there is a reasonable probability that, [were it not for his attorney’s] errors, he would not have pleaded guilty and would have insisted on going to trial.”²⁴

Nixon also argued that his counsel was ineffective in that he failed to challenge the district attorney’s case in any meaningful way.²⁵ The Supreme Court had warned in *United States v. Cronin*²⁶ that “if the process loses its character as a *confrontation* between adversaries, the constitutional guarantee [to effective assistance of counsel] is violated.”²⁷ The underlying and fundamental premise of our justice system’s reliance on the adversary system is the expectation that a diligent and effective counsel will present to the court the most impressive statement of facts, testimony of witnesses, and analysis of precedent in support of his client’s case. The Supreme Court in *Penon v. Ohio*²⁸ observed that the “vigorous representation”²⁹ required by the adversarial system is best complied with by “powerful statements on both sides of the question.”³⁰

Justice Ginsburg delivered the opinion of the Court and held that the lawyer’s choice was reasonable.³¹ She agreed that very often

²⁴ *Id.* at 59. When there has been no trial because the defendant has entered a guilty plea, the burden on defendant to show ineffective assistance is increased. See *Coon v. Weber*, 644 N.W.2d 638, 643 (S.D. 2002). The defendant must show not just deficient performance but gross error by the attorney in advising the plea of guilty. See *id.*

²⁵ *Nixon*, 543 U.S. at 186.

²⁶ 466 U.S. 648 (1984).

²⁷ *Id.* at 656-57 (emphasis added).

²⁸ 488 U.S. 75 (1988).

²⁹ *Id.* at 84.

³⁰ *Id.* See *Osborne v. Schillinger*, 861 F.2d 612 (10th Cir. 1988) (concluding that when a lawyer abandons his duty to his client, the process is not an adversarial one and is, therefore, unreliable); see also *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

³¹ *Nixon*, 543 U.S. at 189, 191.

in death penalty cases the lawyer loses credibility with the jury when the lawyer first argues that his client is not guilty, and then, after the jury has returned a guilty verdict, contends that his guilty client does not deserve the death penalty.³² The Court held that the lawyer's valid strategic choice to try to save his client's life did not constitute ineffective assistance of counsel.³³ Using very strong language, the Court stated that "a 'run-of-the-mill strategy of challenging' guilt can have dire implications for the sentencing phase,"³⁴ and therefore this was often the best way for the lawyer to proceed in a death penalty case.³⁵

The Court's holding begs the question of what will happen in future death penalty cases if, as commonly occurs, the lawyer *has* contested his client's guilt yet the client is convicted and as a result, the lawyer has lost credibility with the jury at the penalty phase. Could the lawyer's decision to challenge the prosecutor's case possibly constitute ineffective assistance of counsel?

II. DECK V. MISSOURI

In *Deck v. Missouri*, the defendant shot an elderly couple in

³² *Id.* at 192.

³³ *Id.* at 191. The Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), declared that there was a "presumption" that the claimed act of ineffectiveness might well have been sound trial strategy. *Id.* at 689. The Court warned against second-guessing counsel's choices and observed that "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

³⁴ *Id.* at 192 (quoting Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1597 (1998)).

³⁵ *Id.* "Unable to negotiate a guilty plea in exchange for a life sentence, defense counsel must strive at the guilt phase to avoid a counterproductive course." *Id.*

their home and stole four hundred dollars.³⁶ The defendant was convicted and sentenced to death. At the sentencing stage, the defendant was shackled, handcuffed, put in leg cuffs, and had a belly chain around him.³⁷ The defense lawyer objected to the shackles and restraints,³⁸ but the judge refused to have them removed, finding that the shackles were needed to alleviate any fear the jurors may have of being attacked by the defendant during the sentencing phase of witness testimony and counsel presentations.³⁹

The defendant received the death sentence and appealed his conviction. The Supreme Court, in a seven-to-two decision, overturned the death penalty. Justice Breyer, writing for the majority, explained that a defendant cannot be forced to appear before a jury at the guilt phase in handcuffs or shackles,⁴⁰ and the same reasons, with some exceptions, should apply at the penalty phase.⁴¹ Justice Breyer traced the historical disapproval of handcuffing defendants when they appear before juries and focused on Blackstone's Commentary from 1769.⁴² He found that at

³⁶ *Deck v. Missouri*, 125 S. Ct. 2009 (2005).

³⁷ *Id.* at 2010.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* (observing that the law clearly prohibits the use of shackles, the only exception is where there is a "special need"). See also *Rhoden v. Rowland*, 172 F.3d 633, 639 (9th Cir. 1999) (holding that due process was denied when the defendant was ordered shackled without a proper determination having been made about the actual need for shackles).

⁴¹ *Deck*, 125 S. Ct. at 2009.

⁴² *Id.* at 2010.

The law has long forbidden routine use of visible shackles during the guilt phase This rule has deep roots in the common law. In the 18th century, Blackstone wrote that "it is laid down in our ancient books, that, though under indictment of the highest nature," a defendant must be brought to bar without irons, or any manner of shackles or bonds; unless there be evidence danger of an escape.

common law, the primary rationale for not handcuffing defendants during the guilt phase of a trial was that it interfered with the presumption of innocence as well as the overall dignity of the court.⁴³ Furthermore, the Court explained that the requirement that the defendant appear before the jury in handcuffs may deter a defendant from taking the stand in his own defense.⁴⁴ Whereas *Deck* involved the penalty phase where the presumption of innocence does not come into play because the jury has already determined the guilt of the defendant, the Court stated that, nevertheless, the considerations that govern the use of shackles during the guilt phase apply with equal force in capital cases during the penalty phase.⁴⁵ The Court held that when the jurors viewed the defendant in shackles, it was a statement by the court that it considered the defendant to be a danger to the community; such dangerousness, was however, explicitly one of the factors for the *jurors* to consider when determining whether or not to impose the death penalty.⁴⁶

In addition, the Court held that prejudice to the defendant was *presumed* when appearing before the jurors in handcuffs, and

Id. (internal quotations omitted). The rule did not apply at the time of arraignment or when the defendant was appearing solely before the judge; the rule's purpose was to protect defendants when appearing before a jury at trial.

⁴³ *Id.* at 2013. The Court in *Illinois v. Allen*, 397 U.S. 337 (1970), observed that “[n]ot only is it possible that the sight of shackles and gags might have a significant effect on the jury’s feelings about the defendant, but the use of this technique is something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.” *Allen*, 397 U.S. at 344.

⁴⁴ *Id.* Justice Breyer cited the Court’s earlier decision in *Allen*, 397 U.S. at 334, that whereas at times binding and gagging a defendant might be required, it should only occur as a last resort. *Deck*, 125 S. Ct. at 2011.

⁴⁵ *Id.* at 2014 (“The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases.”).

⁴⁶ *Deck*, 125 S. Ct. at 2014.

therefore there was no requirement that the convicted defendant demonstrate prejudice.⁴⁷ The Court reasoned that the appearance of the shackled and handcuffed defendant at the penalty phase was so inherently prejudicial that the burden should be on the *state* to prove, beyond a reasonable doubt, that the shackling did not lead the jurors to determine that the death sentence was appropriate.⁴⁸

Justice Thomas wrote the dissenting opinion.⁴⁹ His primary contention was that there were valid reasons to shackle Deck.⁵⁰ The jurors already convicted him of murder and, therefore, they surely regarded him as a danger. As a result, the traditional reason not to handcuff and shackle a defendant at the guilt phase did not exist during the penalty phase of the prosecution against Deck.⁵¹ Justice Thomas argued that the existence of shackles did not effect whether or not the jurors would sentence the defendant to death.⁵² As part of his dissenting opinion, Thomas emphasized the need for security in the courtroom.⁵³ Justice Breyer, in the majority opinion, had

⁴⁷ *Id.* See also *Dyas v. Poole*, 309 F.3d 586, 588 (9th Cir. 2002) (observing that shackling creates a high risk of prejudice because it indicates that the court is of the belief that the defendant is dangerous and needs to be separated from the community).

⁴⁸ *Id.* at 2015-16 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). In a post-*Deck* case, the Court in *Lakin v. Stine*, 431 F.3d 959, 980 (6th Cir. 2005), found that the state had met its burden imposed by *Deck* to show that the defendant's guilt was overwhelming and that the shackling was merely harmless error. *Id.* at 966.

⁴⁹ *Id.* at 2016.

⁵⁰ *Id.* (Thomas, J., dissenting). Justice Thomas' dissent discusses the English common law rule against having a defendant appear in court in shackles, but Thomas concludes that the reason for this was so that the defendant was not in physical pain. *Id.* at 2017. The dissent then criticizes the majority for treating shackling at sentencing, where the defendant has already been found to be guilty of the crime, as the same as shackling during the trial itself. *Id.* at 2025.

⁵¹ *Deck*, 125 S. Ct. at 2025-26.

⁵² *Id.* at 2026 ("It blinks reality to think that not seeing a convicted capital murderer in shackles in the courtroom could import any prejudice beyond that inevitable knowledge.").

⁵³ *Id.* at 2028 (Thomas, J., dissenting) ("The Court's decision risks the lives of courtroom

responded to Justice Thomas' security concerns and reasoned that if the particular facts of a case pointed to a specific security concern then handcuffing may be justified.⁵⁴

As a result of the decision in *Deck*, defendants who appeared before the jury in handcuffs and who were sentenced to death prior to the Supreme Court ruling in this case, are citing *Deck* to claim that their due process rights were denied.⁵⁵

III. MILLER-EL V. DRETKE

*Miller-El v. Dretke*⁵⁶ was a case concerning a murder which had occurred in Texas in 1985; the issue before the Supreme Court was the alleged use by the prosecutor of racially motivated peremptory challenges. During the course of the jury selection, the prosecutor used his peremptory challenges to eliminate ten of eleven potential jurors, all of whom, like the defendant, were black.⁵⁷ All of the prospective jurors had been subjected to individualized questioning while on the witness stand by the prosecutor and the defense counsel.⁵⁸ Miller-El argued that the ten potential jurors were struck because they were black and therefore he was entitled to a new

personnel, with little corresponding benefit to defendants.”).

⁵⁴ *Id.* at 2015 (majority opinion).

⁵⁵ See *Marquard v. Sec’y for Dep’t of Corr.*, 429 F.3d 1278, 1310-11 (11th Cir. 2005); *Spicer v. State*, No. 2003-DP-02281-SCT, 2006 Miss. LEXIS 20, at *15-16 (Miss. Jan. 5, 2006); *State v. Hood*, No. W2004-01678-CCA-R3-DD, 2005 Tenn. Crim. App. LEXIS 1008, at *50-52 (Tenn. Crim. App. Sept. 13, 2005). See also *United States v. Honken*, 381 F. Supp. 2d 936, 980 (N.D. Iowa 2005) (finding that the trial court did do what *Deck* requires and the jurors were unaware that the defendant was restrained); *State v. Gomez*, 123 P.3d 1131 (Ariz. 2005) (finding that the trial judge had not complied with *Decks*’ requirements in that all defendants were routinely being shackled).

⁵⁶ 125 S. Ct. 2317 (2005).

⁵⁷ *Id.* at 2339.

⁵⁸ *Id.* at 2326.

jury.⁵⁹ The trial court denied the request, and Miller-El was found guilty and sentenced to death.⁶⁰ Miller-El appealed and while his appeal was pending, the Supreme Court decided *Batson v. Kentucky*.⁶¹

In *Batson*, the Supreme Court held that peremptory challenges could not be used to eliminate potential jurors based on their race.⁶² As a result of the ruling in *Batson*, cases such as Miller-El's were sent back to the trial judge to determine whether or not, based on the *Batson* decision, the prosecutor inappropriately used peremptory challenges to strike jurors because they were black.⁶³ In the years since the *Batson* holding, the Court has extended the antidiscrimination prohibition on the use of peremptory challenges. In *Georgia v. McCollum*,⁶⁴ the ban was extended to criminal defense counsel; in *Powers v. Ohio*,⁶⁵ to situations where the excluded juror was a different race than the defendant; in *J.E. B. v. Alabama ex. rel. T.B.*,⁶⁶ the equal protection principles were deemed to apply to discrimination based on gender, and the Court in *Edmonson v. Leesville Concrete Co.*,⁶⁷ extended the ban on the discrimination in the use of peremptory challenges to private litigants in civil matters. Whereas the Supreme Court has not extended the ban to include

⁵⁹ *Id.* at 2322.

⁶⁰ *Miller-El*, 125 S. Ct. at 2322.

⁶¹ 476 U.S. 79 (1986).

⁶² *Id.* at 91.

⁶³ *Griffith v. Kentucky*, 479 U.S. 314, 316 (1987) (stating that *Batson v. Kentucky* was to apply to all cases pending on appeal).

⁶⁴ 505 U.S. 42 (1992).

⁶⁵ 499 U.S. 400 (1991).

⁶⁶ 511 U.S. 127 (1994).

⁶⁷ 500 U.S. 614 (1991).

religious affiliation, some lower federal courts have.⁶⁸

Any analysis under *Batson* to determine whether a defendant's constitutional right to a fair trial was violated requires three separate stages. First, the defendant must show a prima facie case that the prosecutor used his challenges to eliminate jurors because of their race.⁶⁹ Second, the burden shifts to the prosecutor, who must give a neutral explanation as to why the potential jurors were eliminated;⁷⁰ the prosecutor attempts to demonstrate that the jurors were not eliminated because of their race.⁷¹ Third, the judge must determine, in light of all of the circumstances, whether or not the prosecutor's explanation is credible and sufficient.⁷² The Supreme Court, nine years after *Batson*, in *Purkett v. Elem*⁷³ held that the ultimate burden of persuasion regarding racial motivation lies always with the opponent of the strike.⁷⁴

The Texas Court of Appeals remanded Miller-El's case to determine, pursuant to the standards set forth in *Batson*, whether Miller-El could establish that the prosecutor used his peremptory challenges to unconstitutionally strike black jurors.⁷⁵ Miller-El was unsuccessful at the trial court level, and the Texas Court of Criminal Appeals affirmed the conviction.⁷⁶ Miller-El then sought habeas

⁶⁸ See, e.g., *United States v. Brown*, 352 F.3d 654 (2d Cir. 2003).

⁶⁹ *Batson*, 476 U.S. at 96.

⁷⁰ *Id.* at 98.

⁷¹ *Id.*

⁷² *Id.* at 96-98.

⁷³ 514 U.S. 765 (1995).

⁷⁴ *Id.* at 768.

⁷⁵ *Miller-El*, 125 S. Ct. at 2322.

⁷⁶ *Id.* at 2323.

relief in federal court. His claim failed in the district court and the Fifth Circuit declined to hear his appeal.⁷⁷ The Supreme Court, however, finding that Miller-El's *Batson* claims were "at the least, debatable by jurists of reason," granted a certificate of appealability.⁷⁸ On appeal, the Fifth Circuit rejected Miller-El's *Batson* claims and the Supreme Court, once again, granted certiorari.⁷⁹ The Court concluded that the prosecutor's peremptory challenges were indeed impermissibly based on the race of the prospective juror.⁸⁰

Justice Souter, very precisely, went through the potential jurors who were eliminated and came to the conclusion that, in many of the instances, the prosecutor's explanations were pretextual and therefore one could assume the jurors were eliminated because of their race.⁸¹ The Court's conclusion was reached not only because the prosecutor's explanations did not withstand careful scrutiny, but also because the appearance of discrimination was confirmed by the Dallas District Attorney's office reputation for excluding blacks from juries.⁸² The Court referenced a publication of the District Attorney's office which was given to newly hired District Attorneys, informing them what factors should be crucial when selecting jurors. The manual stated the following: "Do not take Jews, Negroes, dagos, Mexicans or member of any minority race on a jury no matter how

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Miller-El*, 125 S. Ct. at 2323.

⁸¹ *Id.* at 2325-30.

⁸² *Id.* at 2338.

rich or well-educated.”⁸³

After considering all of the circumstances involved in the selection of the jury for Miller-El’s trial, the Court concluded that the prosecutor clearly used the peremptory challenges to eliminate blacks and therefore Miller-El was denied the equal protection of the law.⁸⁴ Justice Breyer wrote a concurring opinion, and raised questions about the overall use of peremptory challenges by lawyers.⁸⁵ He cited Thurgood Marshall’s decision in *Batson*, where Marshall opined that peremptory challenges should be eliminated completely because there was no effective way of preventing race from being a factor in the exercise of the challenge.⁸⁶ Justice Breyer concluded that it was now necessary to re-examine *Batson* and the system permitting peremptory challenges;⁸⁷ any such generalized examination, however, awaits another day.

IV. ROMPILLA V. BEARD

Rompilla v. Beard also dealt with the issue of ineffective assistance of counsel in the death penalty context.⁸⁸ Justice O’Connor was the swing vote in a five-to-four decision⁸⁹ which was

⁸³ *Id.* at 2340 (“The prosecutors took their cues from a 20-year old manual of tips on jury selection, as shown by their notes of the race of each potential juror.”).

⁸⁴ *Id.* at 2339, 2340. “[B]ut when [the] evidence is viewed cumulatively its direction is too powerful to conclude anything but discrimination.” *Id.* at 2339. The Court observed that the discriminatory use of the peremptory challenge was a betrayal of the democratic origins and representative function of the jury. *Id.* at 2343.

⁸⁵ *Miller-El*, 125 S. Ct. at 2340 (Breyer, J., concurring).

⁸⁶ *Id.* (quoting *Batson*, 476 U.S. at 102-03).

⁸⁷ *Id.* at 2344.

⁸⁸ *Rompilla v. Beard*, 125 S. Ct. 2456 (2005).

⁸⁹ Justice Souter delivered the opinion of the Court, in which Justices Stevens, O’Connor, Ginsburg, and Breyer joined. Justice O’Connor filed a concurring opinion. Justice Kennedy filed a dissenting opinion, in which Chief Justice Rehnquist, and Justices Scalia and Thomas

only the fourth time in twenty years that the Supreme Court found that a lawyer did not provide effective assistance of counsel. In *Wiggins v. Smith*,⁹⁰ the Court had found that the defendant's right to counsel had been violated due to the failure to investigate and present mitigating evidence concerning the "excruciating" life history of the defendant in the sentencing phase of his capital proceeding.⁹¹ In *Glover v. United States*,⁹² the Court had concluded that the failure of counsel to pursue the merging of the defendant's convictions for labor racketeering, money laundering and tax evasion resulted in an increased sentence for the defendant and constituted ineffective assistance of counsel.⁹³ And in *Williams v. Taylor*,⁹⁴ the Court held that the inadequate time which counsel had allotted for investigation precluded his ability to conduct the thorough investigation required, thereby prejudicing his client within the meaning of *Strickland v. Washington*.⁹⁵

The Supreme Court in *Strickland v. Washington*,⁹⁶ established the requirements for a reversal of a conviction due to ineffective assistance of counsel.⁹⁷ The burdens set forth in *Strickland* are very

joined. *Id.*

⁹⁰ 539 U.S. 510 (2003).

⁹¹ *Id.* at 537-38.

⁹² 531 U.S. 198 (2001).

⁹³ *Id.* at 202-04.

⁹⁴ 529 U.S. 362 (2000).

⁹⁵ *Id.* at 396-97. Counsel failed to introduce evidence that the accused had been abused by his father, or that the correctional officers did not believe that the defendant posed a danger, or that the defendant had received commendations for breaking up a prison drug ring, or that a character witness, a respected CPA in the community, would have testified for the defendant. *Id.* at 373.

⁹⁶ 466 U.S. at 668 (1984).

⁹⁷ *Id.* at 687 ("First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning

difficult ones, requiring the rebuttal of a presumption that the trial lawyer had been providing competent representation.⁹⁸ Therefore, it is very rare that the courts, either the Supreme Court or lower courts, overturn convictions based on ineffective assistance of counsel.⁹⁹ As Justice Blackmun noted in *McFarland v. Scott*,¹⁰⁰ “Ten years after the articulation of that standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant’s right to be represented by something more than ‘a person who happens to be a lawyer.’ ”¹⁰¹ *Rompilla* was the third time since 2000 that the Supreme Court overturned a death sentence because of a finding that counsel was ineffective.¹⁰²

In *Rompilla*, the Court dealt with the issue of the defense attorney’s obligation to investigate the facts and circumstances surrounding the allegations against his client.¹⁰³ The obligations of a defense counsel to investigate the facts and *circumstances* of his

as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”).

⁹⁸ *Id.* at 689 (“[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance . . .”).

⁹⁹ See *Florida v. Nixon*, 543 U.S. 175, 189 (2004) (holding that the lawyer’s decision to concede guilt of his client was reasonable); *Coates v. McCormick*, 5 F.3d 535 (9th Cir. 1993) (holding that defense counsel’s use of cocaine during the trial in of itself did not constitute ineffective assistance of counsel); *Bellamy v. Cogdell*, 974 F.2d 302, 303 (2d Cir. 1992) (holding that defense counsel’s admitted physical and mental incapacity prior to trial did not constitute ineffective assistance of counsel).

¹⁰⁰ 512 U.S. 1256 (1994).

¹⁰¹ *Id.* at 1259 (Blackmun, J., dissenting from denial of certiorari) (citing *Strickland v. Washington*, 466 U.S. 668, 685 (1984)). See also Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 59 MD. L. REV. 1433 (1999).

¹⁰² *Rompilla v. Beard*, 125 S. Ct. 2456 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000).

¹⁰³ *Rompilla*, 125 S. Ct. at 2460.

client's case are well established. As the court in *Wolfs v. Britton*¹⁰⁴ observed, "effective assistance refers not only to forensic skills but to painstaking investigation in preparation for trial."¹⁰⁵ In *Brubaker v. Dickson*,¹⁰⁶ the Ninth Circuit concluded that the failure of counsel to investigate, research and prepare is equivalent to no representation at all.¹⁰⁷ The ABA Criminal Justice Standards clearly inform counsel of the duty to "conduct a prompt investigation."¹⁰⁸ The obligation to investigate is so essential to a lawyer's representation of a client that it exists even when a defendant states his desire to plead guilty and admits facts which do constitute guilt.¹⁰⁹

In *Rompilla*, the defendant was accused of murdering a tavern owner during the commission of a felony.¹¹⁰ The alleged purpose of the felony was to commit a robbery, torture was involved, and Rompilla had committed other violent felonies in the past.¹¹¹ Because the jury determined that these aggravating factors outweighed any mitigating factors, the death penalty was deemed to be the appropriate sentence.¹¹² Rompilla's lawyer had learned that the prosecutor possessed a file dealing with an earlier conviction of the defendant for rape,¹¹³ and the prosecutor informed Rompilla's attorney that he planned on reading portions of the rape file to the

¹⁰⁴ 509 F.2d 304 (8th Cir. 1975).

¹⁰⁵ *Id.* at 309.

¹⁰⁶ 310 F.2d 30 (9th Cir. 1962).

¹⁰⁷ *Id.* at 37.

¹⁰⁸ See ABA CRIMINAL JUSTICE STANDARDS § 4-4.1.

¹⁰⁹ *Id.*

¹¹⁰ *Rompilla*, 125 S. Ct. at 2460.

¹¹¹ *Id.*

¹¹² *Id.* at 2460-61.

¹¹³ *Id.* at 2464.

jury.¹¹⁴ The file included an account of the victim setting forth the violent details of the attack.¹¹⁵ Rompilla's attorney did nothing in response; he never asked to see the file¹¹⁶ nor did he ask to see all of the testimony of the rape victim to determine if the prosecutor was going to use the most incriminating portions out of context.¹¹⁷ Instead, the defense attorney proceeded to do other things to prepare for the penalty phase, and never asked to see the file, even though the prosecutor was going to utilize it as an aggravating factor to demonstrate Rompilla's past violent conduct.¹¹⁸

In order to overturn a conviction because of ineffective assistance of counsel, the defendant must not only show that the lawyer acted unreasonably, but also that the outcome might well have been different had the lawyer acted in a competent fashion.¹¹⁹ Therefore, the first thing the Court looked at was whether it was reasonable for Rompilla's attorney not to have asked to see the case file.¹²⁰ The Court concluded that the defense attorney's actions were unreasonable, noting that the attorney had an obligation to examine the materials that the prosecutor intended on utilizing to establish aggravating circumstances.¹²¹

In one of the very important portions of the *Rompilla*

¹¹⁴ *Rompilla*, 125 S. Ct. at 2464.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Rompilla*, 125 S. Ct. at 2469 (“[T]he likelihood of a different result if the evidence had gone in is ‘sufficient to undermine confidence in the outcome’ actually reached at sentencing.” (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984))).

¹²⁰ *Id.* at 2462-64.

¹²¹ *Id.* at 2463.

decision, the Court cited the American Bar Association Standards on Criminal Justice.¹²² The Court has utilized these standards on some occasions in recent years, but at other times they are ignored.¹²³ The Court in *Strickland*¹²⁴ had specifically rejected the use of “detailed guidelines” to assess the effectiveness of counsel because such assessment “would encourage the proliferation of ineffectiveness challenges.”¹²⁵ Here, the Court referenced the Criminal Justice Standard informing that an investigation should always include efforts to secure information in the possession of the prosecution.¹²⁶ In light of this, the Court found that the attorney was required to obtain the file from the prosecutor, and since the lawyer did not, he acted unreasonably.¹²⁷ Furthermore, the Court found that had the defense counsel looked at the file he would have seen information from the authorities at the prison at which the defendant was incarcerated that would have raised questions about the defendant’s mental status.¹²⁸ Given these facts, the Court concluded that, at the very least, a reasonable lawyer would have obtained an independent psychiatric evaluation of the defendant and would have looked at the

¹²² *Id.* at 2465-66.

¹²³ *See id.* at 2466 (“We have referred [to these ABA Standards] as ‘guides to determining what is reasonable.’ ” (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003))) (emphasis added).

¹²⁴ *Strickland v. Washington*, 466 U.S. 668 (1984).

¹²⁵ *Id.* at 690. The Court was also concerned that the use of specific, high standards to evaluate attorney competence would discourage attorneys from accepting assigned cases. *Id.* But see *id.* at 708 (Marshall, J., dissenting) (arguing that the standard of reasonableness articulated by the Court was vague and overlooked the difference in quality between retained, paid counsel and appointed or public representation).

¹²⁶ *Rompilla* 125 S. Ct. at 2460.

¹²⁷ *Id.* at 2467.

¹²⁸ *Id.* at 2468.

relevant school records.¹²⁹

Counsel who has failed to investigate the facts and law surrounding the charges against his client may also have failed in his obligation to properly communicate with his client. All too often, attorneys violate their professional obligations under both the Model Code of Professional Responsibility¹³⁰ and the Model Rules of Professional Conduct.¹³¹ The Code's Disciplinary Rule entitled Failing to Act Competently¹³² mandates that a lawyer not "handle a legal matter without preparation adequate in the circumstances"¹³³ nor "[n]eglect a legal matter entrusted to him."¹³⁴ The Model Rule defining Competence requires counsel to attain the "legal knowledge, skill, thoroughness and a preparation reasonably necessary for the representation."¹³⁵

Had Rompilla's attorney obtained the file from the prosecutor, some of the information that would have been revealed was that Rompilla's parents were alcoholics, that Rompilla had been beaten by his father with leather straps, fists, and sticks, that Rompilla when a child had been locked in a small, dark pen which was filled with excrement, that Rompilla's mother stabbed his father

¹²⁹ *Id.* at 2468-69.

¹³⁰ MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

¹³¹ MODEL RULES OF PROFESSIONAL CONDUCT (1984).

¹³² MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 6-101.

¹³³ *Id.* DR6 – 101(A)(2).

¹³⁴ Most of the Formal and Informal Opinions of the ABA Committee on Professional Ethics which interpret the Code as to issues of competence, focus on neglect. *See* ABA Comm. on Prof'l Ethics, Informal Op. 1442 (1979). Neglect is explained in Informal Opinion 1273 (1973): "Neglect involves indifference and a consistent failure to carry out the obligations a lawyer has assumed to his client or a conscious disregard for the responsibility owed to a client" *Id.*

¹³⁵ MODEL RULES OF PROFESSIONAL CONDUCT R. 1.1 (Competence).

at least once, and that Rompilla's elementary school records demonstrated that he was in the mentally retarded range.¹³⁶ The Court concluded that all this information established that the jury verdict may well have been different had Rompilla's attorney informed the jurors of this information and, therefore, the conviction was overturned because of Rompilla's ineffective assistance of counsel.¹³⁷

This case may prove to be a significant one for defendants who appeal convictions claiming that their counsel failed to conduct an adequate investigation of the facts and circumstances. The Supreme Court's strong support for the obligations of defense counsel is certainly welcome. Perhaps courts in the post-*Rompilla* era will not, as has been the case since the *Strickland*¹³⁸ decision in 1984, routinely dismiss ineffective assistance claims based on a failure to investigate.¹³⁹

V. ROPER V. SIMMONS

One of the most controversial Supreme Court cases this past

¹³⁶ *Rompilla*, 125 S. Ct. at 2469. The Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that it was cruel and unusual punishment, and therefore unconstitutional, to execute an individual who was mentally retarded.

¹³⁷ *Id.*

¹³⁸ *Strickland v. Washington*, 466 U.S. 468 (1984).

¹³⁹ Concern about the impact of the *Strickland* decision on ineffectiveness claims arose very shortly after the opinion was released. See Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 639 (1986) (charging *Strickland* with "seriously undermin[ing] the remedy available to a defendant receiving ineffective representation"); Richard L. Gabriel, Comment, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 139 U. PA. L. REV. 1259, 1288 (1986) (criticizing the *Strickland* Court for "fashion[ing] a test for ineffective assistance of counsel that sacrifices the explicit rights stated in the Sixth Amendment on a judicially created alter of fairness").

Term was the juvenile death penalty case, *Roper v. Simmons*.¹⁴⁰ In 1988, in *Thompson v. Oklahoma*,¹⁴¹ the Supreme Court held that it was unconstitutional to subject someone who was fifteen years old at the time that they committed a crime, to the death penalty.¹⁴² The *Thompson* Court had surveyed states' legislation which indicated that fifteen year olds were not considered to be prepared to assume the full responsibilities of an adult.¹⁴³ The Court concluded that it would offend "civilized standards of decency"¹⁴⁴ and be "abhorrent to the conscience of the community"¹⁴⁵ to execute someone under the age of sixteen. Justice Stevens, in writing the opinion of the Court, made reference to broad opposition throughout Europe to the death penalty in general, and to the execution of juveniles in particular.¹⁴⁶

The next year, in *Stanford v. Kentucky*,¹⁴⁷ the Court held that it was not unconstitutional, i.e., it was not cruel and unusual punishment, to subject someone who was sixteen years old or over at the time they committed a murder, to the death penalty.¹⁴⁸ Justice Scalia, in writing the opinion for the Court, specifically responded to the emphasis in *Thompson* on the correlation between legislation requiring individuals to reach a certain age to drink, or vote, or get

¹⁴⁰ 543 U.S. 551, 125 S. Ct. 1183 (2005).

¹⁴¹ 487 U.S. 815 (1988).

¹⁴² *Id.* at 815.

¹⁴³ *Id.* at 824-25.

¹⁴⁴ *Id.* at 830.

¹⁴⁵ *Id.* at 832.

¹⁴⁶ *Thompson*, 487 U.S. at 830-31. Justice Stevens made particular mention of the prohibition of the death penalty for juveniles in the Soviet Union, a country which at the time was constantly criticized for its poor human rights record by the United States. *Id.* at 831.

¹⁴⁷ 492 U.S. 361 (1989).

¹⁴⁸ *Id.* at 361.

married, and holding someone to be responsible as an adult if a murder is committed. Scalia opined that there was “no relevance” to such laws¹⁴⁹ in reaching a determination whether a particular individual was “mature enough to understand that murdering another human being was profoundly wrong.”¹⁵⁰ Scalia emphasized that the standard for determining what American society perceived to be cruel and unusual punishment was to be determined by reference to the statutes which were enacted by the elected, legislative representatives.¹⁵¹ After *Thompson* and *Stanford*, until 2002, the Court did not find any provisions of state death penalty statutes to be unconstitutional. The jurisprudence of the Court was primarily limited to affirming death sentences.¹⁵²

In 2002, the Supreme Court decided *Atkins v. Virginia*, a case which involved a mentally retarded defendant.¹⁵³ The Court examined whether it was cruel and unusual punishment, and therefore constitutionally prohibited, to impose the death penalty on a mentally retarded defendant.¹⁵⁴ The Court held that the imposition of a sentence of death upon an individual who was mentally retarded at the time of the commission of the murder, was cruel and unusual punishment.¹⁵⁵ The Supreme Court in *Atkins*, therefore reversed its

¹⁴⁹ *Id.* at 374.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 370.

¹⁵² See, e.g., *Walton v. Arizona*, 497 U.S. 639 (1990) (affirming death penalty sentence where the lower court found the sentence to be proportional to sentences of other similar cases); see also *Romano v. Oklahoma*, 512 U.S. 1 (1994).

¹⁵³ 536 U.S. 304 (2002).

¹⁵⁴ *Id.* at 307.

¹⁵⁵ *Id.* at 311.

decision in *Penry v. Lynaugh*,¹⁵⁶ decided the same year as *Stanford v. Kentucky*.¹⁵⁷ In *Penry*, the Court held that it was not cruel and unusual punishment to impose the death penalty on a mentally retarded defendant.¹⁵⁸ However, the Court found that in the thirteen years between the decision in *Penry* and that of *Atkins*, evolving standards of decency had led to a national consensus that it was inappropriate to sentence a mentally retarded defendant to death.¹⁵⁹ The Court relied, in part, upon the fact that sixteen states since 1989 had changed their laws and no longer called for the execution of someone who was mentally retarded.¹⁶⁰

The Supreme Court, in *Roper v. Simmons*, needed to determine whether or not a similar national consensus had evolved regarding the execution of sixteen and seventeen year olds. Simmons' conviction in the State of Missouri was for crimes committed in 1993.¹⁶¹ The jury had found the existence of three aggravating factors, "murder for pecuniary gain," "murder to avoid a lawful arrest," and "murder involving depravity of the mind," and sentenced Simmons to death.¹⁶² The case reached the Missouri Supreme Court in 1997,¹⁶³ and the Court initially held that the sentence was constitutional and affirmed Simmons' death

¹⁵⁶ *Penry v. Lynaugh*, 492 U.S. 302 (1989).

¹⁵⁷ Both cases were decided in 1989. See *Stanford*, 492 U.S. 361; *Penry*, 492 U.S. 302.

¹⁵⁸ *Penry*, 492 U.S. at 341.

¹⁵⁹ *Atkins*, 536 U.S. at 321.

¹⁶⁰ *Id.* at 314-15. The sixteen states that have changed their laws since 1989 are Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina. *Id.*

¹⁶¹ *Missouri v. Simmons*, 944 S.W.2d 165, 169-71 (Mo. 1997).

¹⁶² *Id.* at 191.

¹⁶³ *Id.* at 165.

sentence.¹⁶⁴ However, after the Supreme Court's 2002 decision in *Atkins* prohibiting capital punishment for the mentally retarded,¹⁶⁵ the Missouri Court reconsidered Simmons' sentence.¹⁶⁶

The Missouri Supreme Court found that in the fourteen years since the Supreme Court decided *Stanford*, a national consensus had indeed developed against imposing the death penalty on juvenile offenders. Therefore, the state court found that the death sentence, as imposed on juveniles, was unconstitutional under both the Eighth and Fourteenth Amendments.¹⁶⁷ This decision was reached even though, at this point, *Stanford v. Kentucky* was still good law.¹⁶⁸ The Supreme Court granted certiorari, and as the Missouri Supreme Court had predicted, proceeded to hold that the death penalty, as imposed on defendants who were sixteen or even seventeen when they committed the crime, was unconstitutional.¹⁶⁹

Justice Kennedy, who had been part of the majority in *Stanford*, wrote the decision for the Court.¹⁷⁰ He emphasized the fact that the crime for which the defendant stood convicted was a

¹⁶⁴ *Id.* at 169. In regards to the defendant's sentence, the court specifically held that the defendant's Sixth Amendment rights were not violated when the trial court sustained the state's challenges for cause to two jurors who had stated that they were uncomfortable and uncertain about the death penalty. *Id.* at 171. Furthermore, the court held that the "depravity of mind" aggravating circumstance was not unconstitutionally vague and therefore the defendant was not entitled to a new sentencing hearing. *Id.* at 181. Lastly, the court held that the death penalty imposed was proportionate to other sentences imposed in similar cases. *Id.* at 191.

¹⁶⁵ *Atkins*, 536 U.S. 304 (2002).

¹⁶⁶ *Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003), *aff'd*, 543 U.S. 551, 125 S. Ct. 1183 (2005).

¹⁶⁷ *Id.* at 399-400.

¹⁶⁸ *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

¹⁶⁹ *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005).

¹⁷⁰ *Simmons*, 125 S. Ct. at 1187.

particularly “outrageously and wantonly vile, horrible and inhuman act.”¹⁷¹ Simmons, who was seventeen years old at the time of the murder, had the clear intention to commit robbery and murder.¹⁷² The defendant, along with his accomplice, “broke into the victim’s house in the middle of the night, covered her face with duct tape, drove to a park, tied the victim’s hands and feet with electrical wire and threw her off a bridge. The woman drowned and the robbery netted all of six dollars.”¹⁷³

Justice Kennedy concluded that the standards of decency had evolved since 1989 to a point where there was a national consensus that executing someone who was seventeen or sixteen years old was considered cruel and unusual punishment.¹⁷⁴ Justice Kennedy explained that currently thirty states bar the death penalty for juveniles.¹⁷⁵ The thirty states included twelve states that had no death penalty, and eighteen states that did have a death penalty but not for anyone less than eighteen years old.¹⁷⁶ Second, since the Supreme Court’s decision in *Stanford* in 1989, five states made eighteen the youngest age at which the death penalty could be imposed.¹⁷⁷ Third, the reality was that very few juveniles were actually sentenced to death, even in these jurisdictions where it was permitted.¹⁷⁸ Only twenty-two juveniles have been given the death

¹⁷¹ *Id.* at 1188.

¹⁷² *Id.* at 1187-88.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1194.

¹⁷⁵ *Simmons*, 125 S. Ct. at 1192.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1189 (quoting *Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. 2003)).

¹⁷⁸ *Id.* at 1192.

penalty in the last twenty years; thirteen of those had been in Texas.¹⁷⁹ In the last ten years, juveniles were put to death in only three states: Texas, Oklahoma, and Virginia,¹⁸⁰ and in fact, forty percent of all juveniles on death row were in Texas prisons.¹⁸¹ Two-thirds of all juveniles given the death penalty in the history of this country have been black, and out of the nine women sentenced to death, eight were black.¹⁸²

The Court concluded that the primary explanation for the national consensus was an increasing awareness that a seventeen or sixteen year old is simply less culpable and less mature, and his character is not as completely formed as that of an adult.¹⁸³ Secondly, the justification of the death penalty as a general deterrence is not always applicable to sixteen and seventeen year olds who are more vulnerable to peer pressure and more likely to act in an impulsive manner.¹⁸⁴ Lastly, the societal concern for retribution must take into account the reality that juveniles, like the retarded, do not have the same level of culpability for their conduct as does someone who is over eighteen.¹⁸⁵ The Court relied on scientific studies and analyses in amicus briefs filed by the American Medical Association, the American Psychiatric Association, and the American Society for

¹⁷⁹ Cedric Maximillian Hu, *Drawing Straight Lines on a Slippery Slope: Juvenile Death Penalty in America*, 5 FLA. COASTAL L.J. 41, 52 (2004).

¹⁸⁰ *Simmons*, 125 S. Ct. at 1192.

¹⁸¹ Victor L. Streib, *Children, Crime & Consequences: Juvenile Justice in America: Executing Offenders: The Ultimate Denial of Juvenile Justice*, 14 STAN. L. & POL'Y REV. 121, 124 (2003).

¹⁸² *Id.* at 125.

¹⁸³ *Simmons*, 125 S. Ct. at 1195.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

Adolescent Psychiatry in reaching its conclusion about the degree of responsibility and maturity that is possessed by those younger than eighteen years of age.

The *Roper v. Simmons* decision was a controversial one. The Wall Street Journal, in an editorial, stated the following:

[W]hat makes *Roper* notable, and worthy of wider debate, is the way it symbolizes the current Supreme Court's burst of liberal social activism. From gay rights to racial preferences and now the death penalty, a narrow majority of justices has been imposing its own blue-state cultural mores on the rest of the country. We suspect it is also inviting a political backlash.¹⁸⁶

The Supreme Court's focus in *Simmons* on international perspectives on the juvenile death penalty and international treaties was particularly important.¹⁸⁷ Justice Kennedy wrote that "the United States now stands alone in a world that has turned its face against the juvenile death penalty."¹⁸⁸ Only seven countries since the 1990s have imposed the death penalty on defendants who were less than eighteen years old: Iran, Saudi Arabia, Yemen, China, Pakistan, Nigeria, and the United States.¹⁸⁹ Each of the six countries other than the United States had subsequently renounced the juvenile death penalty and were no longer imposing it.¹⁹⁰ Justice Kennedy also pointed to the United Nations Convention on the Rights of the

¹⁸⁶ Editorial, *The Blue State Court*, WALL ST. J., Mar. 2, 2005, at A16.

¹⁸⁷ *Simmons*, 125 S. Ct. at 1198.

¹⁸⁸ *Id.* at 1199.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

Child,¹⁹¹ which prohibits imposing the death penalty to anyone who is less than eighteen years old.¹⁹²

Justice Kennedy's reference to the Convention on the Rights of the Child was particularly notable because the United States is not a signatory to the Convention.¹⁹³ Thus, in no way is the United States bound by that international treaty,¹⁹⁴ but the Convention, nonetheless, was pointed to as an indication of the international view that subjecting those less than eighteen years of age to the death penalty was improper.¹⁹⁵ Moreover, Justice Kennedy's decision referred to the amicus briefs submitted by the European Union¹⁹⁶ and the opinions of fifteen Nobel Peace Prize lawyers, including the Dali Lama, Bishop Tutu, and Lek Walensa of Poland.¹⁹⁷ The decision also notes that the International Covenant on Civil and Political Rights¹⁹⁸ prohibits capital punishment for those less than eighteen.¹⁹⁹ The Court explained that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and people simply underscores the centrality of these same rights within

¹⁹¹ 157 U.N.T.S. 3, 28 I.L.M. 1448, entered into force Sept. 2, 1990.

¹⁹² *Id.*

¹⁹³ *See Roper*, 125 S. Ct. at 1199. The only other country that has not signed this treaty is Somalia. *Id.* at 1225.

¹⁹⁴ In his dissent to the holding in this case, Justice Scalia refers sarcastically to the Court's respectful reference to the treaty as the Court's desire to add "to its arsenal the power to join and ratify treaties on behalf of the United States." *Id.* at 1226 (Scalia, J., dissenting).

¹⁹⁵ *See id.*

¹⁹⁶ *Id.* at 1199 (majority opinion).

¹⁹⁷ Brief for President James Earl Carter, Jr., et al. as Amici Curiae Supporting Respondents, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

¹⁹⁸ International Covenant on Civil and Political Rights, G.A. Res. 2200 A, 21 U.N. G.A.O.R., Supp. No. 16, at 52, U.N. Doc. A/6316, 993 U.N. T.S. 171 (1966).

¹⁹⁹ *Id.* Art. 6(5).

our own heritage of freedom.”²⁰⁰ Some members of Congress disagreed. The following bill was introduced:

Resolved, That it is the sense of the Senate that judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.²⁰¹

The stance taken by the majority in *Simmons* was a major change from the Court’s decision in *Stanford*. As part of his decision in *Stanford*, Justice Scalia emphasized that it is *American* conceptions of decency and of punishment that should be dispositive, not those of foreign countries.²⁰² However, years later in *Simmons*, Justice Kennedy deemed international authorities to be instructive.²⁰³ The Wall Street Journal commented that “the most troubling feature of *Roper* is it extends the high court’s recent habit of invoking foreign opinion in order to overrule American law. We thought the Constitution was the final arbiter of US law, but apparently that is passé.”²⁰⁴

Justice O’Connor was in the minority in *Simmons*.²⁰⁵

²⁰⁰ *Simmons*, 125 S. Ct. at 1200.

²⁰¹ S. Res. 92, 109th Cong. (2005).

²⁰² *Stanford*, 492 U.S. at 370 n.1 (rejecting the contention that the sentencing practices of other countries are relevant, such practices cannot be used to establish the Eighth Amendment prerequisite that the American people accept or reject a certain practice).

²⁰³ *Simmons*, 125 S. Ct. at 1198-99.

²⁰⁴ *The Blue State Court*, *supra* note 186.

²⁰⁵ *Simmons*, 125 S. Ct. at 1206 (O’Connor, J., dissenting).

O'Connor did not agree with the conclusion that evolving standards of decency have led to a national consensus against the execution of juveniles in this country.²⁰⁶ She explained that “[w]ithout a clearer showing that a *genuine* national consensus forbids the execution of such offenders, this Court should not substitute its own ‘inevitably subjective judgment’ on how best to resolve this difficult moral question”²⁰⁷ Because Justice O'Connor believed that “[r]easonable minds can differ as to the minimum age at which commission of a serious crime should expose the defendant to the death penalty, if at all,” she concluded that this was a question best left for the legislature and not the courts.²⁰⁸

What is of great significance in Justice O'Connor's decision is her defense of the import of looking to international law to guide the Court.²⁰⁹ She observed that “[o]ver the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency . . . this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries.”²¹⁰ The fact that the Justice O'Connor was so emphatic in her defense of the propriety of examining global perspectives on issues before the Court, even while finding that our domestic consensus does not conform with

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1217 (emphasis added).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 1215

²¹⁰ *Simmons*, 125 S. Ct. at 1215-16.

international perspectives regarding the juvenile death penalty,²¹¹ highlighted the increasing willingness of many of the Justices to increasingly seek guidance from the values and experiences of other countries.²¹²

Justice Scalia, in his dissent, concluded that there was no national consensus regarding the impropriety of executing juveniles since there were thirty-eight states that provided for the death penalty and twenty of the thirty-eight provided for the death penalty for those less than eighteen years of age.²¹³ Scalia concluded that the Court's majority in *Simmons* was acting as a legislature, and that judges are ill-equipped to make the type of legislative judgments the Court was insisting on making.²¹⁴ A major aspect of Justice Scalia's dissent criticized the use of foreign perspective in the Court's decision making.²¹⁵ Justice Scalia stated that the premise of the majority opinion that American law should conform to the laws of the rest of the world should be rejected out of hand.²¹⁶ Scalia took this position even though the Court had previously recognized the significance of

²¹¹ *Simmons*, 125 S. Ct. at 1216.

²¹² In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court also noted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Id.* at 316.

²¹³ *Simmons*, 125 S. Ct. at 1218 (Scalia, J., dissenting).

²¹⁴ *Id.* at 1222. Justice Scalia queried, "By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?" *Id.*

²¹⁵ *Id.* at 1225-29.

²¹⁶ *Simmons*, 125 S. Ct. at 1226. The Justice was particularly critical of the majority's reliance on the laws of the United Kingdom, such reliance was deemed by Justice Scalia as "perhaps the most indefensible part of its opinion." *Id.* at 1227. Kennedy had concluded that Britain's rejection of the death penalty for juveniles "bears particular relevance here in light of the historic ties between our countries." *Id.* at 1199 (majority opinion). In Scalia's view, members of the Court selectively look abroad when they believe it advantageous to do so, but choose to ignore alien law at other times. *Id.* at 1228 (Scalia, J., dissenting). The Court was, therefore, not engaging in "reasoned decisionmaking, but sophistry." *Id.*

the perspective of the international community in determining whether a punishment is cruel and unusual in cases such as *Trop v. Dulles*,²¹⁷ *Coker v. Georgia*,²¹⁸ and *Edmund v. Florida*.²¹⁹

In conclusion, Justice Scalia's dissent chastised the Court:

To add insult to injury, the Court affirms the Missouri Supreme Court without even admonishing that court for its flagrant disregard of our precedent in *Stanford*. Until today, we have always held that it is this Court's prerogative alone to overrule one of its precedent's. . . . Today, however, the Court silently approves the state-court's decision that blatantly rejected controlling precedent.²²⁰

Justice Scalia concluded his dissent by opining that to allow the lower courts to "update" and "reinterpret" the Eighth Amendment renders the Court's case law unreliable and "the result [would] be to crown arbitrariness with chaos."²²¹ As he had commented earlier in his dissent, "this is no way to run a legal system."²²²

CONCLUSION

This was a rather remarkable Term of the Court in regard to the imposition of the death penalty,²²³ the requirements for effective assistance of counsel,²²⁴ and the demands of the Due Process and

²¹⁷ 356 U.S. 86, 102 (1958).

²¹⁸ 433 U.S. 584, 596 (1977).

²¹⁹ 458 U.S. 782, 796-97 (1982).

²²⁰ *Simmons*, 125 S. Ct. at 1229.

²²¹ *Id.* at 1230.

²²² *Id.*

²²³ *Deck v. Missouri*, 125 S. Ct. 2009 (2005); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005); *Florida v. Nixon*, 543 U.S. 175 (2005); *Rompilla v. Beard*, 125 S. Ct. 2456 (2005); *Miller-El v. Dretke*, 125 S. Ct. 2317 (2005).

²²⁴ *Florida*, 543 U.S. 175 (2005); *Rompilla*, 125 S. Ct. 2456 (2005).

Equal Protection Clauses of the Constitution for those prosecuted for criminal conduct.²²⁵ The Court overturned the sentence of death in each case, except that of *Florida v. Nixon*, that we have analyzed.

I would not expect the ramifications of the *Florida v. Nixon* case to be substantial. The basic right of the defendant to make the decision concerning whether or not to enter a guilty plea continues; the defendant Nixon never indicated to his attorney that he opposed the strategy of admitting guilt to the jury in order to enhance counsel's credibility during the sentencing phase of the proceedings.

On the other hand, the Court's ruling in *Roper v. Simmons*²²⁶ had immediate, and very significant impact. The Court reversed its prior holding in *Stanford v. Kentucky*²²⁷ and held that it was unconstitutional to impose a death sentence on anyone who was under the age of eighteen at the time that the crime was committed. The Court's change of view was in spite of the Court's awareness that the claim that there was a "national consensus" that it was cruel and unusual punishment to execute juveniles was not as persuasive as had been the case three years earlier regarding the execution of the mentally retarded.²²⁸ The Court acknowledged that the change in perspective concerning a death penalty for juveniles was "less dramatic"²²⁹ than that regarding the mentally retarded and that the

²²⁵ *Miller-El*, 125 S. Ct. 2317 (2005); *Deck*, 125 S. Ct. 2009 (2005).

²²⁶ 543 U.S. 551, 125 S. Ct. 1183 (2004).

²²⁷ 492 U.S. 361 (1989).

²²⁸ See *Atkins v. Virginia*, 536 U.S. 304 (2002); *supra* notes 161-204 and accompanying text. Just as the *Atkins* Court was reviewing a prior Court holding from a 1989 case regarding the death penalty and the Eighth Amendment, the *Simmons* Court was reconsidering the same issue as to the imposition of the death penalty for juveniles.

²²⁹ *Simmons*, 125 S. Ct. at 1193.

rate to change in state legislation prohibiting execution of youths had “been slower”²³⁰ as well. The Court held that the consistent direction of the change was clearly toward the sentiment that executing those who were less than eighteen years of age was cruel and unusual punishment.²³¹

Justice Kennedy emphasized that it was the Court’s judgment, and not that of the states’ legislatures, that should control as to assessing the acceptability of the death penalty under the Eighth Amendment.²³² What is of particular note, is how the Court proceeded to emphasize that its determination that juvenile executions were cruel and unusual “finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”²³³ The increased discussion by the Court in recent years of the international perspective on issues before the Court is a potentially very significant development.²³⁴

²³⁰ *Id.*

²³¹ *Id.* at 1193.

²³² *Id.* at 1191-92 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion)).

²³³ *Id.* at 1198.

²³⁴ *See, e.g., Atkins*, 536 U.S. at 317 (observing that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (plurality opinion) (realizing that the juvenile death penalty has been abolished “by other nations that share our Anglo-American heritage, and by the leading members of the Western European Community”); *Edmund v. Florida*, 458 U.S. 782, 796-97 (1982) (noting that “the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe”); *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion) (noting that “out of 60 major nations of the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue”). *But see Stanford v. Kentucky*, 492 U.S. 361, n.1 (2004) (emphasizing that American perceptions and not those of foreign countries control our interpretation of our Constitution); *Simmons*, 125 S. Ct. at 1226 (Scalia, J., dissenting) (stating that the view of the Court that the laws of the rest of the world should influence the

The Court's concern for fairness, due process, and equal protection in the trial process governed its decisions in *Miller-El v. Dretke*²³⁵ and *Deck v. Missouri*.²³⁶ The Court's holding in *Miller-El* may even have blown new life into the *Batson v. Kentucky*²³⁷ ruling which had been watered down and deprived of the impact that had been expected when enunciated by the Court in 1986. Even though the jury selection process that occurred in *Miller-El* preceded the *Batson* holding, the Court examined the prosecutor's use of peremptories and required fidelity to the principle that the use of race to eliminate prospective jurors was prohibited.

Hopefully the message from *Miller-El* to trial courts will highlight the need to scrutinize the "neutral" reason that may be offered to explain why a peremptory challenge was used to strike a potential juror who was of the same race as the defendant. Courts in recent years have all too often accepted prosecutors' explanations of the neutral criteria that was used to strike the potential juror, without sufficient analysis to determine whether in fact the explanation was just a pretext for a desire to exclude based on race. Of particular note, was the Court's examination of the context in which the peremptories were used. The Court took note of the reputation of the Dallas, Texas prosecutor's office as one that did not desire to have minorities serve as jurors²³⁸ and that information was used by the Court to buttress its conclusion that the prosecutor in *Miller-El* was

Court's interpretation of American law should be rejected).

²³⁵ 125 S. Ct. 2317.

²³⁶ 125 S. Ct. 2009.

²³⁷ 476 U.S. 79 (1979); *see also supra* note 87 and accompanying text.

²³⁸ *Miller-El*, 125 S. Ct. at 2340.

basing his use of peremptories on the race of the juror.

In *Deck v. Missouri*,²³⁹ the Court again highlighted the need for fairness in all aspects of a death penalty prosecution. The Court rejected the claim that since the jurors had already determined the guilt of the defendant it was not prejudicial for the defendant to be handcuffed and shackled during the sentencing phase. The Court declared that prejudice was to be presumed, there was no burden on the defendant to show that his having been handcuffed during the penalty phase is what led to the jury's determination that the death penalty was appropriate.

Yet it is in *Rompilla v. Beard*²⁴⁰ where perhaps the greatest impact will be felt. It is all too common for defense lawyers to fail to engage in the investigation and preparation for a trial that effective representation requires.²⁴¹ Trial judges may be too focused on the need to dispose of cases as rapidly as possible to conduct any inquiry into whether counsel for the defendant is preserving the right of the defendant to get competent representation.²⁴² The Court's reference in *Rompilla* to the ABA Standards on Criminal Justice as a guideline to be used to assess the quantity and level of investigation conducted is a most important occurrence. The Standards do reflect what experts in criminal justice perceive ought to be required for effective representation, yet too often in the past the Court has in effect dismissed the Standards as a guide for assessing effective

²³⁹ 125 S. Ct. 2009 (2005).

²⁴⁰ 125 S. Ct. 2456 (2005).

²⁴¹ See *supra* notes 126-131 and accompanying text.

²⁴² See Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1389-93 (2004).

representation.²⁴³

This was a Term that gave hope to those favoring a chipping away at the imposition of the death penalty in this country.²⁴⁴ Not only was the sentence of death overturned in four of the five major cases concerning the death penalty, but a death sentence can no longer be imposed for anyone who was under eighteen at the time of the commission of the crime. Furthermore, for only the fourth time in the Court's history, a conviction was overturned due to the ineffective assistance of counsel. The 2004 Term of the Court was a remarkable, and rather fascinating, one.

²⁴³ See *supra* notes 119-121 and accompanying text.

²⁴⁴ The Court's decision in a case which was argued before the Court on April 26, 2006, *Hill v. Crosby*, 126 S. Ct. 1189 (2006), regarding a challenge to the use of lethal injection as the mode of execution, may provide another example of the Court's setting restrictions on the imposition of the death penalty.

