

# Report for Congress

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## **Capital Punishment: Summary of Supreme Court Decisions of the 2001-02 Term**

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# Capital Punishment: Summary of Supreme Court Decisions of the 2001-02 Term

## Summary

The Supreme Court took six significant actions with respect to capital punishment during the 2001-02 Term. In *Atkins v. Virginia*, which many consider the most significant case of the term, the Court decided on June 20, 2002, that executing the mentally retarded violates the Eighth Amendment ban on “cruel and unusual punishment.” Three cases involved issues concerning the constitutional standards for effective- assistance- of- counsel in death penalty cases. On March 27, 2002, in *Mickens v. Taylor*, the Court addressed “what a defendant must show in order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known.” The majority held that a defendant in such circumstances must meet the test of *Cuyler v. Sullivan* which requires showing an actual conflict of interest which adversely affected his representation. On May 28, 2002, the Court in *Bell v. Cone*, voted 8-1 to uphold the death sentence of a Tennessee man whose lawyer presented no mitigation case in the penalty phase and offered no closing argument in response to the prosecution’s request for death. The majority held that there was not an “entire” failure by counsel. This case is noteworthy because of its relationship to another performance case where the attorney for the defense in *Cockrell v. Burdine*, dozed off as many as 10 times during the trial, for as long as 10 minutes. The Court refused to reinstate the death sentence by denying *certiorari*. By declining to intervene in a case that focused national attention on the quality of legal representation for death penalty defendants, the Court’s action did not establish a precedent that would apply to capital cases where there continue to be concerns regarding chronic complaints of inadequate and ineffective-assistance-of-counsel. While the Court may have found a sleeping lawyer troubling, it declined to reconsider the larger issue in *Cockrell*: what constitutes ineffective-assistance-of-counsel in death penalty cases. On June 24, 2002, in *Ring v. Arizona*, the Court decided in the often criticized practice of having a judge, rather than a jury, decide the critical sentencing issues in a death penalty case that a judge could not make findings that would increase a defendant’s sentence to the maximum, since that was comparable to an additional conviction. This decision should be submitted to a jury and would require proof beyond a reasonable doubt in order to justify the death penalty. Finally, on June 28, 2002, the Court in *United States v. Bass* ruled against a black defendant’s effort to seek discovery regarding his claim that blacks were charged with capital offenses more than others. The Court ruled that he failed to present evidence that similarly situated persons were treated differently.

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# Capital Punishment: Summary of Supreme Court Decisions of the 2001-02 Term

## Brief Background

Legal challenges to the death penalty reached a crest in a 5-4 Supreme Court decision in *Furman v. Georgia*,<sup>1</sup> which struck down federal and state capital punishment laws permitting wide discretion in the application of the death penalty.<sup>2</sup> Characterizing these laws as “arbitrary and capricious,” the majority ruled that they constituted cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution and the due process guarantees of the Fourteenth Amendment.<sup>3</sup> Since the Supreme Court decision in *Furman*, there has been a gradual refinement in the death penalty laws and in the Court’s jurisprudence.<sup>4</sup> However, death penalty

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<sup>1</sup>408 U.S. 238 (1972).

<sup>2</sup>*Id.* at 247.

<sup>3</sup>*Id.* at 309-10. Justices Brennan and Marshall declared capital punishment to be unconstitutional in all instances with concurrences in the Court’s judgment by Justices Douglas, Stewart, and White.

<sup>4</sup> See *Gregg v. Georgia*, 428 U.S. 153 (1976) (the death penalty is restated under a model to help guide discretion) (two other related cases are: *Jurek v. Texas*, 428 U.S. 262 (1976) and *Proffitt v. Florida*, 428 U.S. 242 [1976]); *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325 (1976) (mandatory death penalty laws are declared unconstitutional); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for rape of an adult women declared unconstitutional because the sentence was disproportionate to the crime); *Lockett v. Ohio*, 438 U.S. 586 (1978) (sentencing authorities must have the discretion to consider every possible mitigating factor, rather than being limited to a specific list of factors); *Beck v. Alabama*, 447 U.S. 625 (1980) (struck a portion of Alabama’s death penalty law that blocked juries from convicting defendants of an included lesser offense rather than the capital crime itself; juries were required to either convict a defendant of the capital crime or to acquit him); *Adams v. Texas*, 448 U.S. 38 (1980) (prospective jurors cannot be excluded from service in capital trials because they would be “affected” by the possibility of a capital sentence); *Hopper v. Evans*, 456 U.S. 605 (1982) (upheld the death sentence of a defendant convicted under the Alabama statute partially struck down in *Beck v. Alabama*. The Court held that, since a lesser offense was not an issue, the law’s failure to allow for it did not prejudice the case; i.e., the conviction of a capital prisoner tried under a partially flawed statute need not be reversed unless it was actually affected by the imperfection); *Enmund v. Florida*, 458 U.S. 782 (1982) (reversed the death sentence of a defendant who had not intended, attempted, or actually killed the victim of a robbery in which he was an accomplice); *Pulley v. Harris*, 465 U.S. 37 (1984) (upheld the death penalty in a California decision, holding that there was no constitutional requirement for a proportionality review—in other words, a review of sentences in comparable cases throughout a state to determine if similar cases are handled in a similar manner—though (continued...)

verdicts in the United States still appear to be without any uniformity. A review and summary of the following cases involving capital offenses which were decided during this term of the Court seem to support this notion.

## Decisions During the 2002 Term

On June 20, 2002, the Court rendered its opinion in the case of *Atkins v. Virginia*,<sup>5</sup> which presented the issue of whether capital punishment for individuals of limited measured intelligence violates the Constitution's ban on "cruel and unusual punishment." The Court began its analysis by looking to the judgment of the legislatures that have addressed the suitability of executing the mentally retarded, and then it considered the reasons for agreeing or disagreeing with these judgments. The Court in *Penry v. Lynaugh*<sup>6</sup> decided that it is not categorically unconstitutional to execute a mentally retarded person found guilty of capital murder. The Court upheld executing the retarded capital offender, saying that only two states with the death penalty barred it which was too few to demonstrate a national consensus against the practice.<sup>7</sup> Since then, 16 more states have passed laws, so that 18 of the 38 states with the death penalty, plus the federal government, have laws against capital punishment for mentally retarded offenders. Twelve states and the District of Columbia have no death penalty statutes. Citing a growing national and international consensus against the practice, as well as the Court's own judgment, Justice Stevens in *Atkins* said the reduced capacity of the mentally retarded provides

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<sup>4</sup>(...continued)

many state death penalty laws provided for such a review); *Ford v. Wainwright*, 477 U.S. 399 (1986) (held that it is unconstitutional to execute a person who is insane); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejected the claim that death penalty sentencing in Georgia was administered in a racially biased manner in violation of the Eighth and Fourteenth Amendments, despite statistical data on capital sentences in Georgia showing that Black defendants convicted of killing White victims were more likely to be given a death sentence than other defendants); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (decided that youths younger than 16 years of age at the time of their offense cannot be constitutionally executed); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (decided that it is not categorically unconstitutional to execute a mentally retarded person found guilty of capital murder; a number of states have enacted laws specifically excluding capital sentences for persons determined to be mentally retarded); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (reaffirmed the Court's opinion that it was not unconstitutional to execute youths at least 16 years of age at the time of committing a capital offense; a number of states define the minimum ages authorized for capital punishment).

<sup>5</sup>122 S.Ct. 2242 (2002) (Virginia sentenced a mentally retarded man, Daryl Atkins, to death for the 1996 killing of a U.S. airman in a car jacking in Hampton, Virginia. A defense witness placed Atkin's IQ at 59).

<sup>6</sup>492 U.S. 302 (1989).

<sup>7</sup>*Id.* at 334 .

the “justification for a categorical rule making such offenders ineligible for the death penalty.”<sup>8</sup> “Death is not a suitable punishment for a mentally retarded criminal.”<sup>9</sup>

Noting that the ruling amounted to a relatively quick reversal of the Court’s 1989 decision in *Penry v. Lynaugh*,<sup>10</sup> in which the Court found that no national consensus existed against executing the retarded, Justice Stevens said “[m]uch has changed since then.”<sup>11</sup> He pointed out that capital punishment laws in 16 states and at the federal level have been amended to bar execution of the retarded, adding to the two states that had banned it before *Penry*.<sup>12</sup> “It is not so much the number of these states that is significant, but the consistency of the direction of change,”<sup>13</sup> said Justice Stevens.

Justice Stevens also asserted that because of their diminished culpability, executing the retarded serves neither of the states’ purposes of capital punishment particularly retribution or deterrence.<sup>14</sup> They are also less able to assist in their own defense exposing them to a “special risk of wrongful execution.”<sup>15</sup>

Justice Scalia, in dissent, described the majority opinion as an “assumption of power” that ignored the will of the public and lawmakers in the 20 states that still permit the execution of retarded condemned prisoners.<sup>16</sup> He predicted that the decision will turn capital trials into a “game” in which defendants will routinely feign retardation.<sup>17</sup> Justice Scalia was joined in dissent by Chief Justice William Rehnquist and Justice Clarence Thomas.

The Court’s decision in *Atkins v. Virginia* is historic because it represents the first dramatic shift for the Court in almost twenty-five years during which time it has endorsed capital punishment. Now citing a growing national and international consensus against the practice, the Court held that “death is not a suitable punishment for a mentally retarded criminal.”<sup>18</sup> The Court said that its decision was based upon an independent evaluation of the issues presented in the case which provided it with no reason to disagree with the judgment of the legislatures that have recently addressed the propriety of applying the death penalty to mentally retarded offenders.

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<sup>8</sup>122 S.Ct. at 2251.

<sup>9</sup>*Id.* at 2252.

<sup>10</sup>492 U.S. 302 (1989).

<sup>11</sup>122 S.Ct. at 2248.

<sup>12</sup>*Id.* at 2248-49.

<sup>13</sup>*Id.* at 2249.

<sup>14</sup>*Id.* at 2251.

<sup>15</sup>*Id.* at 2252.

<sup>16</sup>*Id.* at 2265 .

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

<sup>18</sup>*Id.* at 2252.

Based upon this evidence, the Court concluded that execution of the mentally retarded is an excessive punishment that is prohibited by the Eighth Amendment.

On March 27, 2002, the Court in *Mickens v. Taylor*<sup>19</sup> in a 5 to 4 decision addressed “what a defendant must show in order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known.”<sup>20</sup> The majority held that a defendant in such circumstances must meet the test of *Cuyler v. Sullivan*<sup>21</sup> which requires showing an actual conflict of interest which adversely affected his representation. Mickens’ lead counsel at his capital trial had previously represented the victim whom Mickens was charged with murdering. The lawyer’s representation of the victim occurred about ten days before the victim’s death and involved one 15 to 30 minute meeting. The judge who had appointed the lawyer to represent the victim also appointed the same lawyer to represent Mickens. Counsel never revealed the prior representation, and the judge did not inquire about a potential conflict.

The Court examined its previous conflict of interest cases. In *Holloway v. Arkansas*,<sup>22</sup> the Court applied an automatic reversal rule where the defense counsel was forced to represent codefendants over timely objection. In *Cuyler v. Sullivan*, however, the Court declined to apply an automatic reversal rule where there was no objection to multiple representation, instead requiring the defendant to show that “a conflict of interest actually affected the adequacy of his representation.”<sup>23</sup> *Sullivan* also required a trial court to inquire into a potential conflict when “the trial court knows or reasonably should know that a particular conflict exists.”<sup>24</sup> The Court emphasized that a “particular” conflict is not a “vague, unspecified possibility of conflict.”<sup>25</sup> In *Wood v. Georgia*,<sup>26</sup> the record raised the possibility of a conflict sufficient to require an inquiry from the trial court, and the Supreme Court remanded the case for a determination of “whether the conflict of interest that this record strongly suggests actually existed.”<sup>27</sup> The Court rejected Mickens’ argument that the remand instruction in *Wood* established that a trial judge’s failure to inquire into a potential conflict relieved the defendant of the burden of showing an adverse effect.<sup>28</sup> The Court stated that *Wood*’s remand instruction was “shorthand” for the *Sullivan*

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<sup>19</sup>122 S.Ct. 1237 (2002).

<sup>20</sup>*Id.* at 1239.

<sup>21</sup>446 U.S. 335 (1980).

<sup>22</sup>435 U.S. 475 (1978).

<sup>23</sup>122 S.Ct. at 1243.

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

<sup>25</sup>*Id.*

<sup>26</sup>450 U.S. 261 (1981).

<sup>27</sup>122 S.Ct. at 1242-43.

<sup>28</sup>*Id.* at 1244.

test.<sup>29</sup> The Court also found Mickens' argument made "little policy sense" because the trial court's awareness of a potential conflict does not make an adverse effect more likely or otherwise render the verdict unreliable, because a trial judge's failure to inquire does not make it more difficult for a reviewing court to assess conflict and effect, and because automatic reversal is not an appropriate means of enforcing *Sullivan's* mandate to inquire.<sup>30</sup>

On May 28, 2002, in *Bell v. Cone*,<sup>31</sup> the Court voted 8-1 to uphold the death sentence of respondent, Gary Cone, whose lawyer presented no witnesses in the penalty phase, made no closing argument, and was later found to have been mentally ill during the trial.

Gary Cone was convicted in 1982 of brutally murdering an elderly couple which was the culmination of a two-day crime rampage. On the basis of the testimony taken during Cone's post-conviction hearing, it appeared that his trial lawyers were not prepared for the sentencing phase of the trial. His lead attorney, John Dice, did not seek out witnesses to provide mitigating testimony and never presented mitigating evidence during that phase. He also waived a closing argument after the state completed its case. John Dice was later diagnosed with a mental illness and he committed suicide approximately six months after Cone's post-conviction hearing.

The 6<sup>th</sup> U.S. Circuit Court of Appeals found that the denial of effective counsel was so complete that it did not fall under the usual test for ineffectiveness used by the state court—*Strickland v. Washington*<sup>32</sup>—but under *U.S. v. Cronic*.<sup>33</sup> Applying *Cronic*, the appellate court held that Dice failed to subject the prosecution's case to a meaningful adversarial testing and prejudice to his client was presumed.<sup>34</sup>

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<sup>29</sup>*Id.* at 1243.

<sup>30</sup>*Id.* at 1244.

<sup>31</sup>122 S.Ct. 1843 (2002).

<sup>32</sup>466 U.S. 668 (1984).

<sup>33</sup>466 U.S. 648 (1984).

<sup>34</sup>243 F.3d 961, 979 (6<sup>th</sup> Cir. 2001). In *Strickland*, which was decided the same day as *Cronic*, the Court announced a two-part test for evaluating claims that a defendant's counsel performed so incompetently in his or her representation of a defendant that the defendant's sentence or conviction should be reversed. The Court reasoned that there would be a sufficient indication that counsel's assistance was defective enough to undermine confidence in a proceeding's result if the defendant proved two things: first, that counsel's "representation fell below an objective standard of reasonableness," 466 U.S., at 688; and second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. Without proof of both, i.e., deficient performance and prejudice to the defense, the Court concluded, it could not be said that the sentence or conviction "resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable," *id.*, at 687, and the sentence or conviction should stand.

In *Cronic*, the Court considered whether the Court of Appeals was correct in reversing a defendant's conviction under the Sixth Amendment without inquiring into counsel's actual

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The Supreme Court reversed. Writing for the majority, Chief Justice Rehnquist said *Cronic* did not apply because Dice did not “entirely” fail to subject the prosecution’s case to meaningful adversarial testing.<sup>35</sup> The state court correctly identified *Strickland* as applying to Cone’s claim, added Chief Justice Rehnquist.<sup>36</sup> Also, the state court’s application of *Strickland*—denying Cone’s claim—was not “objectively unreasonable,” the standard for winning federal *habeas* relief.<sup>37</sup>

Justice Stevens, dissenting, noted that *Cronic* applies and Dice’s decisions to present no mitigation case in the penalty phase, and offer no closing argument in the face of the prosecution’s request for death failed as counsel “entirely.”<sup>38</sup> “Moreover, Dice’s explanations for his decisions were not only uncorroborated, but were, in my judgment, patently unsatisfactory.”<sup>39</sup>

On June 3, 2002, in *Cockrell v. Burdine*,<sup>40</sup> the defendant won the right to a new trial when the U.S. Supreme Court declined to review the 5<sup>th</sup> Circuit Court of Appeals reversal of his conviction. The 5<sup>th</sup> Circuit ruled that Burdine’s 1984 trial was unfair because his court-appointed attorney (Joe Frank Cannon) was at times

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<sup>34</sup>(...continued)

performance or requiring the defendant to show the effect it had on trial. 466 U.S. at 650, 658. The Court determined that the lower court had erred and remanded to allow the claim to be considered under *Strickland*’s test. 466 U.S., at 666-667, and n.41. In the course of deciding this question, the Court identified three situations implicating the right to counsel that involved circumstances “so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” *Id.* at 658-659. First, was the “complete denial of counsel.” *Id.* at 659. Second, “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing.” *Cronic, supra*, at 659. And thirdly, in cases like *Powell v. Alabama*, 287 U.S. 45 (1932), where counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the proceedings were affected. *Cronic, supra*, at 659-662.

<sup>35</sup>122 S.Ct. at 1851.

<sup>36</sup>*Id.* at 1852 .

<sup>37</sup>*Id.* at 1850 .

<sup>38</sup>*Id.* at 1862.

<sup>39</sup>*Id.* at 1861.

<sup>40</sup>262 F.3d 336 (5<sup>th</sup> Cir. 2001), *cert. denied*, 70 U.S.L.W. 3742, (U.S. June 3, 2002)( No.01-495) (Burdine was convicted and sentenced to death for the 1983 murder of his roommate and lover, W.T. “Dub” Wise after he acknowledged that he was there but denied participating in the killing; jurors and court officials testified during his appeals that Cannon, who has since died, dozed off at least 10 times during Burdine’s six-day trial and at times, napped for up to 10 minutes).

asleep during the trial.<sup>41</sup> The Court's order, issued without comment, did not elaborate upon the competency standards for lawyers.<sup>42</sup>

On June 24, 2002, the Supreme Court in a 7-2 decision in the case of *Ring v. Arizona*,<sup>43</sup> held that juries rather than judges must decide critical sentencing issues in death penalty cases. The Court also held that a sentence imposed as a result of a judge's decision regarding mitigating or aggravating circumstances violates a defendant's constitutional right to a trial by jury. In Arizona and eight other states, judges decide after a jury has determined guilt.

In 1990, the Supreme Court held in *Walton v. Arizona*<sup>44</sup> that the Arizona sentencing law— which provided that a judge, not a jury, was the ultimate finder of fact with respect to the existence of aggravating circumstances—was constitutional. Later, however, the Court held in *Apprendi v. New Jersey*<sup>45</sup> that a judge could not make findings that would increase a defendant's sentence to the maximum, since that was comparable to an additional conviction. The Court said that such a decision should be submitted to a jury and require proof beyond a reasonable doubt. The decision in *Ring v. Arizona* applied *Apprendi* in which the Court held that “any fact (other than prior conviction) that increases the maximum penalty for a crime must be ... submitted to a jury, and proven beyond a reasonable doubt.”<sup>46</sup> This therefore extends the *Apprendi* application to capital defendants, and ensures that those facing the death penalty will have critical sentencing decisions made by a unanimous jury of their peers.

Lastly, on June 28, 2002, the Court in a *per curiam* opinion, ruled in *United States v. Bass*<sup>47</sup> that the government can seek the death penalty for the Black respondent who contended prosecutors inordinately targeted minorities with capital

<sup>41</sup>*Burdine v. Johnson*, 262 F.3d 336 (5<sup>th</sup> Cir. 2001) (In its appeal, the Texas Department of Criminal Justice complained that the 5<sup>th</sup> U.S. Circuit Court of Appeals wrongly equated a sleeping attorney with an absent one and incorrectly drew a line between sleeping and other attorney impairments that do not automatically compromise the defense).

The Supreme Court rejected the Texas Department of Criminal Justice's request for *certiorari* with a one- sentence order.

<sup>42</sup>The Court has ruled that defendants whose lawyers represent them incompetently can get their convictions overturned, but set a formidable barrier: the defense must prove not only that the trial lawyer's performance fell below minimum standards but also that the deficiencies had a likely impact on the verdict. Under this standard, the Court and lower courts have upheld convictions in which the defense lawyer was drunk or mentally ill, finding a lack of proof that the verdict was affected. *See Bell v. Cone*, 122 S.Ct. 1843 (2002).

<sup>43</sup>70 U.S.L.W. 4666 (U.S. June 24, 2002)(No. 01-488).

<sup>44</sup>497 U.S. 639 (1990) (approved a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a defendant eligible for the death penalty, and thus eligible for greater punishment).

<sup>45</sup>500 U.S. 466 (2000).

<sup>46</sup>*Id.* at 476.

<sup>47</sup> \_\_\_ S.Ct. \_\_\_, 2002 WL 1393948.

punishment. The Court held that the Sixth Circuit was in error to let Bass try to force the prosecutors to turn over information about how they handled death cases. When the government refused to reveal information regarding its capital charging practices, the district court and the Sixth Circuit threw out the death penalty option in Bass' case. The Court ordered that it be reinstated, overruling the Court of Appeals for the Sixth Circuit. The Court held that Bass had not made a sufficient showing of disparate effect or impact on blacks of the government's decisions to make capital charges to entitle him to discovery on the issue.

## Overview

Currently, eighteen states plus the federal government forbid the execution of the mentally retarded.<sup>48</sup> Mental health experts have pointed out that the characteristics of the mentally retarded suggest a willingness to please which leads them to confess—sometimes falsely—to capital crimes. The Court's decision in *Atkins v. Virginia* reflects what the Court views as the national consensus that it is a violation of the ban on "cruel and unusual punishment" to execute death row inmates who have mental retardation.

The Court appeared to recognize the need for better legal counsel in capital cases which could have led to a reexamination of this often-criticized practice in the death penalty cases. However, the Court's decisions in *Mickens v. Taylor* and *Bell v. Cone*, indicate its willingness to continue to adjudge claims of a denial of effective assistance of counsel under strict standards. Some states have taken steps to address the problem, despite the fact that the Court's current majority interprets the Sixth Amendment right to counsel narrowly by setting the bare minimum standards. If the Court eventually acts to address this issue, it will probably be by a narrow margin or it will leave this issue to be decided by the lower courts and the political process.

The Court has also acted to ensure, at least in limited circumstances, that juries should make informed decisions between death sentences and the alternative of life without parole. In its 7-2 decision in *Ring v. Arizona*, the Court has ended the practice of having a judge, rather than a jury, decide the critical issues which would justify the death penalty. The Court held that allowing the judge to decide these issues rather than the jury violates the defendant's constitutional right to a trial by jury. The issue at this stage would appear to be whether the defendants in states with judge sentencing will have their sentences reduced to life sentences or will they receive new sentencing trials with a new jury.

Based on its decision in *United States v. Armstrong*, the Court held in *United States v. Bass* that a defendant who seeks discovery on a claim that the government sought the death penalty against him because of his race must show some evidence of both discriminatory effect and discriminatory intent.

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<sup>48</sup>Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Mexico, New York, North Carolina, South Dakota, Tennessee, Washington, and United States (Federal).

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