

# CRS Report for Congress

## Capital Punishment Overview: 2006-2007 Term of the Supreme Court

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Paul Starett Wallace, Jr.  
Specialist in American Public Law  
American Law Division



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## Summary

During its 2006-2007 term the Supreme Court announced decisions in eight capital cases. Three arose under a later abandoned Texas procedure that restricted jury consideration of mitigation evidence to evidence of intent, future dangerousness and victim provocation. In one, *Smith v. Texas*, the Court held that the defendant's failure to challenging the state's insufficient corrective adjustments in the procedure could not be used to deny him the benefit of a less demanding test to assess the harm caused by use of the challenged, defective underlying procedure. In another, *Abdul-Kabir v. Quarterman*, it rejected the suggestion that the Court's earlier cases permitted the use of the mitigating evidence-restricting procedure as long as the evidence in question related at least in part to one of the narrow factors that the procedure allowed to be considered. In the third, *Brewer v. Quarterman*, it rejected the suggestion that the Court's earlier cases permitted the use of the mitigating evidence-restricting procedure as long as the procedure permitted "sufficient" consideration of the evidence in question given its quality and weight.

Earlier in the term in *Ayers v. Belmontes*, the Court concluded that the feature in California's capital sentencing procedure that permits consideration to any evidence that extenuated the gravity of the crime allowed a jury from giving full effect to mitigating evidence of the defendant's character and background even if otherwise unrelated to the crime.

In *Uttecht v. Brown*, the Court held that appellate courts should give considerable deference to a trial judge's dismissal of a prospective capital juror for cause. In *Schriro v. Landrigan*, it found that the absence of prejudice doomed an ineffectiveness of counsel challenge based on trial counsel's failure to search for mitigating evidence. In *Lawrence v. Florida*, it construed the federal habeas statute of limitations and concluded that the statute was not tolled pending a petition for Supreme Court review of state collateral review decisions (e.g. state habeas corpus decisions). In *Panelli v. Quarterman*, it determined that the limitation on second or successive habeas petitions posed no impediment to consideration of a petition which challenged the execution of a mentally incompetent death row inmate.

## Contents

Introduction .....	1
<i>Smith v. Texas</i> .....	1
<i>Brewer and Abdul-Kabir v. Quarterman</i> .....	4
<i>Ayers v. Belmontes</i> .....	7
<i>Uttecht v. Brown</i> .....	8
<i>Schriro v. Landrigan</i> .....	9
<i>Lawrence v. Florida</i> .....	14
<i>Panetti v. Quarterman</i> .....	15

# Capital Punishment Overview: 2006-2007 Term of the Supreme Court

## Introduction

During its 2005-2006 term, the Supreme Court announced eight capital punishment decisions, each decided by a 5-4 vote. Justice Kennedy voted with the majority in each of the eight. In the four cases in which the defendant succeeded, he joined Justices Stevens, Souter, Ginsburg and Breyer; in the four in which the state succeeded, he joined Chief Justice Roberts and Justices Scalia, Thomas and Alito. Four of the cases involved jury instructions (*Smith*, *Abdul-Kabir*, *Brewer* and *Ayers*), and a fifth (*Brown*) the selection of jurors in capital cases. Of the remaining three, one (*Landrigan*) involved an ineffectiveness of counsel challenge and the last two (*Panetti* and *Lawrence*) the application of the federal habeas corpus statute arising in a capital context.

Three cases (*Smith*, *Abdul-Kabir*, and *Brewer*) reopened constitutional issues on the role of juries in death penalty sentencing under a since discarded procedure in Texas and the authority of states to create their own rules for review of death cases after convictions have become final.

## ***Smith v. Texas***

In *Smith v. Texas*, petitioner LaRoyce Lathair Smith was convicted of capital murder and sentenced to death by a jury in Dallas County, Texas. The trial took place in the interim between *Penry v. Lynaugh* (*Penry I*)<sup>1</sup> and *Penry v. Johnson* (*Penry II*).<sup>2</sup> At that time, Texas capital juries were still given special issue questions that asked whether the murder had been deliberately committed, whether the defendant might prove dangerous in the future, and in cases involving a confrontation whether the defendant had been provoked.<sup>3</sup> If the jury found that the answer to all the special issues was yes, then the death penalty was imposed; otherwise, a sentence of life imprisonment was imposed. The special issue questions were found to be

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<sup>1</sup> 492 U.S. 302 (1989) (*Penry I*).

<sup>2</sup> 532 U.S. 782 (2001) (*Penry II*).

<sup>3</sup> More exactly, "(1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased," Tex. Code Crim. Pro. art. 37.071(b)(1981 ed. & Supp. 1989).

constitutionally inadequate in *Penry I* because of “the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence” offered on the defendant’s behalf.<sup>4</sup>

The Texas courts attempted to cure the inadequacy by instructing the jury that if it felt death should not be imposed but also felt the special issues were satisfied, it should falsely answer “no” to one of the special-issue questions, thus nullifying the special issues.

Prior to his trial, Smith filed three written motions addressing the jury instructions. In the first two motions, Smith argued that the special issue questions were constitutionally inadequate. In the third, Smith requested the court to state the contents of the nullification charge prior to *voir dire* in order to allow Smith to exercise his jury challenges intelligently. The trial court denied the first two motions and, in response to the third, provided Smith a copy of its proposed nullification charge. Smith raised no additional objections and did not suggest alternative wording for the nullification charge.

At sentencing, Smith’s jury received the special issues questions and the supplemental “nullification instruction.”<sup>5</sup> The instructions directed the jury to give effect to mitigation evidence, but allowed the jury to do so only by negating what would otherwise be affirmative responses to two special issues relating to deliberateness and future dangerousness. The jury sentenced Smith to death.

In his appeal and post-conviction state proceedings, Smith continued to argue his sentencing was unconstitutional because of the defects in the special issues. At each stage, the argument was either rejected on the merits, or held procedurally barred because it had already been addressed on direct appeal. Along the way, the Supreme Court in *Penry II* found the nullification charge inadequate to cure the special issues defect because of its continued failure to permit sufficient consideration of mitigating evidence.<sup>6</sup> The Texas Court of Criminal Appeals affirmed the denial of relief, distinguishing Smith’s case from the *Penry* precedents.<sup>7</sup> The Supreme Court reversed, finding that there was *Penry* error and that the nullification charge was inadequate under *Penry II*.<sup>8</sup> On remand, the appeals court denied relief once more. Relying on its *Almanza*<sup>9</sup> decision, the Texas Appeals Court held that Smith had not preserved a *Penry II* challenge to the nullification charge, since he only made a *Penry I* challenge at trial and this procedural defect required

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<sup>4</sup> 492 U.S. at 328.

<sup>5</sup> *Ex parte Smith*, 132 S.W.3d 407, 409 (Tex. Crim. App. 2004).

<sup>6</sup> “Any realistic assessment of the manner in which the supplemental instruction operated would therefore lead to the same conclusion we reached in *Penry I*: ‘[A] reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence,’” 532 U.S. at 804.

<sup>7</sup> 132 S.W.3d at 413.

<sup>8</sup> *Smith v. Texas*, 543 U.S. 37 (2004) (*Smith I*).

<sup>9</sup> *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984 (*en banc*)).

him to show not merely some harm, but egregious harm, a burden he could not meet.<sup>10</sup>

In a decision by Justice Kennedy, the Court held: (1) that the Texas Court of Criminal Appeals made errors of federal law that cannot be the underlying basis for requiring Smith to show egregious harm; and (2) that because there is a reasonable likelihood the jury believed it was not permitted to consider Smith's relevant mitigating evidence, Smith is entitled to relief under the state harmless-error framework.

The majority opinion held that Smith's primary objection at each stage of his appeal was centered around the special issues, a *Penry I* objection.<sup>11</sup> As support for this conclusion, the Court's majority explained its ruling in *Smith I* as holding that the special issues prevented the jury from considering Smith's mitigating evidence, while the nullification charge simply failed to cure that error.<sup>12</sup> The majority was of the opinion that the Texas Court of Criminal Appeals misunderstood the interplay of *Penry I* and *Penry II* and the ruling in *Smith I*, which on remand led it to hold that by failing to object to the nullification instruction Smith had not preserved his challenge to the special issues.<sup>13</sup> Contrary to the belief of the Texas court, Smith was not required to object both to the fact that the special issues unconstitutionally confined jury consideration of mitigation (*Penry I*) and to the fact that the nullification instruction was an insufficient cure (*Penry II*). As a result of this error, the majority held, the Texas Court of Criminal Appeals mistakenly required Smith to show egregious harm.<sup>14</sup>

Having established that the Texas Court of Criminal Appeals applied the wrong standard, the majority examined Smith's claim in light of the correct standard and held that "...there was a reasonable likelihood that the jury interpreted the special issues to foreclose adequate consideration of his mitigating evidence."<sup>15</sup> Accordingly, the Court concluded, "it appears Smith is entitled to relief under the state harmless-error framework."<sup>16</sup> As a result of the Court's conclusion on this issue, the majority did not "...reach the question [of] whether the nullification charge

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<sup>10</sup> *Ex parte Smith*, 185 S.W.3d 455, 463-64 (Tex. Crim. App. 2006). Under the *Almanza* standard, when a defendant challenges a jury instruction the court must determine whether there was error in the jury charge, and if so, whether the defendant objected at the time. If the defendant failed to object "he must show that the error caused him such egregious harm that he did not have a 'fair and impartial trial.'" *Id.* at 463.

<sup>11</sup> 127 S. Ct. at 1697.

<sup>12</sup> *Id.* at 1691.

<sup>13</sup> *Id.* at 1698.

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

<sup>15</sup> *Id.* at 1698.

<sup>16</sup> *Id.* at 1699.

resulted in a separate jury-confusion error, and if so, whether that error is subject to harmless-error review.”<sup>17</sup>

The dissenting opinion written by Justice Alito and joined by Chief Justice Roberts, Justices Scalia, and Thomas concluded that the judgment of the Texas Court of Criminal Appeals on remand did not conflict with the Court’s mandate in *Smith I*.<sup>18</sup> More specifically, the dissent took issue with the majority’s conclusion that Smith had preserved his objection and, as a result, would have held that the Texas Court of Criminal Appeals correctly applied the egregious harm standard. Although Smith did argue that the special issues precluded the jury from considering mitigating evidence, by failing to argue that the trial judge’s proposed instructions were insufficient to cure that defect, according to the dissent, Smith failed to preserve his claim.<sup>19</sup> The dissent further stated that the majority’s contrary conclusion was tantamount to holding that Smith “had a federal right to sandbag the trial court.”<sup>20</sup>

Distinguishing a prior ruling of the Texas Court of Criminal Appeals in *Smith I*, the dissenters said the state court never held that Smith’s challenge was properly preserved; therefore, despite having previously rejected the federal claim on the merits, the state court was not precluded from imposing the state law procedural bar on remand of *Smith I*.<sup>21</sup> Also, the dissent concluded that the “‘egregious harm’ standard [was] an adequate and independent state ground sufficient to support a state judgement that precludes consideration of a federal right.”<sup>22</sup>

### ***Brewer and Abdul-Kabir v. Quarterman***

*Abdul-Kabir [Cole] v. Quarterman*<sup>23</sup> concerns habeas corpus rulings of the U.S. Court of Appeals for the Fifth Circuit arising out of the Texas “special issues”

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

<sup>18</sup> *Id.* at 1706.

<sup>19</sup> *Id.* at 1704-1705

<sup>20</sup> *Id.* at 1702.

<sup>21</sup> *Id.* at 1702-1703.

<sup>22</sup> *Id.* at 1704-1705.

<sup>23</sup> 127 S. Ct. 1654, 1660-1662 (2007). (In 1987, Jalil Abdul-Kabir was convicted of capital murder after he confessed to strangling 66-year-old Raymond Richardson with a dog leash to steal \$20.00 from him. At sentencing, the trial judge asked the jury to answer two special issues, affirmative answer to which would require the judge to impose a death sentence: whether Abdul-Kabir's conduct was committed deliberately and with the reasonable expectation it would result in his victim’s death and whether it was probable he would commit future violent acts constituting a continuing threat to society. Abdul-Kabir's mitigating evidence included family members’ testimony describing his unhappy childhood as well as expert testimony which, to some extent, contradicted the State’s claim that he was dangerous. However, the prosecutor discouraged the jurors from taking these matters into account, advising them instead to answer the special issues based only on the facts and to disregard any other views as to what might constitute an appropriate punishment for this particular defendant).

procedure. *Brewer v. Quarterman*<sup>24</sup> is its companion. Similar to *Smith v. Texas*,<sup>25</sup> the cases address the question of whether the instructions given to inmate Brewer's and inmate Abdul-Kabir's juries provided a sufficient vehicle for consideration of the mitigating evidence presented. The statutory scheme under which they were sentenced was ruled unconstitutional in 1989 in *Penry I*.<sup>26</sup> In 1991, the Texas legislature amended the statute to correct the deficiency. The pre-1991 cases (Smith, Brewer and Abdul-Kabir), however, continued to proceed through the courts, while the Supreme Court issued three more decisions involving Texas cases in an effort to enforce their original ruling. These cases were *Penry v. Johnson (Penry II)*,<sup>27</sup> *Smith v. Texas (Smith I)*<sup>28</sup> and *Tennard v. Dretke*.<sup>29</sup>

While Abdul-Kabir's habeas case was pending initially, the Court in *Tennard* rejected a Fifth Circuit standard under which for purposes of certain *Penry* claims a prisoner was required to demonstrate a nexus between the mitigating evidence and the offense of conviction.<sup>30</sup> The Court remanded Abdul-Kabir for reconsideration in light of *Tennard*.<sup>31</sup> On remand, the Fifth Circuit denied habeas relief on the grounds that the special issue questions permitted the jury to honestly consider the mitigating effect of the particular evidence in the case. They therefore concluded the state court decisions regarding the use of the special issue questions were not contrary to Supreme Court precedent, because the deliberateness and future danger questions permitted the jury to consider mitigating evidence of a destructive family background

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<sup>24</sup> 127 S. Ct. 1706, 1710-1711 (2007). (Petitioner Brewer was convicted of murder committed during the course of a robbery. At sentencing, he introduced mitigating evidence of his mental illness, his father's extensive abuse of him and his mother, and his substance abuse. "In closing argument, the prosecutor emphasized that Brewer's violent response to physical abuse by his father supported an affirmative answer to the 'future dangerousness' special issue. In contrast, he de-emphasize any mitigating effect such evidence should have ..." saying, "you know, folks, you can take a puppy, and you can beat the puppy and you can make him mean, but if that dog bites, he is going to bite the rest of his life." Moreover, he told the jurors that they "lacked the power to exercise moral judgment in determining Brewer's sentence." Ultimately, the jury answered both special issues in the affirmative, and Brewer was sentenced to death.)

<sup>25</sup> 127 S. Ct. 1686 (2007).

<sup>26</sup> *Penry v. Lynaugh*, 492 U.S. 302 (1989).

<sup>27</sup> 532 U.S. 782 (2001).

<sup>28</sup> 543 U.S. 37 (2004).

<sup>29</sup> 542 U.S. 274 (2004).

<sup>30</sup> "The court began by stating the test applied in the Fifth Circuit to *Penry* claims, which involves a threshold inquiry into whether the petitioner presented 'constitutionally relevant' mitigating evidence of a 'uniquely severe permanent handicap with which the defendant was burdened through no fault of his own,' and evidence that 'the criminal act was attributable to his severe permanent condition.'" *Id.* at 281. "The Fifth Circuit's test has no foundation in the decisions of this Court," *Id.* at 284.

<sup>31</sup> *Abdul-Kabir v. Dretke*, 543 U.S. 985 (2004).



and a neurological condition deficiency.<sup>32</sup> It reached much the same conclusion in Brewer's case; the jury could consider depression, substance abuse and destructive family background when called upon to answer the deliberateness and future dangerousness questions.<sup>33</sup> In fact, it suggested that Brewer's claim was less robust, quantitatively and qualitatively, than Abdul-Kabir's.<sup>34</sup> The Supreme Court granted certiorari and consolidated the cases for argument.<sup>35</sup> It then reversed in separate opinions.<sup>36</sup>

The Court decided in *Abdul-Kabir* that the Fifth Circuit wrongly applied the *Penry* line of cases and its predecessors when it concluded that the Texas court decisions were not clearly contrary to existing Court precedents. Writing for the majority, Justice Stevens said their cases beginning with *Lockett v. Ohio*<sup>37</sup> and continuing through *Penry I* have been "... clear that when the jury is not permitted to give meaningful effect or a 'reasonable moral response' to a defendant's mitigating evidence – because it is forbidden from doing so by statute or a judicial interpretation of a statute – the sentencing process is fatally flawed."<sup>38</sup>

Chief Justice Roberts and Justices Alito, Scalia, and Thomas dissented. Chief Justice Roberts for the dissenters said the majority should have deferred to lower court rulings against the defendants because in light of facially limiting, contemporaneous Court decisions there was no clearly established federal law that judges could have followed to grant relief.<sup>39</sup> Justices Scalia and Thomas added a separate dissent in which they repeated their view that mitigating evidence may be kept from the jury without constitutional offense and bemoaned the want of Supreme Court consistency on the question.<sup>40</sup>

The separate opinion in *Brewer* appears to have been designed to preclude any indication that the special issue procedure may have continued vitality in those cases

<sup>32</sup> *Cole v. Dretke*, 418 F.3d 494, 505-11 (5<sup>th</sup> Cir. 2005).

<sup>33</sup> *Brewer v. Dretke*, 442 F.3d 273, 279-82 (5<sup>th</sup> Cir. 2006).

<sup>34</sup> "In *Coble* and *Cole*, moreover, the record contained expert psychiatric evidence that bore both on the defendant's future dangerousness and other potential issues relating to mental impairment. Even if Brewer [who failed to offer the testimony of expert witnesses] had proved mental illness (which it appears he did not), and even if mental illness were tantamount to mental retardation for the purposes of our case law (which it is not), Brewer came nowhere near to producing evidence sufficient for us to grant relief," 442 F.3d at 281.

<sup>35</sup> *Abdul-Kabir v. Quarterman*, 127 S.Ct. 432 (2006); *Brewer v. Quarterman*, 127 S.Ct.433 (2006).

<sup>36</sup> *Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654 (2007); *Brewer v. Quarterman*, 127 S.Ct.1706 (2007). The dissents in the two opinions, however, are identical, 127 S.Ct. at 1675, 1684; 127 S.Ct. at 1713, 1723.

<sup>37</sup> 438 U.S. 586 (1978).

<sup>38</sup> 127 U.S. at 1665-1671.

<sup>39</sup> *Id.* at 1681-1682, citing *inter alia*, *Graham v. Collins*, 506 U.S. 461 (1993) and *Johnson v. Texas*, 509 U.S. 350 (1993).

<sup>40</sup> 127 S.Ct. at 1684-1686.

in which they permit the jury to give “sufficient effect” to the defendant’s evidence when the defendant’s unassessed mitigating evidence is less robust than that available in *Penry* or *Abdul-Kabir*.<sup>41</sup> No more acceptable to the majority than its “constitutional relevance” theory is the Fifth Circuit’s suggestion that a jury has given “sufficient effect” to mitigating evidence whose impact largely falls within the special issues’ sphere of relevance even though some lesser mitigating effects may be disregarded simply because they fall beyond its edge.<sup>42</sup>

### ***Ayers v. Belmontes***

In *Ayers v. Belmontes*,<sup>43</sup> decided November 13, 2006, a California jury convicted Belmontes of murder, and sentenced him to death. Belmontes argued that part of the jury instruction violated the Eighth Amendment by keeping the jury from considering evidence that would have a bearing on how he would behave as a prisoner if he were sentenced to prison rather than sentenced to death.

A California statute states that the jury can consider several mitigating factors when considering whether to impose the death penalty. One of these is “factor (k)” which is “any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.” After being sentenced to death, Belmontes argued at the California Supreme Court that the jury instructions which incorporated factor (k) prevented the jury from considering background evidence unless that evidence related to the murder itself. The California court upheld the conviction.<sup>44</sup> Belmontes then filed a federal *habeas corpus* petition raising the same argument, and the Ninth Circuit decided in his favor.<sup>45</sup> California challenged the ruling and after remand from the U.S. Supreme Court, the Ninth Circuit again held in favor of Belmontes and for the same reasons.<sup>46</sup> In another 5-4 decision, the Supreme Court reinstated the death penalty, concluding that factor (k)’s reference to

<sup>41</sup> “Nowhere in our *Penry* line of cases have we suggested that the question whether mitigating evidence could have been adequately considered by the jury is a matter purely of quantity, degree, or immutability. Rather, we have focused on whether such evidence has mitigating relevance to the special issues and the extent to which it may diminish a defendant’s moral culpability for the crime,” 127 S.Ct. at 1712-1713.

<sup>42</sup> “[T]he Court of Appeals mischaracterized the law as demanding only that such evidence be given ‘sufficient mitigating effect,’ and improperly equated ‘sufficient effect’ with ‘fully effect.’ . . . Like the ‘constitutional relevance’ standard that we rejected in *Tennard*, a ‘sufficient effect’ standard has ‘no foundation in the decisions of this Court,’” *Id.* at 1713.

<sup>43</sup> 127 S. Ct. 469 (2006).

<sup>44</sup> *People v. Belmontes*, 755 P.2d 310 (Cal. 1988), *certiorari* denied in *Belmontes v. California*, 488 U.S. 1034 (1989).

<sup>45</sup> *Belmontes v. Woodford*, 350 F.3d 861 (9<sup>th</sup> Cir. 2003), vacated and remand for reconsideration in light of *Brown v. Payton*, *Brown v. Belmontes*, 544 U.S. 945 (2005). *Brown v. Payton*, 544 U.S. 133, 142 (2005), held that the California Supreme Court had not ruled contrary to U.S. Supreme Court precedent when it held factor (k) would not lead a reasonable jury in a capital case to conclude that it must disregard mitigating evidence of a defendant’s subsequent rehabilitation.

<sup>46</sup> *Belmontes v. Brown*, 414 F.3d 1094 (9<sup>th</sup> Cir. 2005).

any evidence which extenuated the gravity of the crime allowed a jury from giving full effect to mitigating evidence of the defendant's character and background even if otherwise unrelated to the crime.<sup>47</sup> "It was mistaken...to find a 'reasonable probability' that the jury did not consider respondent's future potential," Justice Kennedy wrote.<sup>48</sup> Chief Justice Roberts and Justices Alito, Scalia, and Thomas joined Justice Kennedy's opinion.

In his dissent, Justice Stevens said the majority opinion reaches a "strange conclusion" based upon speculation.<sup>49</sup>

### ***Uttecht v. Brown***

On June 4, 2007, the Court in *Uttecht v. Brown*<sup>50</sup> decided that the Washington state trial judge who presided over the trial of Cal Coburn Brown properly used his discretion to excuse a potential juror who had expressed mixed views regarding the death penalty.<sup>51</sup> After the Washington Supreme Court upheld the trial judge's dismissal of the juror,<sup>52</sup> the federal district court denied Brown's *habeas* petition. The defendant requested *habeas corpus* relief in the U.S. Court of Appeals for the Ninth Circuit and the Court of Appeals reversed finding that under *Witherspoon v. Illinois*<sup>53</sup> the trial court had violated Brown's Sixth and Fourteenth Amendment rights by excusing Juror Z for cause on the ground that he could not be impartial in deciding whether to impose a death sentence.<sup>54</sup> The Court of Appeals said that excluding a

<sup>47</sup> 127 S.Ct. at 473-74, describing *Boyd v. California*, 494 U.S. 370 (1990).

<sup>48</sup> *Ayers v. Belmontes*, 127 S. Ct. 469, 475 (2006).

<sup>49</sup> *Id.* at 492.

<sup>50</sup> 127 S. Ct. 2218 (2007).

<sup>51</sup> *Id.* at 2228.

<sup>52</sup> *State v. Brown*, 132 Wash.2d 529, 940 P.2d 546 (1997).

<sup>53</sup> 391 U.S. 510 (1968) (In an opinion written by Justice Potter Stewart, the Court held 6-3 that *Witherspoon's* death sentence was unconstitutional. The Court reasoned that a jury composed after the dismissal of all who oppose the death sentence was biased in favor of the death sentence; such a jury was not impartial and thus violated the Sixth and Fourteenth Amendments. The Court held that while jurors who say they will not impose the death sentence can be dismissed; jurors who merely oppose the death sentence as a personal belief may not. Justice William Douglas, concurring, was of the opinion that it is also unconstitutional to dismiss prospective jurors who say they will never impose the death sentence.).

<sup>54</sup> The Circuit Court depicted the consideration of the Juror Z's dismissal for cause as follows: "Z expressed no antipathy toward the death penalty; to the contrary, he stated that he 'believe[d] in the death penalty.' In explaining his views, Z outlined a balanced and thoughtful position. For example, Z was discomforted by an earlier era in which '[i]t seemed like ... [the death penalty] wasn't used at all,' because he believed 'there [a]re times when it would be appropriate [to impose the death penalty].' But he expressed caution that the death penalty be reserved for 'severe situations': 'I don't think it should never happen, and I don't think it should happen 10 times a week either.' Z felt most comfortable imposing the death penalty where the defendant is 'incurrable and would re-violate if released,' and

(continued...)

juror is allowed only if it is clear that the juror would not follow the law. The Court of Appeals noted that the juror should not have been excused because he said he would consider the death penalty in an appropriate case.<sup>55</sup>

However, the Supreme Court reinstated the death sentence of Brown based on the premise that the Court of Appeals should have given deference to the trial judge because determinations of a juror's demeanor and credibility are within his province.<sup>56</sup> Writing for the majority, Justice Kennedy said "...where, as here, there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful *voir dire* [examination], the trial court has broad discretion."<sup>57</sup>

Dissenting, Justice Stevens, said the Court wiped away earlier decisions that allow death penalty opponents to sit on juries in capital cases, provided they demonstrate that they can set aside their "beliefs in deference to the rule of law."<sup>58</sup> Justice Stevens noted that juror Z was struck for cause although she was not necessarily an opponent of the death penalty since on *voir dire* (examination), she said she could impose the death penalty if convinced that it was the appropriate measure.<sup>59</sup> Justices Breyer, Souter, and Ginsburg also dissented.

### ***Schriro v. Landrigan***

In *Schriro v. Landrigan*,<sup>60</sup> decided by the Court on May 14, 2007, the respondent, Jeffrey Landrigan was convicted and sentenced to death for murder committed during a burglary.<sup>61</sup> At sentencing, he undermined his attorney's effort to develop and present any mitigating evidence. His attorney sought to offer the testimony of his mother and ex-wife as mitigating evidence; Landrigan persuaded them not to testify.<sup>62</sup> He informed the court that he had instructed his attorney not to present mitigating evidence and that as far as he was concerned there were no

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<sup>54</sup> (...continued)

less comfortable where the defendant is found to have been 'temporarily insane.' But he stated unequivocally that he could consider the death penalty as an option if told to do so. ... More importantly, he promised he would 'follow the law' without reservation. Despite these assurances, the prosecutor protested that Z was too reluctant to impose the death penalty, and that he would only vote for death if convinced that the defendant would 'kill again.' The prosecutor thus moved to excuse juror Z for cause, and the trial judge granted the motion without further inquiry," *Brown v. Lambert*, 451 F.3d 946, 949 (2006).

<sup>55</sup> 451 F.3d at 950-953.

<sup>56</sup> 127 S.Ct. at 2228.

<sup>57</sup> *Id.* at 2230.

<sup>58</sup> *Id.* at 2240.

<sup>59</sup> *Id.* at 2239.

<sup>60</sup> 127 S. Ct. 1933 (2007).

<sup>61</sup> Landrigan had previously stabbed and attempted to murder a fellow inmate while serving time for an earlier murder. *Id.* at 1937.

<sup>62</sup> *Id.* at 1937.

mitigating circumstances.<sup>63</sup> His attorney sought to assert that Landrigan had been lawfully employed to support his family; he interjected that he was “doing robberies supporting my family” as well.<sup>64</sup> His attorney suggested the stabbing of a fellow inmate may have been self-defense; he would have none of it and ended the effort with the observation that “I stabbed him 14 times. It was lucky he lived. But two weeks later they found him hung in his cell.”<sup>65</sup>

The court sentenced Landrigan to death and his direct appeals proved unsuccessful.<sup>66</sup> Landrigan then filed an ineffective assistance claim first in state court and then in federal court.<sup>67</sup> Landrigan argued that if his lawyer had explained better, he would have agreed to allow him at his sentencing hearing to present evidence that he suffered because of fetal alcohol syndrome and a history of violence in his biological family.<sup>68</sup> The Arizona Supreme Court, the U.S. District Court for the District of Arizona, and a three-judge panel of the Court of Appeals for the Ninth Circuit all rejected Landrigan’s argument. However, the Ninth Circuit Court of Appeals en banc affirmed in part, reversed in part, and remanded, saying Landrigan was entitled to a hearing on his claim that his lawyer was ineffective.<sup>69</sup>

In the eyes of the en banc panel, Landrigan’s trial attorney conducted almost no investigation for sentencing and certainly no probing investigation.<sup>70</sup> At the sentencing hearing, Landrigan simply told the court that he did not wish for his mother or ex-wife to testify on his behalf. And trial counsel was unprepared to present any other witnesses. Landrigan knew of no other mitigating evidence because his attorney had developed none. When the state courts found that his instruction not to use his mother and ex-wife to present mitigating evidence constituted an instruction not to present any mitigating evidence from any other source, they had engaged in an unreasonable determination of the facts, as far as the panel was concerned.<sup>71</sup> During habeas corpus proceedings in the district court, mitigating evidence was developed showing organic brain damage, fetal alcohol, and

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Landrigan v. Stewart*, 272 F.3d 1221, 1227 (9<sup>th</sup> Cir. 2001).

<sup>66</sup> *State v. Landrigan*, 176 Ariz. 1, 859 P.2d 111 (1993).

<sup>67</sup> *Id.* at 1223-1224.

<sup>68</sup> *Id.*

<sup>69</sup> *Landrigan v. Schriro*, 441 F.3d 638, 642 (9<sup>th</sup> Cir. 2006).

<sup>70</sup> *Id.* at 643-646.

<sup>71</sup> *Id.* at 646-647. In state prisoner cases, the federal statute binds federal habeas courts to state court decisions with two exceptions, one of which is that the state court decision “was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.” 28 U.S.C. 2254(d)(2). Under 28 U.S.C. 2254(e)(1) state court findings of fact are presumed correct absent a contrary showing by clear and convincing evidence.

certain genetic predispositions.<sup>72</sup> None of this evidence was developed by trial counsel. Moreover, Landrigan had shown no want of diligence to develop the factual basis for his claim.<sup>73</sup> The post-conviction counsel asked for funding for experts and an evidentiary hearing. The state objected to both and the state court denied funding and a hearing.<sup>74</sup> The Supreme Court granted the state's petition for certiorari<sup>75</sup> and reversed.<sup>76</sup>

The ultimate weakness of Landrigan's argument and the en banc decision, in the opinion of the Court, was weakness of the unheard mitigating evidence. Justice Thomas, writing for the Court with the concurrence of four of his brethren, pointed out that habeas relief may only be granted if the state court's treatment of the claim constitutes either unreasonable application of federal law or an unreasonable application of the facts to that law.<sup>77</sup> A court need conduct an evidentiary hearing in aid of an effort to overcome these obstacles, explained the Court, when "the petition's factual allegations ... if true, would entitle the applicant to federal habeas relief."<sup>78</sup> Here, the claim of ineffective assistance of counsel would require a showing of a "deficient performance by counsel *resulting in prejudice*."<sup>79</sup> As far as the Court was concerned, the district court that denied habeas relief "did not abuse its discretion in finding that Landrigan could not establish prejudice based on his counsel's failure to present the evidence he now wishes to offer."<sup>80</sup>

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<sup>72</sup> *Id.* at 648-649.

<sup>73</sup> *Id.* Again in state prisoner cases, the statute declares that a petitioner who has previously failed to develop the factual basis for his claim may have an evidentiary hearing to do so only under two circumstances, one of which is that "the factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. 2254(e)(2)(A) (ii). Even with this accomplished, he must also demonstrate "by clear and convincing evidence that but for the constitutional error," such as the ineffective assistance of counsel, "no reasonable fact-finder would have found the applicant guilty of the underlying offense" or subject to the challenged penalty. 28 U.S.C. 2254(e)(2)(B).

<sup>74</sup> *Id.* at 642-643.

<sup>75</sup> *Landrigan v. Schriro*, 127 S.Ct. 35 (2006).

<sup>76</sup> 127 S.Ct. at 1944.

<sup>77</sup> 127 S.Ct. at 1939, citing, 28 U.S.C. 2554(d)(1),(2).

<sup>78</sup> *Id.* at 1940.

<sup>79</sup> *Rompilla v. Beard*, 545 U.S. 374, 380 (2005)(emphasis added), citing, *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Court seems to take for granted without saying as much that habeas relief under *Strickland* requires a showing of *prejudicial* ineffective assistance, see, 127 S.Ct. at 1941 ("the District Court could conclude that because of his established recalcitrance, Landrigan could not demonstrate prejudice under *Strickland* even if granted an evidentiary hearing. The Court of Appeals offered two additional reasons for holding that Landrigan's inability to make a showing of prejudice under *Strickland* did not bar any potential habeas relief ... it was not objectively unreasonable for that court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice...").

<sup>80</sup> *Id.* at 1943-1944. (The Court continued, "Landrigan's mitigation evidence was weak, and the postconviction court was well acquainted with Landrigan's exceedingly violent past and (continued...)

The Court’s treatment of the contrary en banc panel decision is straightforward in some respects and instructive in others. It concluded that based on the record the panel was simply wrong when it characterized as an unreasonable determination of the facts the state court holdings that Landrigan had instructed his trial attorney not to offer any mitigating evidence.<sup>81</sup> “The Arizona court’s determination that Landrigan refused to allow the presentation of any mitigating evidence was a reasonable determination of the facts,” said Justice Thomas.<sup>82</sup>

The Court’s terse rebuttal of two other points found in the en banc decision may prove more revealing of the Court’s future direction. First, the panel suggested that Landrigan’s conduct “cannot excuse his counsel’s failure to conduct an adequate investigation prior to the sentencing.” Earlier cases seemed to teach: (1) in *Wiggins*, that the adequacy of a presentencing investigation is measured at the time the investigation was and should have been conducted not at the time of sentencing hearing;<sup>83</sup> and (2) in *Rompilla*, that counsel must sometimes probe the defendant’s background for mitigating evidence even when the defendant and members of his family assure counsel there is none.<sup>84</sup> The Court dismissed the references with the observation that it had never previously addressed “a situation in which a client interferes with counsel’s efforts to present mitigating evidence to a sentencing

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<sup>80</sup> (...continued)

had seen first hand his belligerent behavior. Again, it is difficult to improve upon the initial Court of Appeals panel’s conclusion: ‘The prospect was chilling: before he was 30 years of age, Landrigan had murdered one man, repeatedly stabbed another one, escaped from prison, and within two months murdered still another man. ... In his comments to the sentencing judge, defendant not only failed to show remorse or offer mitigating evidence, but he flaunted his menacing behavior. On this record, assuring the court that genetics made him the way he is could not have been very helpful. There was no prejudice.’ 272 F.3d at 1229.”).

<sup>81</sup> 127 S.Ct. at 1940-1941.

<sup>82</sup> *Id.* at 1941. In addition, the district court, whose denial habeas relief the panel overturned, “was entitled to conclude that regardless of what information counsel might have uncovered in his investigation, Landrigan would have interrupted and refused to allow his counsel to present any such evidence.” *Id.* at 1942.

<sup>83</sup> *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003)(emphasis in the original)(“In finding Williams’ ineffectiveness claim meritorious, we applied *Strickland* and concluded that counsel’s failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision ... because counsel had not fulfilled their obligation to conduct a thorough investigation of the defendant’s background. ...[O]ur principal concern ... is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel’s decision not to introduce mitigating evidence of Wiggins’ background was *itself reasonable*.”).

<sup>84</sup> *Rompilla v. Beard*, 545 U.S. 374, 383 (2005)(“The Commonwealth argues that the information trial counsel gathered from Rompilla and the other sources gave them sound reason to think it would have been pointless to spend time and money on the additional investigation espoused by postconviction counsel, and we can say that there is room for debate about trial counsel’s obligation to follow at least some of those potential lines of enquiry”).

court.”<sup>85</sup> No more need have been said since a habeas court may not distribute a state court’s ruling on the merits of a claim in absence of contrary Supreme Court precedent.<sup>86</sup> Yet this does little to encourage the belief that the Court may soon address the question and resolve it to the possible benefit of state death row inmates.

The want of Supreme Court precedent was but one of several reasons why the Court was unmoved by the panel’s objection that any decision of Landrigan’s to forego the introduction of mitigating evidence could hardly be described as “informed and knowing.”<sup>87</sup> The Court has “never imposed an ‘informed and knowing’ requirement upon a defendant’s decision not to introduce evidence.”<sup>88</sup> Even if such a claim had merit, Landrigan could not assert it because he had failed to present to state courts first.<sup>89</sup> In addition, the Court noted that trial counsel had in fact alluded to the perils of Landrigan’s decision to bar the introduction of mitigating evidence.<sup>90</sup> Finally, Landrigan dispelled any illusion that he was unaware of the consequences of unheard mitigating evidence when in his final statement he told the sentencing judge, “I think if you want to give the death penalty, just bring it right on. I’m ready for it.”<sup>91</sup>

Again, the Court did little to encourage the belief that it would soon rule and rule in a manner favorable to defendants on the question of whether a capital defendant may only waive the introduction of mitigating evidence at sentencing if his decision is an informed and knowing one.

Justice Stevens, writing the dissent, said the Court should have allowed the hearing to determine whether Landrigan truly did not want a judge to consider evidence in his favor as well as the strength of mitigating factors.<sup>92</sup> “Without the benefit of an evidentiary hearing, this is pure guesswork,” Justice Stevens said.<sup>93</sup>

Furthermore, Justice Stevens continued, in light of a panoply of circumstances under which the Court has held that trial rights may only be intelligently waived, “it makes little difference that we have not specifically imposed an informed and

<sup>85</sup> 127 S.Ct. at 1942.

<sup>86</sup> 28 U.S.C. 2254(d).

<sup>87</sup> 441 F.3d at 647 (“Nor does the record indicate that Landrigan’s decision was informed and knowing. It is difficult for an attorney to advise a client of the prospects of success or the potential consequences of failing to present mitigating evidence when the attorney does not know that such evidence exists”).

<sup>88</sup> 127 S.Ct. at 1942.

<sup>89</sup> *Id.* at 1942-1943, citing, 28 U.S.C. 2254(e)(2).

<sup>90</sup> *Id.* at 1943 (“[I]n Landrigan’s presence, his counsel told the sentencing court that he had carefully explained to Landrigan the importance of mitigating evidence, especially concerning the fact that state is seeking the death penalty.”).

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

<sup>92</sup> *Id.* at 1955.

<sup>93</sup> *Id.* at 1944.



knowing requirement upon a defendant's decision not to introduce evidence. A capital defendant's right to present mitigating evidence is firmly established and can only be exercised at a sentencing trial."<sup>94</sup>

Finally, the dissenters could not accept the majority's conclusion that Landrigan's mitigating evidence was weak or that it could be said without hearing that Landrigan had not been prejudiced by his trial counsel's failure to investigate the presence, depth and breath of any mitigating evidence.<sup>95</sup>

### ***Lawrence v. Florida***

On February 20, 2007, the Supreme Court announced its decision in *Lawrence v. Florida*<sup>96</sup> seeking to address the confusion surrounding the tolling of a one-year statute of limitations applicable to federal *habeas corpus* petitions. The statute provides for tolling through "the conclusion of direct appeal" including certiorari review by the Supreme Court.<sup>97</sup> It provides for tolling thereafter during the "pendency of state post-conviction or other collateral review" (i.e., habeas in state court).<sup>98</sup> But does this include the period during pendency of a petition for Supreme Court certiorari review of this second round of state proceedings. Prior to *Lawrence*, a split had developed in the circuits on the question. On one hand, the Eleventh Circuit and others held that the statute of limitations was not tolled during the pendency of a certiorari petition to the Supreme Court seeking review of a state court's collateral relief decision.<sup>99</sup> On the other hand, the Sixth Circuit decided differently prior to *Lawrence*, concluding that an application for state post-conviction relief would remain pending and would therefore toll the statute of limitations during the review by the Supreme Court.<sup>100</sup>

In settling the issue, the Court, in a 5-4 decision with Justice Thomas writing for the majority (which Chief Justice Roberts and Justices Scalia, Kennedy and Alito joined) rejected the Sixth Circuit reasoning and affirmed that of the Eleventh Circuit. The majority opinion decided that under ordinary circumstances, the time to file under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is not tolled while the Court is considering whether to grant *certiorari* regarding a state post-conviction petition; tolling of the statute of limitations is available only during direct appeals including certiorari to the Supreme Court and then during the pendency of the state post-conviction proceedings in state court, but not during the pendency

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<sup>94</sup> *Id.* at 1947.

<sup>95</sup> *Id.* at 1953-1954.

<sup>96</sup> 127 S. Ct. 1079 (2007).

<sup>97</sup> 28 U.S.C. 2244(d)(1).

<sup>98</sup> 28 U.S.C. 2244(d)(2).

<sup>99</sup> *See, e.g., Lawrence v. Florida*, 421 F.3d 1221 (11<sup>th</sup> Cir. 2005); *Miller v. Dragovich*, 311 F.3d 574 (3d Cir. 2002).

<sup>100</sup> *Abela v. Martin*, 348 F.3d 164, 170 (6<sup>th</sup> Cir. 2003).

of a petition for Supreme Court review of those proceedings.<sup>101</sup> For the majority, the issue turned on the language used in the statute. Supreme Court review cannot be part of the “state” review to which Congress referred when it spoke of “state post-conviction or other collateral review” in paragraph 2244(d)(2).<sup>102</sup> That phrase, Justice Thomas continued, stands in stark contrast to the phrase used in paragraph 2244(d)(1) that contemplates Supreme Court participation as the final stage of the state appellate process – “the conclusion of direct review.”<sup>103</sup>

Justice Ginsburg with whom Justices Stevens, Souter, and Breyer joined in dissenting would hold that 28 U.S.C. § 2244(d)’s statute of limitations is tolled during the pendency of a petition for certiorari to review of state collateral relief opinions.<sup>104</sup> The dissent concluded that the language does not require, nor should practicality encourage, a statutory construction that would compel a state prisoner to file his habeas petition in federal district court while his petition requesting review of the very same issues is pending before the Supreme Court.<sup>105</sup>

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

On the last day of its term, the Supreme Court announced its decision in *Panetti v. Quarterman*.<sup>106</sup> The questions presented were: “(1) Does the Eighth Amendment permit the execution of a death row inmate who has a factual awareness of the reason for his execution but who, because of severe mental illness, has a delusional belief as to why the state of Texas is executing him, and thus does not comprehend that his execution is intended to seek punishment for his capital crime? (2) Does the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) require deference to the state court’s determination that Panetti is competent to be executed—and thereby statutorily preclude Panetti’s request for federal *habeas* relief? and (3) Must petitioner’s habeas application be dismissed as ‘second or successive’ pursuant to 28 U.S.C. 2244?”<sup>107</sup>

In 1995, Panetti was convicted of capital murder and sentenced to death by a Texas jury for the 1992 slaying of his in-laws in the presence of his wife and

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<sup>101</sup> 127 S. Ct. at 1082.

<sup>102</sup> *Id.* at 1083 (“This Court is not a part of a ‘state’s post-conviction procedures.’”).

<sup>103</sup> *Id.* (“The Courts of Appeals have uniformly interpreted ‘direct review’ in §2244(d)(1)(A) to encompass review of a state conviction by this Court. By contrast, §2244(d)(2) refers exclusively to ‘state post-conviction or other collateral review,’ language not easily interpreted to include participation by a federal court.”).

<sup>104</sup> *Id.* at 1086.

<sup>105</sup> *Id.* at 1089.

<sup>106</sup> 127 S.Ct. 2842 (2007).

<sup>107</sup> *Panetti v. Quarterman*, No. 06-6407, Brief for Respondent On Writ of *Certiorari* To The United States Court Of Appeals For The Fifth Circuit, page i; Supplemental Brief for Respondent, page i.

three-year-old daughter.<sup>108</sup> Following his direct appeal, state post-conviction proceedings, and initial efforts at federal *habeas* relief were all unsuccessful, an execution date was set.<sup>109</sup> In December 2003, Panetti claimed for the first time that he was mentally incompetent to be executed. Other procedural maneuvers followed his claim, however, in May 2004, the state trial court (relying on evaluations by court-appointed experts) decided that Panetti was competent.<sup>110</sup> The state court then closed the case without ruling on various pending motions filed by Panetti, including requests for a competency hearing and for funds to hire his own expert.<sup>111</sup>

Panetti went back to federal court, where a second *habeas* petition was pending. The district court held that although the state court had not complied with either state law or the requirements imposed by the Supreme Court's decision in *Ford v. Wainright*,<sup>112</sup> Panetti was competent as defined by Fifth Circuit precedent insofar as he was aware of his impending execution and the basis for the execution.<sup>113</sup> The Fifth Circuit affirmed,<sup>114</sup> and the Supreme Court granted certiorari.<sup>115</sup>

On June 28, 2007, the Court in a 5-4 ruling reversed the Fifth Circuit. First, the Court rejected the state's argument that the Court lacked jurisdiction to consider the case because Panetti's first federal *habeas* petition would, explained the Court, prompt all death row inmates to include such claims in their first petition even though the claims may not be ripe or meritless.<sup>116</sup> While announcing what appears to be a new rule,<sup>117</sup> the Court concluded that "Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe."<sup>118</sup> Notwithstanding, the lower courts here emphasized instead, "[a]n empty formality requiring prisoners to file unripe *Ford* claims [which] neither respects the limited resources available to the

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<sup>108</sup> 127 S.Ct. at 2848.

<sup>109</sup> *Id.* at 2849.

<sup>110</sup> *Id.* at 2850-2851.

<sup>111</sup> *Id.* at 2851.

<sup>112</sup> 477 U.S. 399, 409-410 (1986) ("The Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane").

<sup>113</sup> *Panetti v. Dretke*, 401 F.Supp.2d 702, 705-706 (W.D. Tex. 2004).

<sup>114</sup> *Panetti v. Dretke*, 448 F.3d 815 (5<sup>th</sup> Cir. 2006).

<sup>115</sup> *Panetti v. Quarterman*, 127 S.Ct. 852 (2007).

<sup>116</sup> 127 S. Ct. at 2852.

<sup>117</sup> The Court will ordinarily decline to announce a "new rule," that is a first-time constitutional interpretation, in a habeas case, *Teague v. Lane*, 489 U.S. 288 (1989).

<sup>118</sup> *Id.* at 2853. 28 U.S.C. 2244(b)(2) states that, "A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed... ."

States nor encourages the exhaustion of state remedies.”<sup>119</sup> Recognizing that the State’s argument had some merit, nonetheless, Justice Kennedy concluded that it was flawed because of “[t]he results it would produce”<sup>120</sup> when considered with an earlier decision.<sup>121</sup>

The Court addressed the next issue that, in the state’s opinion, would preclude it from reaching the merits of Panetti’s claim regarding the state court’s determination that Panetti was competent and was entitled to deference under the AEDPA.<sup>122</sup> The Court agreed with Panetti that no deference was due because the state court had failed to provide Panetti with the minimum procedures required by Justice Powell’s concurring opinion in *Ford*—which, the Court explained constituted “clearly established law” for AEDPA purposes.<sup>123</sup> The Court took notice that in Panetti’s case, for example, the state court failed to provide Panetti with even the “rudimentary process” of giving him an opportunity to submit psychiatric evidence to rebut the report filed by the court-appointed experts.<sup>124</sup> The Court left undecided questions regarding other due process protections —“such as the opportunity for discovery or the cross-examination of witnesses which may also be required.”<sup>125</sup> The Court rejected any idea that the state court’s application of *Ford* was necessarily reasonable because the standard outlined in *Ford* was “stated in general terms”: “AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts ‘different from those in which the principle was announced.’”<sup>126</sup>

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<sup>119</sup> *Id.* at 2854.

<sup>120</sup> *Id.*

<sup>121</sup> *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998)(In *Stewart*, the Court held that if an inmate brings a *Ford* claim in his first petition that is dismissed because it is not ripe, the inmate can bring the claim later when it becomes ripe; based on *Stewart* case, refiling the dismissed claim is basically just a continuation of the earlier claim dismissed on ripeness grounds).

<sup>122</sup> 127 S. Ct. at 2855. When considering a state inmate’s habeas claim of a violation of federal law, Federal habeas courts must defer to state court decisions adjudicating the claim unless those decisions are “contrary to, or involve an unreasonable application of, clearly established” Supreme Court precedent, 28 U.S.C. 2254(d)(1).

<sup>123</sup> *Ford* was a 5-4 decision in which Justice Powell provided the fifth vote. Of the five, his was the most limited, and consequently controlling, statement on the question of how a State must proceed in the face of a claim that a death row inmate cannot be executed because of incompetence, which would include providing a hearing at which the prisoner has the opportunity “to submit ‘evidence and argument from the prisoner’s counsel, including expert psychiatric evidence that may differ from the state’s own psychiatric examination.’” 127 S.Ct. at 2585-2586, quoting Justice Powell’s concurrence in *Ford*, 477 U.S. at 427.

<sup>124</sup> *Id.* at 2858.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

Lastly, the Court addressed the merits of Panetti’s Eighth Amendment claim. The Court considered the Fifth Circuit’s test “too restrictive” insofar as it “treats a prisoner’s delusional belief system as irrelevant if the prisoner knows that the state has identified his crimes as the reason for his execution.”<sup>127</sup> In the Court’s opinion, “[a] prison’s awareness of the State’s rational for an execution is not the same as a rational understanding of it. *Ford* does not foreclose the latter.”<sup>128</sup>

In the dissent joined by Chief Justice Roberts and Justices Scalia and Alito, Justice Thomas said “[t]his case should be simple” because Panetti’s claim does not meet AEDPA’s “‘second or successive’ *habeas* application” requirements.<sup>129</sup> According to Justice Thomas, “...the Court ben[t] over backwards to allow Panetti to bring his *Ford* claim despite no evidence that his condition has worsened – or even changed – since 1995.”<sup>130</sup> Referring to the Court’s earlier decision in *Burton v. Stewart*,<sup>131</sup> Justice Thomas said “[i]n light of *Burton*, it simply cannot be maintained that Panetti is excused from § 2244’s requirements solely because his *Ford* claim would have been unripe had he included it in his first *habeas* application.”<sup>132</sup> The dissent, according to Justice Thomas, minimizes the majority’s opinion as representing only “the proposition that *Ford* claims somehow deserve a special (and unjustified) exemption from the statute’s plain import.”<sup>133</sup>

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<sup>127</sup> *Id.* at 2861. Although Panetti claimed “to understand ‘that the state is saying that it wishes to execute him for his murders,’ he believes in earnest that the stated reason is a ‘sham’ and the State in truth wants to execute him ‘to stop him from preaching.’” *Id.* at 2860.

<sup>128</sup> *Id.* at 2862.

<sup>129</sup> *Id.* at 2864.

<sup>130</sup> *Id.*

<sup>131</sup> 127 S.Ct. 793, 797 (2007).

<sup>132</sup> 127 S. Ct. at 2866.

<sup>133</sup> *Id.* at 2866-2867.