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Mixed Messages: The Supreme Court's Conflicting Decisions on Juries in Death Penalty Cases

By Kenneth Miller and David Niven[1]

Were the jury made up of experienced death penalty lawyers, it might understand these instructions . . . in the way that the Court understands them. - Jutice Breyer[1]

The right to a jury of one's peers is fundamental for those accused of criminal wrongdoing. For those charged with a capital crime, a jury may be all that stands between the defendant and a sentence of death. However, a jury pool that systematically excludes members of certain races or individuals with reservations concerning the death penalty cannot be said to satisfy the Sixth Amendment. Likewise, a jury that cannot understand the law it must follow, as set forth in legal instructions, cannot fulfill this vital function of democracy, nor does such a jury provide a defendant a meaningful Sixth Amendment right to a jury trial. Yet it is almost a truism that jurors do not understand their legal instructions and that juries are hardly representative bodies.

Jury instructions, by and large, are written by committees of lawyers, or are quoted verbatim from statutory or case law. The result is jargon-ridden language that lawyers might understand, but laypersons certainly would not understand. It is no surprise that social scientists have demonstrated repeatedly that, in a myriad of settings using diverse methods, jurors do not understand the instructions that are intended to guide them. Researchers are not alone here; jurors themselves register their confusion by requesting clarification from trial judges. The criminal justice system, however, has been slow to respond, and appellate courts continue to "presume" that jurors understand their instructions, even when jurors ask pointed questions regarding the meaning of those same instructions. Moreover, capital proceedings continue, with the passive or direct support of the Court, to assemble jury panels dramatically skewed relative to the community as a whole. The Supreme Court, in a series of decisions beginning with *Apprendi v. New Jersey*,[2] has expanded the role of juries in the criminal sentencing process, granting juries many powers previously relegated to judges. Following *Ring v. Arizona*,[3] capital juries must be given the task of determining whether the prosecution has established the relevant aggravating circumstances that would make the defendant eligible for the death penalty. The Court has also decided to expand the role of juries under the federal criminal sentencing guidelines. We argue that the expansion of Sixth Amendment rights is necessarily bad, but we are concerned with and will explore the implications of expanding the role of juries in capital, as well as other criminal cases, when juries are not given sufficient tools with which to work. Specifically, juries cannot hope to fulfill their duties when they do not understand their instructions, when no effort is made to clarify those instructions, and when juries under-represent certain segments of the population.

In short, the Supreme Court has expanded a defendant's right to a jury in capital cases without commensurate attention to the obligations on government that would make that right meaningful. The legal and social science literature is replete with commentary and research on the alarming lack of understanding that jurors demonstrate in capital and other criminal cases.[4] The fact that death qualification and voir dire exclude certain members of society has been demonstrated repeatedly. Likewise, the literature is fairly consistent in praising the expansion of a criminal defendant's Sixth

Amendment rights. What we show, however, is that when these two trends are laid side by side, there is a troubling – even glaring – lack of congruity between the expansion of the Sixth Amendment and any effort to make that right meaningful.

More to the point, Rehnquist, Scalia, and Thomas, seem particularly willing to expand Sixth Amendment rights without thought to corresponding governmental obligations to animate that right. The collective jurisprudence of Rehnquist, Scalia, and Thomas in one area is completely uninformed by their jurisprudence in another area. This leads to quite troubling implications regarding the justice of capital and other criminal trials.

The Expanding Sixth Amendment

The Sixth Amendment guarantees the right to a trial by jury for the criminally accused. But what is the nature of that right? It is not enough to say that the jury determines the defendant's guilt or innocence, for the Sixth Amendment means much more – and less – than the mere determination of guilt. Indeed, the nature and extent of a criminal defendant's right to a jury has changed considerably over time. It was not until 1970, when the United States Supreme Court decided *In re Winship*, that the familiar "reasonable doubt" standard became a constitutionally required element of criminal due process.[5] After reflecting on a long tradition of using the reasonable doubt standard in criminal trials in the United States, the Court found it necessary to state: "[l]est there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[6] After *Winship*, then, a criminal defendant appeared to have a constitutional right to a jury determination of his or her guilt "beyond a reasonable doubt."[7]

However, the Court complicated matters in an opinion written by Rehnquist, [8] when it failed to overturn a state statute that increased the sentence of a person convicted of a felony by five years based on a *judicial* finding – by a preponderance of the evidence – that the person "visibly possessed" a firearm.[9] The Court reasoned that the "visible possession" of a firearm portion of the statute was not an element of the crime; rather, it was a "sentencing consideration" and did not subject the defendant to a greater penalty than he would have been subject to otherwise under the statute.[10] Rehnquist stated that because they "concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."[11] In other words, the criminal defendant's Sixth Amendment right was limited to jury determinations of elements of the crime, not sentencing considerations, and the distinction between elements of the crime and sentencing considerations was a matter of statutory construction. The only limit *McMillan* placed on a sentencing consideration was that it not impose a sentence beyond the maximum allowed by the underlying charge.

The *McMillan* decision left open the question of whether, upon conviction for first degree murder, a person was entitled to a jury determination of any facts that could expose him or her to a death sentence. In *Walton v. Arizona* (1990),[12] the Court considered Arizona's capital sentencing scheme, which called for a judge to determine the existence of aggravating factors during the sentencing phase of a first-degree murder trial. If the judge found at least one aggravating factor, the defendant was eligible for the death penalty and would avoid that sentence only if the judge found sufficient mitigating circumstances that called for leniency. The Court upheld this capital sentencing scheme, stating that the factors that led to a death sentence were not elements, but sentencing considerations that did not entitle a defendant to a jury consideration. Accordingly, the Court concluded that the sentencing scheme did not violate the Sixth Amendment.[13]

Thus, after *Walton*, it was clear that a defendant's sentence could be increased up to and including death if that sentence was one that fell within the charged crime's sentencing range even if a judge rather than a jury found the facts necessary to increase the sentence, and even if the judge found the necessary facts by a standard of proof less rigorous than beyond a reasonable doubt. What was left unanswered by *Walton*, however, was whether a defendant's sentence could be increased beyond *McMillan's* 'statutory maximum.' The Court addressed just such a question in *Jones v. United States* (1999),[14] when the defendant was convicted of a federal carjacking, a statute that carried with it a maximum sentence of fifteen years. The defendant was eventually sentenced to twenty-five years after a judicial finding that serious bodily injury had occurred

during the course of the crime.[15] On appeal, the Court concluded that the finding of "serious bodily injury" was an element of the crime rather than a mere sentencing consideration because, after an analysis of similar federal criminal statutes, "Congress probably intended serious bodily injury to be an element defining an aggravated form of the crime."[16] Accordingly, *Jones* stood for the proposition that if a defendant's sentence increased because of statutorily constructed elements (as opposed to sentencing considerations) the defendant was entitled to a jury determination beyond a reasonable doubt on the facts necessary to support those elements.[17]

Although *Jones* could be seen as a decision favorable to defendants, the extent of the Sixth Amendment right after *Jones* was somewhat truncated. A defendant was clearly entitled to a jury determination beyond a reasonable doubt on every element that constituted the crime. The Court had carved away that right, however, so that an "element" of the crime did not include – nor was a defendant entitled to a jury determination thereof – every factor that increased his or her sentence.

In a groundbreaking case, the Court in *Apprendi v. New Jersey*,[18] opened the door to a broader Sixth Amendment right than *McMillan* suggested. In *Apprendi*, the defendant was charged under state law with criminal possession of a firearm, which carried with it a prison sentence of up to ten years. After pleading guilty, the trial court determined by a preponderance of the evidence, that Apprendi violated the state's hate crime statute. Apprendi was sentenced to twelve years based on this finding – a sentence two years in excess of the statutory maximum. On appeal, the state defended Apprendi's sentence, arguing that the state hate crime statute was merely a permissible "sentence enhancement" similar to the enhancement upheld in *McMillan*. The Court disagreed, noting that "[a]s a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently."[19] The Court noted that Apprendi was "indisputably" entitled to "a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."[20] And then, as if to reiterate the point, the Court stated that "[e]qually well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt."[21] The Court went on to trace the history of criminal jury trials and admitted that it "coined" the term "sentencing factor" in its *McMillan* decision, creating a species of criminal law facts that were not determined by a jury but could nevertheless "affect the sentence imposed by the judge."[22] The Court concluded that based on its own decisions and the history of criminal law in the United States "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[23] "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established beyond a reasonable doubt."[24]

The Court seemed untroubled that its ruling could be considered overruling *Walton*, in which the defendant's sentence was set at life in prison and, but for the trial court's factual findings, could not be increased to a sentence of death. The Court rejected this concern, stating that "once a jury has found the defendant guilty of all the elements of an offense for which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed."[25] The Court, with *Apprendi*, expanded the right to a jury trial but carved out an exception for capital cases in which judges could determine the facts necessary to impose a sentence of death.

It only took two years for the Court to overturn that exception, however. In *Ring v. Arizona* (2002),[26] the Court again considered the Arizona capital sentencing scheme it had previously upheld in *Walton*: "Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[27] Contrasting its holding in *Apprendi*, the Court stated that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death."[28] The Court held that "to the extent [a capital sentencing scheme] allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty," that scheme is unconstitutional.[29]

For our purposes here, *Ring* marks the state-of-the-art Sixth Amendment jurisprudence concerning cap-

ital defendants. However, two recent decisions show how the Court is continuing to expand the right to a jury in non-capital cases. In *Blakeley v. Washington*,[30] the Court considered the meaning of "statutory maximum" as it applies to Sixth Amendment jurisprudence. At issue was a state law that allowed a sentencing judge to depart from the standard sentencing range if the judge found the defendant acted with "deliberate cruelty."[31] The Court held that "the "statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by the defendant* . . . . In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional finding."[32] The Court's opinion was not remarkable because it broke with the *Apprendi* ruling, but rather because it called into question the federal sentencing guidelines, which look a lot like the state sentencing scheme overturned by the Court. As if on cue, the Court examined the federal sentencing guidelines in *United States v. Booker* (2005).[33] In *Booker*, the Court fell short of invalidating the federal sentencing guidelines but did confirm that the guidelines were also subject to the requirements of the Sixth Amendment as stated in *Apprendi*.[34] The *Blakely* and *Booker* decisions merely confirm that the Court is intent on expanding the right to a jury trial.

For the capital defendant to have a meaningful right to a jury trial, it is incumbent upon the legal system to ensure that, among other things: the jury is adequately informed of the appropriate law; there are adequate safeguards in place to ensure that a misinformed jury is properly corrected; and the selected jury is free from bias or prejudice.

This brief overview of the Court's recent Sixth Amendment jurisprudence demonstrates that the right to a jury trial has expanded considerably since *In re Winship*. As it stands now, the right to a jury trial means, at least, that:

- The defendant is entilted to a jury determination of each and every element of the crime;

- The jury must be convinced beyond a reasonable doubt about each and every element;

- Despite a flirtation with "sentencing considerations," any fact that increases a defendant's sentence must be determined by a jury beyond a reasonable doubt, and

- Capital defendants, no less than other criminal defendants, are entilted to all the protections of the Sixth Amendment. This expansion in the meaning of the Sixth Amendment is encouraging for proponents of robust defendant rights. It removes factual determinations that can determine the fate of the criminal defendant from the hands of the government (in these cases judges). But for any right to be meaningful, it must be accompanied by corresponding obligations that are fulfilled by appropriate actors. For the capital defendant to have a meaningful right to a jury trial, it is incumbent upon the legal system to ensure that, among other things: the jury is adequately informed of the appropriate law; there are adequate safeguards in place to ensure that a misinformed jury is properly corrected; and the selected jury is free from bias or prejudice.

Juror Misunderstanding

It would seem that in matters as weighty as capital jury deliberations, the Court would vigorously strive to ensure that jurors understand their instructions – instructions that are complex and replete with legalese. Knowing what we know about jurors (especially capital jurors) and the instructions they are required to follow, the criminal justice system should demonstrate both an awareness that jurors frequently will not understand those instructions [35] and a willingness to redress misunderstandings as they arise.

Instead, the law in this area is based on a presumption that jurors understand and follow their instructions.[36] As the Court emphatically stated, "we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions."[37] Of course, a weak presumption (or assumption[38]) that jurors understand their instructions would serve this purpose well. Capital trials would operate effectively if it were assumed that jurors understand and follow their instructions *absent evidence to the contrary.* But, it does not work that way. Rather,

the presumption that jurors understand their instructions is used to buttress against attacks on death sentences and other criminal convictions. The blind allegiance to the presumption that jurors understand their instructions is so overwhelming that it has nearly morphed into a standard whereby appellate courts look the other way despite overwhelming evidence that jurors fail to comprehend their instructions.

As a threshold matter, it would seem that if a defendant raises the possibility that the jury instructions are subject to competing interpretations, one of which would result in unconstitutional considerations, a reviewing court should first look at the instruction itself for the claimed ambiguity. If the instruction is subject to at least one unconstitutional interpretation, it is probably not possible to determine whether the jury applied the correct interpretation – after all, appellate judges cannot step inside the minds of jurors. Instead, following a developing line of argument first introduced in dissent then later marshaled for the majority, Rehnquist has successfully advanced the notion that the possibility of unconstitutional interpretation need not impinge on the Court's confidence in producing a just verdict.

Thus, even when the jury questions a judge on an ambiguous instruction and receives an ambiguous response, that jury is, in the words of Rehnquist, "presumed both to follow its instructions and to understand a judge's answer to its question."[39] As Scalia admits, the presumption is closer to an article of faith than a demonstrable truth: "The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process."[40]

But does available evidence support the position that jurors understand and follow their instructions? It does not. The list of studies demonstrating the inability of typical citizens to process, much less faithfully act upon, jury instructions is capacious.[41] Social science evidence suggests that misunderstood instructions do not merely confuse juries, they tend to tilt the process in the prosecution's favor.

While any legal process built upon a foundation of misunderstanding is intolerable, both legally and logically, the weakness of juror instructions is also a logistical impediment to the functioning of our courts. For example, a comprehensive study of the legal fates of capital defendants found that fully 20% of death sentence reversals are based on unconstitutional jury instructions.[42]

Two areas of capital sentencing instructions that have proved particularly fertile for producing challenges based on potential juror misunderstanding are mitigation instructions and definition of sentence instructions.

Mitigation

When a divided Court permitted the re-implementation of the death penalty in *Gregg v. Georgia* (1976),[43] only four years after a similarly divided Court had effectively suspended the death penalty in *Furman v. Georgia*,[44] justices sought to establish boundaries for its use. The death penalty, the Court ruled, may only be imposed if it is "directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[45]

In *Gregg*, and a series of subsequent cases, the Court established the value of a bifurcated trial process. Typically, a single jury in a capital case would, in effect, sit through two trials, deliberate twice, and reach two verdicts. In the first, as in any non-capital trial, the jury would hear evidence and render a verdict on guilt. If the defendant were found guilty of a capital crime, the jury then would hear evidence relating to the nature of the crime and the nature of the defendant and render a verdict on the appropriate sentence.

In the sentencing phase of the trial, the prosecution seeks to establish aggravating evidence – typically relating to the heinousness of the crime and the depravity of the defendant. The defense is entitled to rebut those claims, and is also entitled to introduce evidence relating to any aspect of the defendant's character or background that might mitigate the defendant's actions and suggest a sentence short of death.[46] The Court has ruled that mitigating evidence is not subject to a "beyond a reasonable doubt" standard, and can result in a verdict rejecting the death sentence based on juror agreement that mitigation exists, even if jurors do not unanimously agree on specific mitigating factors.[47]

Despite the gravity of a death sentence deliberation, and the centrality of weighing aggravating and mitigating evidence to that process, numerous academic studies suggest that jurors are ill-equipped or disinclined to adequately consider mitigating evidence.[48] In short, many jurors do not understand the instructions they are given by the courts that are supposed to guide their deliberations and verdict. The consequences of misunderstanding are considerable. "If the jury does not understand how the law requires it to establish, weigh, and balance aggravation and mitigation," Wiener and colleagues argue, "then it may well be requiring the de-

fendant to forfeit his or her life without the benefit of due process of law."[49]

To test juror understanding of the death sentencing and deliberation process, one study used members of the jury pool in Columbus, Ohio who were awaiting assignment to a case.[50] The researchers showed those jurors a video summarizing a capital case, followed by the actual instructions read by a judge.[51] After a period of deliberation, jurors were given a multiple-choice test to measure their understanding of their duties.[52] The questions most frequently answered *incorrectly* involved the concept of mitigation.[53] The questions most frequently answered *correctly* involved the concept of aggravation.[54]

Another study used a similar method with jury eligible citizens in the St. Louis area.[55] After supplying the typical instructions offered by Missouri courts in capital cases, they found only a 50% rate of understanding for mitigation concepts.[56]

When a 1994 study provided California juror instructions to a college student sample, they also found fewer than half could explain mitigation.[57] More alarmingly, one-fourth of the subjects thought a mitigating factor (such as mental illness) was a basis for supporting a death sentence.[58]

While these studies employ a variety of proxy groups to substitute for actual deliberating capital juries, there is little doubt that the patterns unearthed apply in the jury room. Indeed, surveys of former capital jurors confirm confusion regarding mitigating factors and a willingness to see mitigating evidence as irrelevant.[59] One capital juror summed up the mitigating evidence presented in the sentencing proceeding: "It was interesting, but it had no bearing on the case…his whole life boils down to this once incident.[60]

Beyond discounting mitigating evidence, research suggests the application and weighing of mitigating factors can be dependent on personal biases. One survey of former capital jurors found that contrary to the laws and their sworn duty, jurors were less apt to value mitigating evidence if they felt empathy for the victim.[61] Empathy, in turn, was affected by factors including the race of the victim.

One could summarize the situation by noting that "existing literature converges on a serious challenge to the assumption that reasonable individuals understand jury instructions," and therefore, "courts should be cautious in concluding that reasonable people understand mitigation and aggravation as presented in pattern instructions."[62] In fact, contrary to all applicable laws, the typical juror enters the sentencing proceeding with a "presumption of death."[63] Instead of alleviating that legal misconception, court instructions often exacerbate it by leaving jurors confused.

Of course, the significance of juror understanding of capital instructions and the nature of aggravating and mitigating circumstances is only amplified by the expansion of the jurors' role in capital sentencing. Indeed, as some point out: "[t]he logic followed in *Ring* highlights the importance that the Court assigns to the way in which judges and jurors use aggravating and mitigating circumstances to reach penalty decisions."[64]

Given the increasing centrality of jurors in the capital sentencing process, and the strong academic evidence of juror confusion regarding sentencing generally and mitigation specifically, it is not surprising that a number of cases have advanced to the Supreme Court for review hinging on the role and definition of mitigation, for example: *Franklin v. Lynaugh* [65]; *Buchanan v. Angelone*[66]; *Boyde v. California*[67]; and *Weeks v. Angelone*.[68] In one aggravation case *Francis v. Franklin*,[69] Rehnquist found himself advancing an argument that pertinent instructions need not be clarified, amplified, defined, or sometimes even mentioned.[70] In the four cases Scalia participated in, and in the two Thomas took part in, they shared Rehnquist's conclusion. More to the point, over time, the conservatives' perspective on capital jury instructions has become the Court's perspective.

The capital prosecution of Raymond Franklin hinged on the defendant's intent. To win a jury verdict of malicious murder in Georgia, and to pursue a death sentence, prosecutors had to prove Franklin intended to kill his victim.

Franklin was imprisoned for a non-capital offense when he was taken, shackled and guarded, to a civilian dentist.[71] Temporarily unshackled while in the dentist's office, Franklin was able to take an officer's gun and alight with a hostage from the dental office.[72] Franklin made several unsuccessful efforts to steal a car.[73] Franklin and the hostage eventually walked to a nearby home where Franklin knocked on the door and demanded the resident's car keys.[74] The resident slammed the door, after which Franklin fired the gun twice.[75] Both shots went through the door; the first killed the homeowner, the second lodged in the home's ceiling.[76]

Franklin's entire defense was lack of intent.[77] He claimed that the shooting was not intentional, pointing to the fact that neither the people he encountered on

the street nor his hostage were harmed.[78] The fact that the second shot went into the ceiling, Franklin claimed, was evidence that he was not attempting to kill the victim.[79]

The aggravation instructions given to the jury addressed the issue of intent.[80] One hour into their guilt phase deliberations the jury asked for further instructions on the issue of intent and the definition of accident.[81] After hearing the original instructions repeated the jury deliberated for ten additional minutes before returning a guilty verdict.[82] Franklin was sentenced to death the next day.[83]

Franklin's attorneys argued that the jury instructions inverted the burden of proving intent and placed that burden on the defense, and Justice Brennan, writing for a five to four majority, agreed; he wrote that the instruction on intent "violate[d] the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt."[84] The instruction created a "mandatory presumption" where proving the act (firing the gun) in effect established the intent and that "a reasonable juror" would understand the instructions to shift "to the respondent the burden of persuasion on the element of intent once the State had proved the predicate acts."[85]

The Court emphasized the phrase "may be rebutted" implied that it was the defendant's burden to establish that an intent "inference was unwarranted."[86] Separately, the instructions did note, "criminal intention may not be presumed."[87] But Brennan concluded that the language "merely contradicts" but does not "absolve" the instruction's infirmity.[88] Indeed, he noted, "a reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdicts."[89]

Rehnquist's dissent was incredulous, stating, "today the Court sets aside Franklin's murder conviction…because this Court concludes that *one or two sentences* out of several pages of instructions given by the judge" lowered the state's burden of proof.[90] Indeed, later in his dissent Rehnquist explicitly stated: "due process is not violated in every case where an isolated sentence implicates constitutional problems."[91] To Rehnquist, it would appear, the standard for an unconstitutional instruction must demonstrate it to be not only unconstitutional but also verbose.

In fact, Rehnquist conceded that a "technical analysis of the charge…from a legal standpoint" would support the Court's conclusion that the instructions were misleading.[92] However, no "reasonable juror" could have read the instructions closely enough to form the misimpression the Court posits.[93] Indeed, Rehnquist suggested "the Court is attributing qualities to the average juror that are found in very few lawyers."[94]

Brennan took suspicious note of Rehnquist's conclusion that jurors would not have paid enough attention to the instructions to be affected by the contradiction. In a previous case, *Parker v. Randolph*, in which the prosecution's argument hinged on close juror attention to the instructions, Rehnquist was burdened by no doubts regarding juror rigor. Rehnquist wrote for the Court, "[a] crucial assumption underlying [trial by jury] is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed."[95] Thus, Brennan chides, "[a]pparently [Rehnquist] would have the degree of attention a juror is presumed to pay to particular jury instructions vary with whether a presumption of attentiveness would help or harm the criminal defendant."[96]

Instead of burdening the defense with disproving intent, Rehnquist concluded the typical juror would have approached the situation far differently. Rehnquist wrote: "[t]he reasonable interpretation of the challenged charge is that…the presumption could be rebutted by the circumstances surrounding the acts, *whether presented by the State or the defendant*."[97] In other words, Rehnquist did not find the burden of disproving intent to be placed on the defense because at any given moment the prosecution could switch sides and attempt to present a case disproving intent.

While the minority in this case, Rehnquist's underlying conclusion, that the Court must raise the bar for defendants to demonstrate faulty instructions, would ultimately take hold and be applied in mitigation instruc-

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tion cases. As he suggested in his dissent, "it must at least be *likely*" rather than a reasonable possibility that instructions led jurors to misapply the law before the Court should intervene.[98]

As Brennan noted, such a standard would leave the Court an "impressionistic and intuitive" task to deign what path jurors followed in cases such as *Francis v. Franklin* when the instructions contained a contradiction.[99] This is despite what Brennan called a settled precedent that verdicts must be set aside when there is a reasonable possibility that jurors based their verdict on an unconstitutional understanding of law .[100]

In a Texas capital case, *Franklin v. Lynaugh*[101] the sentencing jury was instructed to return a death sentence if they found two specific aggravating factors: that the murder was deliberate and that the defendant represented a continuing threat.[102] The instructions made no mention of the concept of mitigation.[103]

The issue before the Court was whether the instructions afforded the defendant an adequate opportunity to have mitigating evidence weighed by the jury in its sentencing deliberations.[104] In a decision written by Justice White, and joined by Chief Justice Rehnquist and Justice Scalia, a plurality of the Court found the instructions adequate.[105] Justice White noted that the judge's instructions told the jury to base their verdict "on all the evidence."[106] Thus, even though mitigation was never mentioned, that general instruction carried with it the obligation to weigh mitigating evidence.

The entirety of the defense's mitigation presentation was Franklin's prison record, which revealed that he was not a violent inmate.[107] "We are thus quite sure that the jury's consideration of petitioner's prison record was not improperly limited," White wrote, because the jury was "free to weigh and evaluate" that record.[108]

In reality, though, the standard advanced by White and the plurality was not based on any demonstrable indication that the jury did weigh the mitigating evidence, but rather by their conclusion that weighing such evidence was possible. White wrote, "[w]e do not believe that the jury instructions or the Texas Special Issues precluded jury consideration of any relevant mitigating circumstances in this case."[109]

Given the Texas instructions, Stevens' dissent questioned how a defendant, with a clearly established right to present mitigating evidence reflecting upon any factor relevant to his life, could possibly have that evidence be properly weighed when the jury entered deliberations with only two questions before them.[110] "A sentencing jury must be given the authority to reject imposition of the death penalty on the basis of any evidence relevant to the defendant's character or record or the circumstances of the offense proffered by the defendant in support of a sentence less than death. That rule does not merely require that the jury be allowed to hear any such evidence the defendant desires to introduce, it also requires that the jury be allowed to give 'independent mitigating weight' to the evidence."[111]

Stevens argued that by not offering an instruction on the application of mitigation, the judge had, in effect, told the jury to ignore such evidence. "The failure to give such an instruction removed that evidence from the sentencer's consideration just as effectively as would have an instruction informing the jury that petitioner's character was irrelevant to its sentencing decision."[112] In fact, in her concurring opinion, O'Connor admitted that the implied legal relevance of mitigation seems limited only to direct responses to the aggravating factors.[113]

Ten years later the Virginia Court considered a very similar case. In *Buchanan v. Angelone*, the judge presented capital sentencing instructions to the jury without mention of mitigation.[114] Instead, the judge instructed the jury to weigh whether the crime was "outrageously or wantonly vile, horrible or inhuman."[115] If they agreed it was, the jury would then deliberate on whether a death sentence was appropriate. Again, the judge instructed jurors to consider "all the evidence."[116]

As in *Franklin v. Lynaugh*, the defense unsuccessfully sought a set of instructions explaining mitigation.[117] Further the defense asked that jurors be instructed that if they found the factor to mitigate against the death penalty then they "shall consider that fact in deciding whether to impose a sentence of death or life imprisonment."[118]

In a six to three decision, the Court again found that lack of instructions on the concept of mitigation and mitigating factors does not violate due process or cruel and unusual punishment.[119] Writing for the Court, Chief Justice Rehnquist emphasized that while any death sentence deliberation must be a "broad inquiry into all relevant mitigating evidence," there is no "particular way" juries should consider such evidence.[120] Adhering to the *Franklin v. Lynaugh* plurality, Rehnquist here noted that the jury was told to "base its decision on 'all the evidence,'" thus affording "jurors an opportunity to consider mitigating evidence."[121]

Rehnquist argued that the amount of mitigating evidence presented to the jury indicates that the jury gave weight to that evidence. That is, because the jury heard two days of testimony on defendant's background

and mental problems, "it is not likely that the jury would disregard this extensive testimony in making its decision, particularly given the instruction to consider 'all the evidence.'"[122] Of course, Rehnquist came to the same conclusion when the jury was presented with almost no mitigating evidence in *Franklin v. Lynaugh*.[123]

One fundamental fact here and in related cases is that the Court's certainty regarding juror understanding does not rely on direct evidence. That is, no one bothered to ask the jurors if they understood the instructions to ensure that the mitigating evidence was properly considered. No one bothered to test these instructions to see if ordinary laypersons could understand them.

Meanwhile, in a concurring opinion, Scalia agreed that juror instructions need not explain mitigation. He offered this conclusion not because the relevance of mitigation is obvious in its presentation, or established inside the phrase "all the evidence," but rather because juries need not "be given discretion to consider mitigating evidence."[124] Indeed, Scalia found fault not only with mitigation, but also with the entire bifurcated process; "drawing an arbitrary line in the sand between the 'eligibility and selection phases' of the sentencing decision is, in [his] view, incoherent and ultimately doomed to failure."[125]

In the dissent, as in *Franklin v. Lynaugh*, Breyer argued that since the only question put to jurors involved aggravating circumstances, jurors would reasonably apply mitigating information only to the extent it directly helped them decide upon the aggravating evidence. Breyer questioned how jurors were to operationalize the mitigating evidence, noting that the jury instructions at issue "tell the jury that evidence of mitigating circumstances (concerning, say, the defendant's childhood and his troubled relationships with the victims) is not relevant to their sentencing decision."[126]

Unless the jury was "made up of experienced death penalty lawyers …parsing the instructions in a highly complicated, technical way that they alone are likely to understand" then "a natural reading of the language" would seem to foreclose the application of mitigation.[127] Breyer made a rather simple suggestion for changing the instructions: "mention of mitigating evidence anywhere in the instructions" would clear things up.[128]

In directly competing interpretations, Rehnquist and Breyer attempt to show how each other's conclusion is a "strained parsing" of the instruction.[129] They debate, among other matters, the relative weight of the instruction's use of the words "if" and "or." It is an amusing colloquy between two jurists quibbling over language – at least it would be if a person's life did not hang in the balance.[130]

What the exchange proves, however, is that one judge with the aid of a team of law clerks does not interpret a jury instruction the same way as another – and his own team of law clerks – does. If justices on the Court cannot agree on an interpretation, how can laypersons with no legal training be presumed to do so?

California's capital instructions in place at the time Richard Boyde was tried did mention mitigation.[131] The instructions featured eleven factors – lettered *a* through *k* – the jury should consider before deciding upon a sentence: the first eight factors essentially established possible aggravating circumstances, and the ninth and tenth factors established two specific forms of mitigating circumstances, neither of which applied to Boyde.[132] The eleventh – factor *k*, as it was referred to – instructed the jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."[133] After deciding upon the factors, the jury was told to determine if the aggravating circumstances outweighed the mitigating circumstances, and if so, then "you shall impose a sentence of death." [134]

The issue before the Court was whether the wording of the mitigation instruction narrowly focused the jury's attention on the crime, thus undermining the value of the mitigation evidence regarding Boyde's personal background and troubled childhood that was the focus of his defense.[135] Boyde also argued that the "shall impose" language created a limit on juror discretion to support a life sentence regardless of the aggravation/mitigation equation.[136]

In a five to four decision written by Rehnquist and joined by Scalia the Court upheld the instructions.[137] Rehnquist admitted the instructions could be considered "ambiguous."[138] But as was the case in *Buchanan v. Angelone*, he argued that surely the presentation of mitigating evidence implied its relevance.[139] Further, the jury was free to consider any information and decide that it somehow applied "to the crime."[140]

Thus, Rehnquist concluded that the jury's interpretation of the instructions as limiting their attention to information directly relevant to the crime was "only a possibility."[141] Instead, building on his dissent in *Francis v. Franklin*, Rehnquist argued that the Court needed to be concerned about instructions only when there is a "reasonable likelihood that the jury as a whole applied instructions as the defendant asserted."[142] "Finality and

accuracy," Rehnquist wrote, are better established by a focus on the likely conclusions of the entire jury rather than considering "how a single hypothetical 'reasonable juror' could or might have interpreted the instruction."[143]

This evolving standard for juror confusion continues to have tremendous implications. In previous cases, including *Francis v. Franklin*, the Court dealt with instructions that "a reasonable *juror*" could rely upon to impose an unconstitutional judgment.[144] Here the Court applies a standard requiring that jury instructions create a "likelihood that *the jury*" has applied an unconstitutional standard. [145]

Beyond dismissing the significance of objections to instructions that are potentially misleading, the Court here moved to dismiss objections to instructions which have misled jurors (providing that some unspecified ratio of jurors were not misled). As Marshall noted in the dissent, "the majority regards confidence" that individual jurors understood the instructions "as unnecessary to its affirmance of Boyde's death sentence."[146] Marshall argued that such a stance "reflects the Court's growing and unjustified hostility to claims of constitutional violation by capital defendants."[147]

Apart from arguing that it is acceptable for some jurors to act based on an unconstitutional standard, Rehnquist essentially sent the Court down the very difficult path of determining precisely what percentage of a jury was misled by an instruction. How the court is to determine this percentage is not spelled out.[148] Ironically, given he has created a standard based on guesswork, Rehnquist then mocked the defense claim of juror confusion because it "amounts to no more than speculation."[149]

Part of the distinction Rehnquist made between *juror* confusion and *jury* confusion was based on the conclusion that the deliberation process allows juries to rise above confusing instructions because the group will ultimately arrive at a "commonsense understanding of the instructions."[150] By contrast, academic research shows the deliberation process is by no means a place where misconceptions go to die, but rather a forum where preconceived notions and faulty instructions can wreak havoc with legal process.[151]

Indeed, Rehnquist cited no evidence that would suggest "commonsense" understandings would prevail; more importantly, he fails to mention exactly what a commonsense understanding of the instructions might look like. As is readily apparent from the instruction, the language, syntax, and structure are not what laypersons generally encounter, so it is hard to understand how they might have come to a "commonsense" interpretation.

People do not view "the seriousness of a crime as dependent upon the background and character of the offender. A typical juror would not, for example, describe a particular murder as 'a less serious crime' because of the redeeming qualities of the murderer." - Chief Justice Marshall

In the dissent, Marshall lamented the lowering of the bar for instructions (or the raising of the bar for challenges to them). Indeed, Marshall suggested the Court had created an ambiguous standard in reviewing ambiguous instructions, which can only result in "confusion."[152]

Given that the only relevant mitigation instruction "unambiguously refers to circumstances *related to the crime*"[153] Marshall questioned how the majority could be convinced that the jury gave weight to mitigating evidence that was outside "the plain meaning of the factor's language."[154] People do not view "the seriousness of a crime as dependent upon the background and character of the offender. A typical juror would not, for example, describe a particular murder as 'a less serious crime' because of the redeeming qualities of the murderer."[155]

For Marshall, "when we tolerate the possibility of error in capital proceedings and leave people in doubt," we step toward the death penalty process the Court had found "discriminatory" and "intolerable" in *Furman v. Georgia*.[156]

Instead of the obvious course of action – confronting head-on the ambiguity of the instructions and conceding that a layperson could easily produce an unconstitutional application of those instructions – Rehnquist chose to instead speculate about whether it was likely that the jury interpreted the instructions unconstitutionally.[157] This does not seem to be a jurisprudence aimed at ensuring a meaningful right to a jury but,

rather, a jurisprudence of protecting the legal system from legitimate questions. In addition, as the dissent noted, "[i]t is an essential corollary of our reasonable-doubt standard in criminal proceedings that a conviction, capital or otherwise, cannot stand if the jury's verdict *could* have rested on unconstitutional grounds."[158]

The fact that Rehnquist, in establishing the "reasonable likelihood" standard, is more worried about protecting the system against attack rather than supporting a meaningful right to a jury is confirmed when he wrote about two "strong policies" of the Court: one in favor of "accurate determination of the appropriate sentence in a capital case" and the other, which he wrote is "equally strong", "against retrials years after the first trial where the claimed error amounts to no more than speculation."[159] Rehnquist's commentary on the Court's two "equally strong" policies begs the question: when the two policies conflict, which one wins? Rehnquist found *getting it over with* more persuasive than ensuring that the capital defendant receives a meaningful right to a jury trial.

Despite the Court's support for its instructions, state legislators in California ultimately rewrote the mitigation language in their statute. Beyond the original language of factor k referring to "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," the new instructions included the requirement that jurors note "any sympathetic or other aspect of the defendant's character or record . . . whether or not related to the offense for which he is on trial."[160]

In many respects a perfect culmination of this line of controversy occurred in *Weeks v. Angelone*.[161] Again the issue centered on how to consider mitigation. On this occasion, however, there was no need to speculate on whether "a reasonable juror" was confused, or if there was a "reasonable likelihood" the jury was confused, because the jury announced that it was confused.[162]

The defendant, Lonnie Weeks in the case confessed the day after the crime to killing a police officer.[163] Arrested the day after the crime, Lonnie Weeks quickly confessed and expressed remorse.[164] Weeks articulated the desire to commit suicide because of his actions.[165]

The judge informed the jury that if they found aggravation "then you may fix the punishment at death, or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment at life imprisonment."[166]

After four hours of deliberation, the jury asked whether their deliberation was complete if it did find aggravation, or if it then still had to weigh whether a death sentence was appropriate:

> If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the [aggravating factors], then is it our duty as a jury to *issue* the death penalty? Or must we *decide* . . . whether or not to issue the death penalty, or one of the life sentences? What is the rule? Please clarify?[167]

The defense asked the judge to instruct the jury that even if they found aggravation beyond a reasonable doubt they could still impose a life sentence. The judge declined, instead repeating the original instruction without clarification. The judge noted, "I don't believe I can answer the question any clearer than the instruction."[168] The jury deliberated for two additional hours before returning a death sentence.

In another five to four decision written by Rehnquist, joined by Scalia and Thomas, the Court found the instruction "constitutionally sufficient."[169] Again, the Court admitted the jury might have fundamentally misunderstood its charge stating: "there exists a slight possibility that the jury considered itself precluded from considering mitigating evidence."[170] However, Rehnquist rebutted that fear because "a jury is presumed to follow its instructions" and "to understand a judge's answer to its question."[171]

Thus, the Court took the position that the jury must have understood the instruction because the jury openly asked for help upon receiving nothing more than the original instruction.

Moreover, Rehnquist advanced what he called "empirical" evidence of juror understanding; since the jurors spent more than two hours deliberating after the judge's answer, they must have understood its meaning.[172]

Presumably, if the jury had returned almost immediately after the instruction Rehnquist would have seen that as evidence that the Jury had clearly understood the instruction because they were able to act so swiftly. This is no mere speculation, as ten minutes of deliberation following a jury question in *Francis v. Franklin* was considered to be evidence of juror understanding in Rehnquist's dissent in that case.[173] Here, staying out two additional hours was evidence of under-

standing. It is interesting to consider what length of time Rehnquist would possibly have seen as an indication of misunderstanding. Indeed, it seems more likely that Rehnquist has constructed an unfalsifiable standard where brevity of deliberations suggests easily understood standards and prolonged deliberations establish seriously undertaken discussion of evidence, but no length of deliberations implies misunderstanding of instructions.

The majority further took as evidence of understanding the fact that the jury "did not inform the court that after reading the relevant paragraph of instruction, it still did not understand its role."[174] Indeed, Rehnquist concluded, "This particular jury demonstrated that it was not too shy to ask questions, suggesting that it would have asked another if it felt the judge's response unsatisfactory."[175] In other words, after the jury directly asked for clarification it did not receive, the Court takes the jury's lack of inclination to ask the exact same question again as evidence of understanding, though repeating the question would logically have resulted in the same non-answer.[176]

Stevens asked in his dissent, "if the jurors found it necessary to ask the judge what that paragraph meant in the first place, why should we presume that they would find it any less ambiguous just because the judge told them to read it again?"[177] Moreover, he questioned attaching any significance to the jury's failure to repeat the question: "It seems to me far more likely that the reason they did not ask the same question a second time is that the jury believed that it would be disrespectful to repeat a simple, unambiguous question that the judge had already refused to answer directly."[178]

Similarly intriguing is the notion that the jury's question ultimately lends confidence to Rehnquist's conclusion that the jury understood its instructions. If the jury had never asked a question, it would have been presumed to understand its instructions. If, instead, the jury directly questioned an instruction fundamental to their duty, expressing complete uncertainty about the standard they were to apply and including the words, "What is the rule? Please clarify?" upon which point they received clarifying information, then the jury is presumed to understand its instructions. Even if, as in this case, the jury posed that same question and received no new information or clarification of any kind, the jury is presumed to understand its instructions. Again, Rehnquist has advanced an unfalsifiable standard: not asking a question is evidence of understanding, and asking a question is also evidence of understanding.[179]

Rehnquist's powers of jury mind reading are not limited to legal interpretation. The dissent noted that a majority of jurors were in tears when the death sentence was read, an unusual occurrence according to state court officials.[180] This suggests, suggesting to Stevens that some may have felt that the sentence was inappropriate. Rehnquist countered that the unusual tears reflected exhaustion and a belief that the defendant "deserved the death sentence."[181] Rehnquist does not elaborate on why what are presumably elements of nearly every jury death sentence should produce tears only in this rare instance.

In the dissent, Stevens made a basic case for "clarity – clarity in the judge's instructions when there is a reasonable likelihood that the jury may misunderstand the governing rule of law."[182]

Even with the high standard for demonstrating juror confusion, Stevens argued that "this case establishes, not just a 'reasonable likelihood' of jury confusion, but a virtual certainty that the jury did not realize that there were two distinct legal bases for concluding that a death sentence was not 'justified.'"[183] That is, the jury could find aggravation had not been proved, or if aggravation had been proved, it could find the death penalty was not warranted after weighing mitigation. In contrast to Rehnquist's position that the jury's question demonstrated understanding, "[t]he fact that the jurors asked this question about that instruction demonstrates beyond peradventure that the instruction had confused them. There would have been no reason to ask the question if they had understood the instruction to authorize a life sentence even though they found that an aggravator had been proved."[184]

Given that the judge provided the confused jury no new information, Stevens asked where the majority found confidence that the jury was "magically satisfied by the repetition of the instruction that had not heretofore answered its question."[185] Stevens posited that "a non-lawyer" would have concluded death was the only available sentence if aggravation had been proved. There was simply "no reason to believe that the jury understood the judge's answer to its question" and therefore "overwhelming grounds for reversal."[186] Ultimately, Stevens, like Breyer in the *Buchanan* dissent, called for the "easy" step of giving the jury a "straightforward categorical answer to their simple question."[187]

Would Weeks' have received a death sentence if the jury had understood its duty to determine both aggravation and, separately, whether the sentence was warranted? A team of academics took up the question.

Using jury eligible subjects, researchers created a series of simulated sentencing deliberations.[188] In each, subjects were given information on the case and the instructions provided by the judge.[189] But three different conditions were created with regard to the question on whether they needed to deliberate past finding aggravation.[190] The first group was never told of the jury's question in *Weeks* and asked to deliberate based on the original instructions.[191] The second group was told of the jury's question, and, as occurred in the case, was provided a second reading of the original instructions.[192] The third group was told of the jury's question and provided a plain language answer that they must deliberate on the question of whether to impose death even if they find aggravation.[193]

The results were quite clear. At least half of the subjects in the first two groups thought that finding aggravation ended the need for deliberation and established the penalty at death.[194] Even among the third group, given a plain language instruction that this was not true, one-fourth of the subjects held the same belief.[195] More significantly, among those who correctly understood the obligation, a majority favored a life sentence.[196]

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Regardless of the reality of studies like the one described above, *Franklin v. Lynaugh* , *Buchanan v. Angelone*, *Boyde v. California*, *Weeks v. Angelone*, and *Francis v. Franklin* establish a successful effort on the part of Rehnquist, joined by Scalia and Thomas, to establish two pillars that now undergird the Court's approach to jury instructions in capital cases. First, whether the instructions are clear or unclear, consistent or contradictory, explicit or unmentioned, jurors can be expected to understand their duties. Second, even if the Court identifies "one or two sentences"[197] of unconstitutional instructions, or find evidence that a "reasonable juror"[198] was misled, the instruction is still tolerable.

Defining a Sentence

While capital jurors are apt to be confused by instructions regarding the sentencing decision, they are similarly flummoxed by the sentences themselves. When jurors are asked to decide whether to impose a death sentence, the alternative typically available to them is to impose a life sentence. What "life sentence" means provokes wildly different interpretations from jurors – and those beliefs are crucial to their sentencing preferences. The belief that a "life sentence" is for a period of less than life dramatically increases the likelihood that a person will favor imposing a death sentence.[199] Indeed, interviews with former capital case jurors confirmed that the less time they understood a life sentence to require the more likely they were to support a death verdict.[200]

As was the case with the meaning and import of mitigation, the definition of a sentence was discussed in the case in which the Court brought the death penalty back into legal use. In *Gregg v. Georgia*, the Court declared that the Eighth Amendment demands that jurors are given "accurate sentencing information" because it is "an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die."[201]

In the four cases highlighted below (*California v. Ramos*[202]; *Simmons v. South Carolina*[203]; *Shafer v. South Carolina*[204]; *Kelly v. South Carolina*[205]), the issue turned on juror understanding of the sentences they might impose. In the latter three cases, Scalia and Thomas dissented and made clear that they found no need to make plain to the jurors the meaning of the sentence they were considering; Rehnquist joined their position in the final case. In the first case, in which only Rehnquist participated, he joined a majority advancing the notion that the state may assert life sentences are something less than life sentences.

In typical criminal trials, jurors must determine guilt or innocence. The length or nature of the sentence a defendant might face if found guilty is legally irrelevant to jury proceedings. Were the jurors to inquire about punishment, they would be told that punishment is not for their consideration.

In capital trials, jurors determine not only guilt or innocence, but they also impose a sentence. While telling jurors not to concern themselves with punish-

ment may be a legally sound practice in other cases, in many jurisdictions it is also the default practice in capital cases in many jurisdictions. That is, even though they are explicitly deciding upon a sentence, in effect jurors are commonly told not to concern themselves with the actual meaning of the sentence.[206]

As such, when they ask if a "life sentence" means a term of life, or if it is for some shorter period, or if they ask whether parole is possible, jurors' questions often go unanswered. This despite the fact that confusion about these terms is widespread, and in some jurisdictions the meaning of "life sentence" has changed dramatically in recent years.

In *Simmons v. South Carolina*, among the reasons the state argued Jonathan Simmons should get the death penalty was that he posed a future threat. Executing Simmons, the prosecutor said, "[would] be an act of self-defense" for society.[207] Jurors deliberating on Simmons' sentence were asked to choose between death and a sentence of life imprisonment, and in doing so, the jurors asked if the defendant was eligible for parole.[208] The judge not only refused to answer directly, but he had previously barred the defense from mentioning Simmons parole ineligibility during the proceedings.[209]

Blackmun wrote for the Court's plurality that misunderstanding a "life sentence" created "a false dilemma" between a death sentence and a sentence to a "limited period of incarceration."[210] Given that the prosecution argued that the defendant would be a danger to society, the defendant had a due process right to inform the jury that a life sentence would result in his imprisonment for the rest of his life because "in assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant."[211]

It seems well established that the meaning of a "life sentence" was not commonly understood in the state. The defense presented contemporary polling data showing only seven percent of jury eligible South Carolinians thought a life sentence carried with it a term of life.[212] Nearly half thought a life sentence was twenty years or less, nearly three in four thought it was thirty years or less.[213]

Thus, it was not entirely surprising when, after 90 minutes of deliberation, the jury asked, "Does the imposition of a life sentence carry with it the possibility of parole?"[214]

The judge replied: "You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning."[215]

Given that ninety-three percent of state residents did not know what the plain and ordinary meaning of "life imprisonment" was, the response was less than illuminating.[216] As Justice Blackmun put it, the jury "was denied a straight answer about petitioner's parole eligibility even when it was requested."[217] Indeed, Blackmun concluded that the judge's response not only did not establish the truth about parole, but supported a misconception. "This instruction actually suggested that parole was available, but that the jury, for some unstated reason, should be blind to this fact. Undoubtedly, the instruction was confusing and frustrating to the jury."[218]

Twenty- five minutes after hearing the judge's response, the jury sentenced Simmons to death.[219]

Justice Scalia, joined by Justice Thomas, offered a dissent. Scalia questioned the relevance of the parole issue and the future dangerousness argument. "I am sure it was the sheer depravity of those crimes, rather than any specific fear for the future, which induced the South Carolina jury to conclude that the death penalty was justice."[220] It would be "quite farfetched" to think parole was a significant matter for the jury.[221] If that were true, and parole was very irrelevant, one must wonder why the prosecution vociferously objected to the jury being told parole was not available.

Moreover, why would the jury ask about parole if its deliberations were not in any way affected by questions related to when the defendant might gain freedom and what he might do under those conditions? Further, if the future dangerousness of the defendant was irrelevant to the jury, why did the prosecution bother making the argument, and how is Scalia in a better position to determine the value of the argument to the jury than the prosecutor who handled the case?

Nevertheless, Scalia asserted that the prosecutor's claim that executing Simmons will be "an act of self defense" was irrelevant to the jurors. "This reference to 'self-defense' obviously alluded neither to defense of the jurors' own persons, nor specifically to defense of persons outside the prison walls, but to defense of all members of society against this individual, wherever he or they might be."[222] How a phrase could allude to "all members of society" without alluding to the jurors and other "persons outside prison walls" is something of a semantic mystery.

Beyond making the case that the parole issue was irrelevant, Scalia asserted that there was also a matter of fundamental fairness here. "Preventing the de-

fense from introducing evidence regarding parolability is only half of the rule that prevents the *prosecution* from introducing it as well."[223]

Just to be clear, Scalia has argued that not allowing the defense to define the true meaning of a life sentence is fair because the prosecution, were they to switch sides during the trial in an attempt to aid the defense, would also be prohibited from defining the life sentence. This is the companion argument to the assertion that Rehnquist made in *Francis v. Franklin* that both the defense and prosecution were free to demonstrate the defendant lacked intent to kill. Apparently prosecutors switching sides in the middle of a trial must be fairly common, although it a phenomenon known only to the Court's most conservative members. [224]

Ultimately, Scalia's dissent suggested his objection was less to the Court's conclusion than to its larger implications for executions. The Court's standard is a "reasonable as a matter of policy," he wrote, but sadly represents "another front in the guerilla war to make this unquestionably constitutional sentence a practical impossibility."[225]

Seven years after *Simmons* the Court dealt with nearly the same question in another South Carolina capital case. In *Shafer v. South Carolina* (2001)[226] the judge again provided sentencing instructions without defining life imprisonment. Despite the prosecution raising the specter of future dangerousness, the defense was barred from explaining to the jury that parole was not a possibility. The judge also rejected the defense's request that the language of the applicable state statute be read to the jury. [The statute explains that "'life imprisonment' means until death of the offender" and that there is no possibility of parole, furlough, or any type or fashion of release].

Again, confusion on the meaning of a life sentence ensued. About three and a half hours into deliberations the jury asked the judge: "Is there any remote chance for someone convicted of murder to become eligible for parole?"[227] The judge replied: "Parole eligibility or ineligibility is not for your consideration."[228] Eighty minutes later the jury returned with a death sentence. The defense asked that the jury be polled regarding their understanding of a life sentence, but the judge refused.

Writing for a seven to two majority, Justice Ginsburg concluded that the jury lacked "any clear understanding" of the life sentence they were meant to weigh against a death sentence.[229]

In a rather astonishing dissent, Thomas, joined by Scalia, asserted there was no evidence of juror confusion. "I believe that the court's instructions and the arguments made by counsel in Shafer's case were sufficient to inform the jury of what 'life imprisonment' meant for Shafer"[230] and "left no room for speculation by the jury"[231] on meaning of life sentence.

What, then, did the jury mean to indicate when it asked about the potential for the defendant to be released? "I can only infer that the jury's questions regarding parole referred not to Shafer's parole eligibility in the event the jury sentenced Shafer to life, but rather to his parole eligibility in the event it did not sentence him at all."[232] In other words, Thomas takes the jury's direct question regarding their direct task, and concludes they meant to inquire not about anything they were doing but rather wished to clarify a point of law that they had not raised and which had no bearing on them.

As was the case in *Weeks v. Angelone*, direct jury questions on topics which are widely misunderstood are taken here by Scalia and Thomas to be not so much indicators of confusion, but either indicators of understanding or interest in arcane legal points unrelated to the jurors' task.

The South Carolina legal system would produce yet another iteration of this basic controversy one year later. In *Simmons*, and again in *Shafer*, the Court had clearly stated a defendant's right to establish before the jury that parole was unavailable in response to prosecution efforts to establish future dangerousness. In *Kelly*[233] the state claimed, (and the trial judge agreed,) it had made no effort to establish future dangerousness and therefore no mention of parole ineligibility was warranted.

The Court, in a five to four decision, took note of the prosecutor's repeated characterizations of the defendant William Kelly. The prosecutor called Kelly "Bloody Billy,"[234] the "Butcher of Batesburg,"[235] and noted he was "more frightening than a serial killer."[236] The prosecutor warned "murderers will be murderers and he is there is a cold-blooded one right over there."[237]

Souter, writing for the Court, highlighted several such examples as well as the overall thrust of the prosecutor's presentation and concluded: "the evidence and argument . . . . . .are flatly at odds with the view that 'future dangerousness was not an issue in this case.'"[238]

Justice Rehnquist in his dissent disputed the notion that future dangerousness came up in the case. "The prosecutor did not argue future dangerousness . . . . . .in any meaningful sense of that term."[239] Curiously,

Rehnquist admitted that "the prosecutor's arguments about the details of the murder, as well as the violent episodes in prison, demonstrated petitioner's evil character."[240] Thus, as Rehnquist would have it, the prosecutor sought and successfully established the defendant's credentials for evil status, but somehow apparently implied his evilness had expired and carried no implications for the future.

Thomas, joined by Scalia, offered a separate dissent, not to dispute whether future dangerousness was raised in the case, but to reaffirm his position that the defendant should have no right to reveal parole information regardless of prosecution arguments.

While *Simmons,* Shafer, and *Kelly* fought over the state not providing information about life sentences, *California v. Ramos* (1983)[241] centered on the state giving additional information about life sentences. In short, California law required the judge to inform the sentencing jury in a capital case that if they sentenced the defendant to life imprisonment the state's governor could commute the sentence to a shorter term.

Ramos' attorney argued such an instruction invited the jury to speculate, and was biased against the defendant because there was no mention of the fact that the governor had the same power to commute a death sentence.

In a five to four decision, the Court found the instruction permissible. O'Connor wrote for a majority which included Rehnquist. Commutation "information is relevant and factually accurate," O'Connor argued.[242] "Informing the jury of the Governor's power to commute a sentence of life without possibility of parole is merely an accurate statement of a potential sentencing alternative, and corrects the misconception conveyed by the phrase 'life imprisonment without possibility of parole.'"[243]

Indeed, the Court went on to assert that without this information "life imprisonment without possibility of parole" would create a "misleading impression" that release was impossible.[244] The commutation instruction "dispels that possible misunderstanding" leaving little room for the defense to object as "surely, the respondent cannot argue that the Constitution prohibits the State from accurately characterizing its sentencing choices."[245]

The Court apparently had no concern that the sentence of death – which carries with it the precise equivalent legal possibility of commutation – is in any way misleading because it too can result ultimately in the defendant being set free. As Marshall argued in the dissent, "the instruction thus erroneously suggests to the jury that a death sentence will assure the defendant's permanent removal from society whereas the alternative sentence will not."[246]

The Court apparently had no concern that the sentence of death – which carries with it the precise equivalent legal possibility of commutation – is in any way misleading because it too can result ultimately in the defendant being set free.

Stevens argued in the dissent that the Court should show no tolerance for biased jury instructions. "No matter how trivial the impact of the instruction may be, it is fundamentally wrong for the presiding judge at the trial - who should personify the evenhanded administration of justice" to provide the jury one-sided information.[247]

As in *Ramos*, in *Lowenfield v. Phelps* (1988)[248] leeway that was denied to the defense was generously provided to the state. In *Lowenfield*, a capital jury spent thirteen hours in sentencing deliberation and reported to the judge that they had reached a deadlock. At one point, the jury reported to the judge that it was experiencing "much distress."[249] The judge replied: "I order you to go back to the jury room and to deliberate and arrive at a verdict."[250]

Later, when the jury again reported difficulty, the judge twice polled the jurors to ask if further deliberations would be useful, – and reminded the jurors for what would be the fourth time since the conclusion of the case that if they failed to reach a verdict the defendant would be sentenced to life imprisonment. The judge's polls, which required the jurors to sign their name to their vote, in effect forced the jurors to take a position on the verdict since further deliberations were necessary for a death sentence. After the first poll found eight in favor of continuing deliberations, the judge repeated the process and found eleven in favor of continuing deliberations. Just thirty minutes after the polls the jury returned a death sentence. Despite the seemingly tilted nature of the judge's instructions, his command to continue deliberating, and his repeated admonitions on the consequences

of deadlock ("Ladies and Gentlemen, as I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment"),[251] Rehnquist wrote for the Court that while the judge's instruction "suggests the possibility of coercion" the instruction was "not 'coercive' in such a way" as to deny the defendant's rights.[252]

Ultimately, the conservative judges proved themselves willing to tolerate sentencing definition rules which tend to establish the defendant as a threat. Whether that is through the withholding of information pertaining to parole ineligibility, the one-sided presentation regarding commutation possibility, or the browbeating of a trial judge to push the jury out of its deadlock, the jury instruction rules that the conservative judges support consistently provide freedom for the prosecution and limitation on the defense.

Even as the current Court majority has provided for the defendant's right to define parole ineligibility, it is a narrow right. Only when the prosecution seeks to establish future dangerousness, and only when life without possibility of parole is the sole available alternative sentence does a defendant have a right to define the meaning of life sentence. Even in that limited instance, however, it is clear that the right is far from firmly established. *Kelly* produced only five votes for the defendant's right to define life sentence, with two dissenters (Thomas and Scalia) asserting there is no such right in any circumstance.

Creating Understandable Instructions

Rehnquist wrote in *Buchanan v. Angelone* that the jury could not have been confused because "the instruction presents a simple decisional tree."[253] He meant that metaphorically. The practical meaning of the instructions in *Buchanan* would be difficult for any non-lawyer to explain. Indeed, there is no shortage of evidence on the point that jurors have trouble understanding typical capital sentencing instructions.

Ironically, among the suggestions researchers have made to improve comprehension of instructions is to provide jurors with decision trees or flowcharts.[254] That is to say, actual decision trees in which each plainly worded question points the jurors to the next issue they must decide, not metaphorical decision trees that exist only in the mind of a Supreme Court justice.

Plain and direct language would also aid jurors in carrying out their task. As Justice Souter argued in his concurring opinion in *Simmons*, jurors should be given "instructions on the meaning of the legal terms used"[255] and when questions arise they should be answered directly. When the *Simmons* jury asked "Does the imposition of a life sentence carry with it the possibility of parole?" Souter wrote, "The answer here was easy, and controlled by state statute. The judge should have said no."[256] Concomitantly, in his dissent in *Weeks*, Justice Stevens issued a call for "clarity"[257] in jury instructions. Should the jury fail to understand and ask a question, a "straightforward categorical answer" should be provided.[258] At the very least, Justice Breyer suggested it would be helpful if instructions on mitigation included the "mention of mitigating evidence anywhere in the instructions."[259]

In their simulation using members of the jury pool, one study found that rewriting juror instructions in plain language improved juror comprehension scores by twenty percent.[260] Among the areas jurors showed the most improvement on was the understanding of mitigation, including what counts as mitigation, what is the standard for demonstrating mitigation, and whether every juror must agree to apply the same mitigating piece of evidence to find mitigation.[261] Other researchers have also found significantly higher comprehension with plain language instructions.[262]

Another massive jury simulation tested not only plain language instructions, but also a flowchart instruction, and instructions with specific clarifications on common misconceptions.[263] These various instruction forms were tested against traditional instructions.[264] The plain language instructions had the most dramatic effect, in some areas doubling comprehension rates on such matters as mitigation.[265] Other forms of instruction also produced gains over the traditional instructions.[266]

While scholars have established both the depth of misunderstanding in response to traditional juror instructions, as well as the promise of user-friendly instructions, the Court remains largely aloof. If the Court is to give true effect to its expanding right to a jury, though, it must turn away from its line of juror instruction cases in which it has established an expanding jurisprudence of permissible confusion.

Juror Exclusion

Belief Exclusion

Given the unique obligations of a capital case juror, the Court has recognized the significant effect per-

sonal values might have in inhibiting jurors from following their instructions and applying the law. In *Witherspoon v. Illinois* (1968) and subsequent cases, the Court concluded that a juror could be excluded from participating in a capital case if his views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath."[267]

Such exclusion applies to both those who would never impose the death penalty as well as those who would always impose the death sentence in a capital case. "[A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death."[268]

To give effect to this requirement, prospective jurors are questioned during voir dire to determine their death penalty views and if those views would impair their ability to reach a verdict based on the law and the evidence at hand. In effect, the so-called "death qualification" process allows the prosecution to challenge for cause and thereby remove prospective jurors who state, for example, that they would never vote to impose the death penalty, and the defense to challenge and remove the comparatively rare individual who states they would always vote to impose the death penalty.

While the concept of death qualification is relatively straightforward, the line between who is acceptable and who is not acceptable is not always clear, nor are the parameters of the qualification process. Moreover, academic research makes it quite clear that death qualification dramatically affects the makeup of juries beyond its stated purpose.

Not surprisingly, those who can be excluded based on their opposition to the death penalty are more likely to pay attention to mitigating evidence[269] and less likely to accept the cost of convicting the innocent over freeing the guilty.[270] Notably, they are also less likely to hold racist beliefs,[271] more likely to remember evidence, accurately understand the law, and thoroughly weigh the evidence.[272]

Even more to the point, contrary to the premise of death qualification, evidence suggests that many excludables (those who may be excluded) who oppose the death penalty would actually be willing to impose a death sentence. That is, while excludables may report an abstract unwillingness to impose the death penalty sufficient to have them removed for cause from the jury, when presented with evidence on specific cases, the majority report favoring the death penalty's application for particularly heinous murders.[273]

Relative to excludables, includables (those who may be included) meanwhile are conviction prone. Meta-analyses of studies on death penalty includables show they are up to forty percent more likely to favor conviction in individual cases,[274] while other studies reveal the difference is particularly great when the evidence is weakest.[275]

Among the factors in includables' conviction tendencies is their generally held belief that the prosecution is more trustworthy than the defense. One jury simulation showed participants conflicting evidence variously supporting the prosecution or the defense's position.[276] Includables were far more likely to accept the prosecution's perspective; in contrast to excludables, includables were more likely to fear erroneous acquittals than erroneous convictions.[277]

Meanwhile, contrary to the premise of their inclusion, more than one fourth of includables express the belief that the death penalty should be imposed after every capital case conviction.[278]

In each of the five death qualification cases discussed below Rehnquist supported an expansive prosecutorial right to cleanse the jury of death penalty skeptics and a narrow defense right to purge the jury of death penalty enthusiasts. In the three cases Scalia heard and the one Thomas participated in, they joined Rehnquist's position. Overall, the thrust of the conservatives' position is what they consider to be the state's right to an impartial jury and generally cast a skeptical eye on defendant's countervailing claims.

In *Adams v. Texas* (1980)[279] the judge asked jurors if they held any beliefs regarding the death penalty, which would "affect their deliberations on any issue of fact."[280] Jurors who said yes were excused.

The state argued this was a fair way to determine death penalty excludables. The defense countered that the state had re-written a standard which allowed people to be excluded only if their views "would prevent or substantially impair" them from carrying out their duties to a new lower standard rejecting jurors who might be affected in any way by the weight of a death proceeding.[281]

In an eight to one opinion (Rehnquist dissenting), the Court held that Texas law had created an unreasonable standard which had the effect of excluding jurors "whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected."[282]

"Nervousness" and "emotional involvement" were inherent in a death proceeding, the Court argued,

thus the "inability to deny…any effect whatsoever" is in no way "equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths."[283]

In short, the Court reaffirmed that jurors may not be excluded "on any broader basis than inability to follow the law or abide by their oaths."[284]

In the dissent, Rehnquist said he could "see no reason why Texas should not be entitled to require each juror to swear" that he or she will be unaffected by the possibility of a death sentence.[285] Further, foreshadowing an argument Scalia would offer in *Holland v. Illinois*, Rehnquist asserted, that "society, as much as the defendant, has a right to an impartial jury."[286]

In *Lockhart v. McCree* (1986)[287] the entire process of death qualification was challenged as an impediment to an impartial jury reflecting a cross section of society. Before McCree's capital murder trial, the judge removed for cause jurors who said they could not impose death penalty. The jury convicted McCree of murder but later sentenced him to life imprisonment. McCree's attorneys argued that the death qualification process had created a conviction prone jury.

In a six to three opinion written by Rehnquist, the Court found that death qualification did not violate the defendant's rights because the Constitution "does not require that petit juries actually chosen reflect the composition of the community at large."[288] Moreover, death qualification does not "violate the constitutional right to an impartial jury . . . because all individual jurors are to some extent predisposed towards one result or another."[289]

Lower courts had sided with McCree, finding that "social science evidence" showed "that 'death qualification' produced juries that 'were more prone to convict' capital defendants than 'non-death qualified' juries."[290]

Rehnquist dismissed the studies because of what he said were "several serious flaws in the evidence."[291] Quoting language used when the Court weighed the same issue two decades earlier, Rehnquist labeled the research "too tentative and fragmentary."[292]

Some of the studies referred to in this chapter, [for example Cowan, Thompson and Ellsworth (1984)] were before the Court then, but were deemed of no value because they were based on surveys and simulations, not the deliberations of actual jurors hearing applicable cases. [Of course, as Marshall pointed out in dissent, studying the deliberations of actual jurors in actual cases is legally impossible, and not something any court would accommodate. Leaving surveys and simulations "the only available means of proving their case."][293]

Rehnquist also dismissed McCree's claim that he was denied a jury consisting of a "fair-cross-section" of society.[294] Death penalty excludables are not "a 'distinctive' group in the community[,]" thus McCree has no right that they be included at any stage of the jury process.[295]

Oddly, Rehnquist made much of the fact that McCree's jury, which had been subject to death qualification, produced a panel which could have been the product of the "luck of the draw."[296] Rehnquist elaborated, "it is hard for us to understand the logic of the argument that a given jury is unconstitutionally partial when it results from a state-ordained process, yet impartial when exactly the same jury results from mere chance."[297]

In any given case, chance could produce an all male jury or an all white jury. Surely, the fact that "mere chance" *could* produce a panel would not justify any mechanism of discrimination the state wished to create.

In any given case, chance could produce an all male jury or an all white jury. Surely, the fact that "mere chance" *could* produce a panel would not justify any mechanism of discrimination the state wished to create.

Rehnquist added that if one were to follow McCree's "illogical and hopelessly impractical" standard, that is "if it were true that the Constitution required a certain mix of individual viewpoints on the jury, then trial judges would be required to undertake the Sisyphean task of 'balancing' juries, making sure that each contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers, and so on."[298]

Again, Rehnquist mixed the concepts of exclusion and random chance. It was not random chance that created the panel McCree objected to; it was the practice of death qualification. As there is no political party

qualification, age qualification, or occupation qualification for jury service, none of these factors is remotely congruent.

While Rehnquist dismissed the social science research presented in the case, in the dissent Marshall referred to it as "overwhelming evidence that death-qualified juries are substantially more likely to convict."[299] Rather than questioning varying research practices, Marshall took confidence from "the essential unanimity of the results obtained by researchers using diverse subjects and varied methodologies"[300]

Marshall noted that the death qualification process has a disparate effect on groups more likely to hold anti-death penalty views, thus excluding more women and African Americans from jury service.

Marshall suggested that capital defendants suffer a double burden. First, unlike defendants for other crimes, capital defendants are burdened with a jury which has been systematically and legally structured to increase the likelihood of conviction. Second,

> I cannot help thinking that respondent here would have stood a far better chance of prevailing on his constitutional claims had he not been challenging a procedure peculiar to the administration of the death penalty. For in no other context would a majority of this Court refuse to find any constitutional violation in a state practice that systematically operates to render juries more likely to convict, and to convict on the more serious charges.[301]

Thus, the absurd possibility Marshall implied: it may be easier to convict someone of capital murder than of a lesser crime.

In *Gray v. Mississippi* (1987)[302] the judge excluded a legally qualified juror for cause at the prosecution's request. In effect, the judge excluded the juror to compensate the prosecutor for previous decisions the judge made to deny the prosecutor's earlier challenges.

This case then hinged on whether the disqualification of a qualified juror was a sufficient error to require the case be overturned, or whether the decision should be considered "harmless."[303]

In a five to four decision written by Blackmun, the Court employed a standard based on "whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error" reasoning that "the nature of the selection process defies any attempt to establish that an erroneous *Witherspoon* exclusion is harmless."[304]

In a group voir dire, jurors were asked questions to establish whether they were death qualified. Apparently realizing that if they said they would not impose the death penalty they would be excused, an otherwise unprecedented number of prospective jurors announced their opposition to the death penalty. The judge grew suspicious that they were misleading him to dodge service on the jury, at one point saying, "Now I don't want nobody telling me that, just to get off the jury. Now, that's not being fair with me."[305] Because he doubted their sincerity, the judge began to disallow traditional challenges for cause when jurors said they were reluctant to impose the death penalty. Instead, the prosecutor had to use many of his nine peremptory challenges to remove jurors who claimed to be anti-death penalty.

After exhausting his peremptory challenges, the prosecutor sought to exclude a prospective juror, Mrs. Bounds, who initially expressed hesitation about the death penalty before saying she was able to impose it. The prosecutor asked for an extra peremptory to compensate for the challenges he had used on jurors the judge refused to dismiss for cause.

Rejecting the notion of giving the prosecutor an extra challenge, the judge instead suggested they see if there was a way Mrs. Bounds might be excluded for cause. The judge told the prosecutor: "Go ask her if she'd vote guilty or not guilty…let's see what she says to that. If she gets to equivocating on that, I'm going to let her off as a person who can't make up her mind."[306]

When Mrs. Bounds said she did not know whether she would vote guilty or not (she had, after all, not heard any evidence since the trial had not yet begun), the judge ruled that she was "totally indecisive. She says one thing one time and one thing another."[307] The judge dismissed her for cause.

Admitting that the prosecutor had, in effect, lost some of his peremptory challenges to the judge's decision-making, Blackmun nevertheless concluded, "we cannot condone the 'correction' of one error by the commitment of another."[308]

Meanwhile, Blackmun concluded that the improper exclusion of a qualified juror could not be tolerated: "some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error. The right to an impartial adjudicator, be it judge or jury, is such a right."[309]

Scalia's dissent objected to nearly every premise

of the majority opinion. Scalia believed the judge would have been justified in granting the prosecution an extra peremptory challenge, therefore Bounds would not have been on the jury, therefore the defendant suffered no harm when Bounds was removed for cause.

Scalia claimed that it is "*certain* that the jury that was impaneled was identical to the jury that would have been impaneled had the trial judge not erred"[310] in refusing the prosecution's earlier for cause challenges. Later Scalia repeated his conclusion that it was "certain that the trial judge's decision to exclude Mrs. Bounds for cause rather than granting that request [for an additional peremptory challenge] did not affect the composition of the jury in any way."[311] Scalia went on to say the judge's decision "could not possibly have affected the composition of the jury"[312] and that the resulting jury was "identical"[313] to the panel that otherwise would have been created. Given there was no effect on the jury, and therefore no effect on the defendant, "There is thus no reason to vacate petitioner's sentence."[314]

Where the authority to grant the prosecution, and only the prosecution, extra peremptory challenges comes from, Scalia did not specify.[315] Moreover, how he could be "certain" that the resulting jury was "identical" is also hard to fathom since, presumably, a prosecutor armed with an extra peremptory challenge would weigh the acceptability of every juror with a different standard and would therefore adjust his strategy of using the challenges. Both Blackmun in the majority opinion and Powell in his concurring opinion note that the prosecutor may or may not have actually excluded Bounds if he had an extra challenge, but it is inconceivable that he would have engaged in precisely the same series of challenges regardless of the number of challenges he had at his disposal. Moreover, if the defense were to also be granted an extra challenge in the interests of fairness the notion that an "identical" jury panel would emerge becomes even more absurd.

The year after the Court decided *Gray*, it was confronted by almost the opposite set of circumstances. Rather than removing an eligible juror at the prosecution's request, in *Ross v. Oklahoma*, the judge failed to remove an ineligible juror at the defense's request[316]

In a five to four decision, Rehnquist wrote for the Court that the judge had indeed "erred" in failing to "remove a juror whom the trial court should have excused for cause"[317] because he stated he would support the death penalty for the defendant regardless of the evidence or law. However, since the defense was able to strike the juror (Mr. Huling) using a peremptory challenge, the error did not compromise petitioner's "Sixth and Fourteenth Amendment right to an impartial jury."[318] That is, "petitioner exercised a peremptory challenge to remove him, and Huling was thereby removed from the jury as effectively as if the trial court had excused him for cause."[319]

The standard announced in *Gray* (the "relevant inquiry is whether the composition of the jury penal as a whole could possibly have been affected by the trial court's error"[320]) suggests that the verdict must be overturned since Ross' jury was indisputably affected by what amounted to the defense's loss of a peremptory challenge. "Although we agree that the failure to remove Huling may have resulted in a jury panel different from that which would otherwise have decided the case," Rehnquist failed to see a reason to apply the Court's finding in *Gray* because it was "too sweeping to be applied literally."[321]

The defense's loss of a peremptory challenge is not a "constitutional problem" because "we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury" as "peremptory challenges are not of constitutional dimension."[322]

Oklahoma state law specifies that defendants must use preemptory challenges to exclude jurors whom the judge has erroneously allowed to sit. "As required by Oklahoma law, petitioner exercised one of his peremptory challenges to rectify the trial court's error, and consequently he retained only eight peremptory challenges to use in his unfettered discretion. But he received all that Oklahoma law allowed him, and therefore his due process challenge fails."[323]

To Rehnquist, "There is nothing arbitrary or irrational" about such a policy as it serves "the goal of empanelling an impartial jury."[324] This statement is made without limitation. Thus if the judge refused to exclude nine ineligible pro-death penalty jurors, while simultaneously granting prosecution challenges to anti-death penalty jurors, effectively preserving all peremptories for the prosecution while eliminating them for the defense, there would be "nothing arbitrary or irrational" about such an outcome.

Indeed, Rehnquist noted that loss of all peremptories to correct for a judge's error would be acceptable because "the error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him."[325]

Limitations on the use of peremptory challenges are portrayed as not only reasonable but obvious. "The

concept of a peremptory challenge as a totally freewheeling right unconstrained by any procedural requirement is difficult to imagine."[326]

Interestingly, Huling's bias was so clear that "had Huling sat on the jury that ultimately sentenced petitioner to death…the sentence would have to be overturned."[327] However, Rehnquist questioned the notion that the panel that ultimately formed was less than impartial because "none of those 12 jurors…was [sic] challenged for cause by petitioner."[328] Under Rehnquist's logic, then, when the challenge of a blatantly biased juror is rebuffed, the defense should have responded by challenging jurors whose responses were less egregiously biased.

Justice Marshall issued an angry dissent stating, "[a] man's life is at stake. We should not be playing games."[329] The logic of forcing the defense to use one of its peremptory challenges to correct a judge's error was lost on Marshall, who noted that, "everyone concedes that the trial judge could not arbitrarily take away one of the defendant's peremptory challenges. Yet, that is in effect exactly what happened here."[330]

Marshall could not comprehend how the Court could fail to apply the *Gray* precedent because "here the trial court, rather than excusing a qualified juror, refused to excuse a biased juror" but "the loss of a peremptory challenge in this case affected the composition of the jury panel in precisely the same way as the trial court's error in *Gray* itself."[331]

Marshall could not comprehend how the Court could fail to apply the *Gray* precedent because "here the trial court, rather than excusing a qualified juror, refused to excuse a biased juror. . . ."

In *Morgan v. Illinois*, the prosecution requested that the judge ask all prospective jurors if they would automatically vote *against* imposing the death penalty.[332] The judge agreed. The defense then requested that the judge ask all prospective jurors if they would automatically vote *for* imposing the death penalty and the judge declined.

Recall in *Ross* that Rehnquist's opinion, joined by Scalia, asserted that, had someone who would automatically vote for a death sentence "sat on the jury that ultimately sentenced petitioner to death…the sentence would have to be overturned."[333] Such a position seemingly would lock Rehnquist and Scalia into supporting a death qualification question on the inclination to automatically impose death, for how else would the defense know of a juror's position, and how else could the defense act upon the rights Rehnquist discussed in *Ross*.

Instead, while six members of the Court found the refusal to inquire about automatic imposition of the death penalty to be a due process violation, Rehnquist, Scalia, and Thomas dissented.

In an opinion written by White, the Court noted that "a juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do."[334] The state was empowered to remove anti-death penalty persons from the jury with the right to ask about opposition to capital punishment, but how could a defendant "exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death" if he could not ask questions to identify pro-death penalty excludables.[335] Without opportunity to ask a relevant question of prospective jurors, the right to challenge for cause becomes a "meaningless" right.[336]

In contrast to the prosecution's direct question, the defense was left to work with only a general question about whether prospective jurors thought they could be fair.

Scalia's dissent, joined by Rehnquist and Thomas, directly contradicted the language of the *Ross* decision authored by Rehnquist and signed by Scalia a year earlier. Gone is their conclusion that a single juror who would automatically vote to impose death would mean "the sentence would have to be overturned."[337] It is replaced with a sneering renouncement of the Court's position in *Ross*, which is to say, a sneering renouncement of their own position in *Ross*. Scalia wrote: "The Court today holds that a juror who will always impose the death penalty for capital murder is not 'impartial.'"[338] He added, "The Court has, in effect, now added the *new* rule that no merciless jurors can sit."[339]

Scalia stated that: "The fact that a particular juror thinks the death penalty proper whenever capital murder is established does not disqualify him" because there is no "requirement that all jurors must, on the facts of the case, be amenable to entertaining" a sentence less

than death.[340]

Scalia coined a new phrase when he concluded "the Court's exclusion of these *death- inclined* jurors" is not "justified."[341]

A juror who would automatically impose the death penalty is admitting they would automatically dismiss any and all mitigating evidence. Scalia sees no problem with that because "we have held, not that he must consider mitigating evidence, but only that he may not, on legal grounds, refuse to consider it."[342] Thus, Scalia distinguishes between the right to have evidence considered and the right to not have evidence not considered (which heretofore have been amounted to the same thing). That is similar to the concept that, for example, the right of criminal defendants to counsel is effectively the same as the right not to be forced to not have counsel.

Scalia proceeded to argue that since Illinois had absolutely no standard to define mitigation, it is perfectly reasonable for jurors to impose a personal standard which effectively recognized no forms of mitigation[343].

Scalia's position that mitigation goes undefined is somewhat harder to defend upon consulting the relevant Illinois statute, which states:

> Mitigating factors may include but need not be limited to the following: (1) the defendant has no significant history of prior criminal activity; (2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution; (3) the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act; (4) the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm; (5) the defendant was not personally present during commission of the act or acts causing death.[344]

Nevertheless, Scalia drew a distinction between jurors who would never impose the death penalty and those who would always impose the death penalty. The former "juror is a lawless juror," the latter "juror to be disqualified under the Court's new rule is not."[345]

Scalia's point again neatly ignores the applicable state law in the case. Illinois law explicitly states "the jury shall consider aggravating and mitigating factors" – and "if the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death." Quite distinct from Scalia's semantic jumble, Morgan had a right to have mitigating factors considered and any juror who would automatically impose a death sentence was without question a "lawless juror."

White responded directly to Scalia's position: "Justice Scalia, in dissent, insists that Illinois is entitled to try a death penalty case with one or even twelve jurors who, upon inquiry, announce that they would automatically vote to impose the death penalty if the defendant is found guilty of a capital offense, no matter what the so-called mitigating factors, whether statutory or nonstatutory, might be. But such jurors obviously deem mitigating evidence to be irrelevant to their decision to impose the death penalty…"[346] and are therefore "announcing an intention not to follow the instructions."[347]

The essence of the conservatives' holding on death qualification is this: it is acceptable when a judge strikes a juror for cause when that juror suggests the slightest hesitation to impose the death penalty. It is acceptable when a judge fails to strike for cause a juror who says the death penalty should be automatically imposed. It is acceptable when a judge goes to great lengths questioning a juror seeking a pretense to strike her on the prosecution's behalf. It is acceptable when a judge refuses a defense request to ask even the most basic and fundamental question regarding whether a juror intends to follow the law. It is acceptable that death qualification advances the participation of conviction prone jurors. It is, in Rehnquist's words, a defense of the state's right to an impartial trial. As a Constitutional matter the state holds no such right. Nevertheless, the conservatives' creativity in advancing a state's right to impartial trials is clearly magnified by their wobbly definition of impartial.

Trait Exclusion

While the Court has weighed the right to exclude jurors based on their beliefs, so too has it been faced with the even more thorny (although sometimes concurrent) effort to exclude jurors based on race.

Race, it would seem apparent, infects the capital prosecution process. For example, one study found that an African American defendant accused of killing a white person was eleven times more likely to be sentenced to death than a white defendant accused of killing

an African American.[348] Another study indicated that the racial imbalance reflects both an increased likelihood that capital charges will be filed against the former and an increased likelihood that once capital charges are filed a death sentence will be returned.[349] Yet another calculated that less than two-tenths of one percent of the executions in this country have been in response to a white person killing an African American.[350]

One factor in these patterns is surely the response of the jury. Researchers have found notable differences in response to the race of the defendant and the race of the victim.[351]

The Court, sensitive to both the reality and appearance of bias, has at times thundered against the exclusion of jurors. In *Strauder v. West Virginia* (1880), the Court confronted a state law barring African Americans from jury service. The Court struck the law down because: "The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."[352] Jurors must be "indifferently chosen" with regard to race to secure a defendant's right to "protection of life and liberty."[353] The Court suggested that in this area the judiciary should be held not only to a legal standard but a societal standard because discrimination inside a courthouse is "a stimulant to that race prejudice which is an impediment to securing …equal justice."[354]

Notable then are the efforts of Rehnquist and his conservative colleagues a century later to defend exclusion and differential treatment based on race. While the series of cases are not exclusively capital prosecutions, they illustrate the foundation of their thinking as it applies to trait exclusion of jurors in capital proceedings, and they represent the foundation of their conclusions in the multiple hearings of the Miller-El death penalty appeal.

In *Batson v. Kentucky* (1986),[355] and subsequent juror exclusion cases, the means of achieving exclusion was the peremptory challenge. Batson, an African American on trial for burglary, objected to the prosecutor's use of peremptory challenges to remove all of the prospective African American jurors from serving on his jury. Batson claimed a violation of the fair cross section requirement and the due process clause of the 14th Amendment.

In a seven to two decision, the Court agreed. Writing for the Court, Justice Powell concluded that "the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria."[356] Further, "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race."[357] To operationalize this right, the Court ruled that if a prosecutor engages in an apparent pattern of racial exclusion the burden will be placed on the prosecutor to demonstrate that there was some non-race based rationale that guided the decision on whom to challenge.[358]

Rehnquist again dissented from a holding that would protect equal access to juries. In the process, Rehnquist offered a strong defense of the peremptory challenge. "I cannot subscribe to the Court's unprecedented use of the Equal Protection Clause to restrict the historic scope of the peremptory challenge, which has been described as 'a necessary part of trial by jury.' In my view, there is simply nothing 'unequal' about the State's using its peremptory challenges to strike blacks from the jury..."[359] Thus, in addition to accommodating the "historic" nature of peremptory challenges, Rehnquist accommodates the "historic" nature of racism.

Indeed, he characterized race-based thinking as "extremely useful."[360]

"The use of group affiliations, such as age, race, or occupation, as a 'proxy' for potential juror partiality…has long been accepted as a legitimate basis for the State's exercise of peremptory challenges….Given the need for reasonable limitations on the time devoted to voir dire, the use of such 'proxies' by both the State and the defendant may be extremely useful in eliminating from the jury persons who might be biased in one way or another."[361]

Four years after *Batson*, Daniel Holland objected to peremptory challenges used by the prosecution to create an all-white jury in his kidnapping trial (*Holland v. Illinois* 1990[362]). Unlike Batson, however, Holland was white. Holland objected to the exclusion of African Americans on Sixth Amendment fair cross section grounds.

In a five to four decision, written by Scalia and joined by Rehnquist, the Court offered an even more forceful defense of peremptory challenges. An impartial jury "*compels* peremptory challenges."[363] Scalia concluded that under the Sixth Amendment we are guaranteed "not a representative jury…but an impartial one"[364] and an impartial jury "would positively be obstructed"[365] by a petit jury fair cross section requirement, because one would have to "cripple"[366] the peremptory challenge which "would undermine rather than further the Amendment's guarantee of the right to trial by 'an impartial

jury.'"[367]

"The rule we announce today is not only the only plausible reading of the text of the Sixth Amendment, but we think it best furthers the Amendment's central purpose as well. *Although the constitutional guarantee runs only to the individual and not to the State, the goal it expresses is jury impartiality with respect to both contestants."*[368] Just as Rehnquist did in *Adams*[369], Scalia here re-writes the Sixth Amendment to protect heretofore unmentioned (in the Constitution) rights of the State.

While ruling against Holland's fair cross section claim, Scalia admitted that, an Equal Protection case against race based juror exclusion would have merit:

> We do not hold that the systematic exclusion of blacks from the jury system through peremptory challenges is lawful; it obviously is not. We do not even hold that the exclusion of blacks through peremptory challenges in this particular trial was lawful. Nor do we even hold that this particular (white) defendant does not have a valid constitutional challenge to such racial exclusion. All we hold is that he does not have a valid constitutional challenge based on the Sixth Amendment.[370]

In fact, Scalia argues that while the Sixth Amendment establishes only the need for a representative jury pool not a representative jury, and was therefore satisfied in Holland's case, the Fourteenth Amendment by contrast applies to both the pool and the resulting jury: "[t]he Fourteenth Amendment's prohibition of unequal treatment in general and racial discrimination in particular …has equal application at the petit jury and the venire stages, as our cases have long recognized."[371]

In his dissent, Marshall objected to the Court's distinction between the goals of an impartial jury and a fair cross section jury, arguing that the latter goal does not serve the former is "a false dichotomy."[372] Also, writing in his dissent, Stevens echoed the sentiment: "A jury that is the product of such a racially discriminatory selection process cannot possibly be an 'impartial jury' within the meaning of the Sixth Amendment."[373]

By refusing to apply the fair cross section requirement, Marshall argued the Court empowered "prosecutor's systematic use of peremptory challenges to exclude Afro-American prospective jurors on the ground that they, as a class, lack the intelligence or impartiality fairly to fill the juror's role"[374]

The next year *Powers v. Ohio*[375] brought much the same facts to the Court as did *Holland*. Larry Joe Powers was a white defendant who objected to the prosecution's use of peremptory challenges to eliminate African Americans from his jury. Unlike Holland, Powers advanced an Equal Protection argument rather than a fair cross section argument.

The Court, in a seven to two decision, agreed "The Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race."[376]

Kennedy, writing for the Court, quoted Scalia's opinion in *Holland* stating, "as the *Holland* Court made explicit, however, racial exclusion of prospective jurors violates the overriding command of the Equal Protection Clause, and 'race-based exclusion is no more permissible at the individual petit jury stage than at the venire stage.'"[377] The Court ruled that not only the plaintiff but also the prospective jurors themselves have a right to a selection process not based on race.[378] Scalia, joined by Rehnquist, vigorously dissented from the decision founded on Scalia's own words.

Where Scalia asserted in *Holland* that the Sixth Amendment did not apply to racial exclusion, but Equal Protection did, a year later he realized, "What is true with respect to the Sixth Amendment is true with respect to the Equal Protection Clause as well."[379] In other words, neither applied to Powers' claim.

Scalia fumed that nothing in the Court's decision in *Strauder*[380] compelled the protection of a white defendant from a jury process which excluded African Americans. "It was not suggested in *Strauder*, and I am sure it was quite unthinkable, that a white defendant could have had his conviction reversed on the basis of" a process which "did not exclude members of his race."[381] Scalia did not emphasize that the case in which "it was quite unthinkable" was decided more than 100

The Court ruled that not only the plaintiff but also the prospective jurors themselves have a right to a selection process not based on race.

years earlier, in a time of rampant legal segregation. Moreover, if *Strauder* was the controlling precedent in *Powers*, surely it was the controlling precedent a year earlier in *Holland* when Scalia wrote for the Court: "We do not hold that the systematic exclusion of blacks from the jury system through peremptory challenges is lawful; it obviously is not."[382]

In a new formulation, however, Scalia realized that the systematic exclusion of African Americans from jury service by prosecutors' use of peremptory challenges is actually an indication of equality. "When that group, like all others, has been made subject to peremptory challenge on the basis of its group characteristic, its members have been treated not differently, but the same. In fact, it would constitute discrimination to exempt them from the peremptory strike exposure to which all others are subject. If, for example, men were permitted to be struck but not women, or fundamentalists but not atheists, or blacks but not whites, members of the former groups would plainly be the object of discrimination."[383]

That logic would support innumerable legal conclusions – it would be perfectly reasonable to ban African Americans from part of a bus, say the front, if you banned whites from part of the bus, say the back, because in that case everyone would be barred from part of the bus.

Indeed, the majority casts Scalia's position in just such a light. "The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy v. Ferguson* (1896). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree."[384]

As Rehnquist argued in his *Batson* dissent, Scalia reminds us that race based use of peremptory challenges is inherently rational. "A peremptory strike on the basis of group membership implies nothing more than the undeniable reality (upon which the peremptory strike system is largely based) that all groups tend to have particular sympathies and hostilities."[385]

Scalia also reminded us that the thrust of the Court's thinking endangers peremptory challenges. "To affirm that the Equal Protection Clause applies to strikes of individual jurors is effectively to abolish the peremptory challenge."[386] Instead, peremptory challenges need protection because they ensure that "the jury will be the fairest possible."[387] The notion that peremptory challenges could have unconstitutional consequences "is implausible" because they are "such a permanent and universal feature of our jury-trial system."[388]

But that logic implies that it is impossible to use a legal tactic for nefarious purposes. That is the very essence of this case; not that peremptory challenges are unconstitutional, but that using them for racial purposes would be. Similarly, the state's powers to arrest and prosecute are "permanent and universal" features, but nothing in their ubiquity prevents them from being marshaled for discriminatory purposes and ultimately being subject to limitation.

Finally, Scalia noted that protecting the individual juror, rather than the defendant, from exclusion is also specious. "We have *never* held, or even said, that a juror has an equal protection right not to be excluded from a particular case through peremptory challenge."[389] Scalia neatly overlooked a federal law. Section 243 of the Civil Rights Act of 1875, which was enacted as a way to give meaning to the recently enacted Fourteenth Amendment, provides:

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude.

Thus, to the extent that Justice Scalia intends to say that there is no constitutional-level guarantee that jurors are not excluded for inappropriate reasons, he is, at least, misleading. In addition, to the extent that he means that there is no support in the Constitution or federal law that jurors have an explicit right not to be excluded for the wrong reasons, he is wrong.

In *Miller-El v. Cockrell* (2003)[390], the prosecution in Dallas County, Texas used 10 peremptory challenges to remove African Americans from the capital jury.

In an eight to one decision, the Court found "substantial evidence" of racial bias in jury selection, in violation of principles held in *Batson,* and therefore restored Miller-El's ability to appeal his sentence.[391]

The prosecution in the case not only used peremptories against African Americans, but treated African Americans disparately throughout the voir dire process. While whites were typically asked for their thoughts on the death penalty without preface, African

Americans were first told what the death penalty means and then asked the question.[392] While whites were typically told what the minimum sentence would be if the defendant was convicted and then asked if they could impose it, African Americans were not told what the minimum sentence was and were asked only what it should be. Thus, "prosecutors designed their questions to elicit responses that would justify the removal of African-Americans from the venire."[393]

The defense unearthed evidence that discrimination against jurors was a standing practice in the prosecutor's office. A sitting judge testified that when he worked in the prosecutor's office, superiors had told him not to allow African Americans on juries. A Dallas County district attorney memo from the 1960s – known to at least one of the prosecutors in the present case – instructed prosecutors to exercise peremptory challenges against minorities: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated."[394]

Taking up the mantle of defending exclusion in this case was Justice Thomas. In his dissent, Thomas called the defense's allegations "entirely circumstantial."[395]

Why did the prosecutor ask whites and African Americans different questions? According to Thomas: "The strategy pursued by the prosecution makes perfect sense: When it was necessary to draw out a venireman's feelings about the death penalty they would use the graphic script, but when it was overkill they would not."[396]

The slight logical flaw in that position is that the description of execution preceded the question on the death penalty – thus the "strategy" that "makes perfect sense" would have also required the prosecutor to see into the future. Thomas concedes the point: "I recognize that these *voir dire* statements only indirectly support respondent's explanation because the graphic script was typically given at the outset of *voir dire*—before the above quoted veniremen had the chance to give their stark answers."[397]

Even so, after conducting his own analysis in which he compared the treatment of individual white and African American prospective jurors, Thomas disputed that race was related to the type of questions that the prosecutor asked. After all, in Thomas' calculation: "race predicted use of the graphic script only 74% of the time."[398]

After the Court affirmed Miller-El's right to proceed with his appeal, lower courts rejected his contention that the construction of his jury was with a racial blueprint. Miller-El's appeal of that conclusion would itself be aired before the Court in 2005 in *Miller-El v. Dretke*.

In a six to three decision, the Court found "clear and convincing" evidence of racial bias indicated by the overall pattern in jury selection ("By the time a jury was chosen, the State had peremptorily challenged twelve percent of qualified nonblack panel members, but eliminated 91% of the black ones. It blinks reality to deny that the State struck [jurors] because they were black."), the disparate questioning of white and African Americans during voir dire, and the irreconcilable use of explanations to justify the removal of African Americans while similarly situated whites were accepted. ("Nonblack jurors whose remarks on rehabilitation could well have signaled a limit on their willingness to impose a death sentence were not questioned further and drew no objection, but the prosecution expressed apprehension about a black juror's belief in the possibility of reformation even though he repeatedly stated his approval of the death penalty and testified that he could impose it according to state legal standards…").[399]

To the majority, "the very integrity of the courts is jeopardized" when prosecutors respond to potential jurors based on "illegitimate grounds like race."[400]

In a dissent joined by Rehnquist and Scalia, Thomas again took exception to Miller-El's claim that race was a factor in jury selection. Referring to the case as "the antithesis of clear and convincing evidence," Thomas's analysis found no hint of racialized thinking or behavior.

Thomas rejected the majority's contention that whites and African Americans with similar *voir dire* responses were treated differently. "To isolate race as a variable," Thomas wrote, would require that "the jurors must be comparable in all respects that the prosecutor proffers as important." In other words, a prosecutor could never be found to violate the prohibition on using race in jury selection because *any* difference the prosecutor identifies would justify disparate treatment.[401]

Indeed, Thomas noted "any number of characteristics other than race could have been apparent to prosecutors from a visual inspection of the jury panel." What those factors would be, other than similarly proscribed gender, Thomas did not specify.

Even where prospective white and African American jurors in Miller-El's case were identical in thinking, background, and all other respects, Thomas warned that comparisons of their treatment still would

not be meaningful. Whites, Thomas noted, "were questioned much later in the jury selection process, when the State had fewer peremptories to spare" thus requiring a different strategic response.

Thomas' conclusion is somewhat ironic given that his attention to comparisons of individual jurors in the first Miller-El case was at the heart of his conclusion that race was not a factor, and was central to the majority's interest in conducting its own comparison of individual jurors in the second Miller-El case. Apparently, then, Thomas has concluded that Whites and Africans Americans were not similarly situated enough that differences in their treatment reveal anything about racial disparities. At the same time, however, he has also concluded that Whites and African Americans were similarly situated enough that similarities in their treatment reveal the absence of racial disparities.

Indeed, Thomas held up several examples of whites who were treated similarly to African Americans. Even more forcefully, Thomas pointed to prospective white jurors who were more favorable to the death penalty than several African Americans, but were nevertheless struck from the panel by the prosecution. For example, Thomas scolded the majority for failing to explain why the prosecution struck "Penny Crowson, a white panelist who expressed a firm belief in the death penalty."[402] Thomas' choice of Crowson as an exemplar of his case suggests how little foundation existed for his position. That is, although Thomas did not note it in his dissent, Crowson has said in *voir dire* that she would.[403] It is odd that Thomas used Crowson as an example of the prosecution's fairness. Indeed, one wonders how Thomas concluded Crowson had a "firm belief in the death penalty?"[404] The answer: that precise phrase, without explanation or justification, appeared twice in the state's brief for the case.[405]

Miller-El's case demonstrates the depth of Thomas, Scalia, and Rehnquist's deference to the prosecution. Even under Thomas' highly favorable accounting, race accounted for 74% of the state's questioning pattern in *voir dire*. But the prosecution said race did not matter – so race did not matter. But this deference has the effect of nullifying the rights of the defendant.

Overall the racial exclusion cases demonstrate the conservatives' tendency to redefine the issue – first by questioning that exclusion is wrong, then by questioning that it happens, then by questioning that it matters. Even as Miller-El successfully appealed the prosecution's racial blueprint for his case, his experience only serves to dramatize the absurdly high bar one must clear to demonstrate discrimination in jury selection. Miller-El had not only stark numbers on his side but a clear and unmistakable pattern of differential treatment infecting all phases of the jury selection process and a documented history of racist jury selection. In Rehnquist, Scalia, and Thomas's view, the resulting right, in effect, is not to a jury of one's peers, but to a jury selected by anything short of boastfully racist procedures.

Conclusion

> Jury service "is not a pleasant experience in many jurisdictions" as it "tends to be time consuming and often seemingly useless from the point of view of the prospective juror" – Justice Rehnquist [406]

With the participation of the Court's most conservative members, the right to a jury determination of a capital defendant's fate has expanded. The era of judges making factual determinations then determining whether to apply a death sentence (for example in Arizona) or judges having the power to overrule a jury's life sentence to impose death (for example in Florida) are over.

The expanded right to access a jury and have it hold determinative power over a defendant's life has not, however, been accompanied by commensurate attention to the instructions that guide those jurors through the applicable law toward their verdict. Nor have adequate procedures been designed to produce a truly representative jury panel.

In brief, the right to a jury has been enhanced without concern for the government's obligations necessary to animate that right. This contradiction has clear consequences. A capital defendant puts his life in the hands of a group we have strong reason to suspect will have difficulty understanding their instructions, difficulty defining and applying mitigating evidence, and uncertainty regarding the true meaning of the sentences available to them. Moreover, that group was assembled systematically to be unrepresentative of community mores.

In the cases highlighted here, dealing with mitigation instructions, the definition of sentences, belief exclusion, and trait exclusion, Rehnquist, Scalia, and Thomas have led the Court toward a laissez faire position on the jury system. They assert there is no problem.

They offer unfalsifiable and infallible evidence that the jury functioned properly. If a problem arises, they assert it has no consequence. If it has a consequence, they assert it was permissible because the problem could have happened by chance, or was inevitable, or affected only some jurors, or served their newly discovered state's right to an impartial trial.

Even as they strongly advance their arguments, their standards for defining an acceptable jury system are slippery. This is perhaps best embodied by a comparison of the logic raised in response to the use of peremptory challenges. When the state used peremptory challenges to eliminate African Americans from the jury, Scalia declared the right to unfettered use of peremptory challenges must never be thwarted because the Constitution's guarantee of an impartial jury "*compels* peremptory challenges."[407] Scalia added that peremptory challenges are a "permanent and universal feature of our jury-trial system"[408] which serves to ensure "the jury will be the fairest possible."[409] Similarly, Rehnquist noted "the historic scope of the peremptory challenge, which has been described as 'a necessary part of trial by jury.'"[410]

When a defendant lost a peremptory challenge to a judge's failure to remove what Rehnquist called "an incompetent juror" the historic, permanent and universal, compelled nature of peremptory challenges took on a different hue.[411] The defense's loss of a peremptory was in Rehnquist's words (joined by Scalia): not a "constitutional problem" because "we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury" as "peremptory challenges are not of constitutional dimension."[412]

Whether in response to peremptory challenges, or the many other issues raised here, the conservatives on the Court come perilously close to defining a "fair jury" as falling within the parameters of whatever happened to occur in a particular case. Thus, under Rehnquist, Scalia, and Thomas' views, the capital defendant's right to access a jury expands while his right to access an impartial jury contracts.

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[1] Buchanan v. Angelone, 522 U.S. 269, 283 (1998) (Breyer, J., dissenting).
[2] Apprendi v. New Jersey, 530 U.S. 466 (2000).
[3] Ring v. Arizona, 536 U.S. 584 (2002).
[4] *See, e.g.*, Richard L. Wiener et al., *Guided Jury Discretion in Capital Murder Cases: The Role of Declarative and Procedural Knowledge*, 10 Psychol. Pub. Pol'y & L. 516, 571-72 (2004) [hereinafter Wiener et al., *Guided Jury*] (finding that the complexity of jury instructions makes it difficult for jurors to understand those instructions, and can sometimes lead juries to impose harsher sentences than warranted).
[5] In re Winship, 397 U.S. 358 (1970).
[6] *Id.* at 364.
[7] Even the foundational question regarding how many members are required to form a jury has been subject to stark revision. After what the Court found to be several hundred years of established practice requiring a twelve person jury, the Court moved to explicitly sanction smaller panels. The minimum jury panel in criminal cases is six members. In capital cases, however, every state uses a twelve-member jury. Ballew v. Georgia, 435 U.S. 223 (1978).
[8] McMillan v. Pennsylvania, 477 U.S. 79 (1986).
[9] *Id.* at 80-84 (agreeing with the Supreme Court of Pennsylvania that Pennsylvania's Mandatory Minimum Sentencing Act did not "create a new set of upgraded felonies of which visible possession is an 'element'").
[10] *Id.* at 93.
[11] *Id.*
[12] Walton v. Arizona, 497 U.S. 639 (1990).
[13] *Id.* at 649 (asserting that aggravating circumstances do not rise to the level of elements of a crime, and thus do not require a jury finding).
[14] Jones v. United States, 526 U.S. 227 (1999).
[15] *Id.* at 231.
[16] *Id.* at 236 (remarking that neither the Court nor the Government could think of a good reason for Congress to treat robbery and aggravated robbery in the same manner for sentencing purposes).
[17] *Id.* at 251-52.
[18] Apprendi v. New Jersey, 530 U.S. 466 (2000).
[19] *Id.* at 476.
[20] *Id.* at 477 (internal quotations omitted).
[21] *Id.* at 478.
[22] *Id.* at 485.
[23] *Id.* at 490. The "other than the fact of a prior conviction" language in the *Apprendi* holding evolved out of another case, in which the Court was not troubled by a judicial finding that increased a sentence beyond the statutory maximum when the increase was based on prior felony convictions that (a) the defendant admitted, and (b) were themselves subject to the protections of due process. Almendarez-Torres v. United States, 523 U.S. 224 (1998).
[24] *Id.* (quoting Jones v. United States, 526 U.S. 227, 252-53 (1999)).
[25] *Id.* at 497 (quoting Almendarez-Torres, 523 U.S. 224, 257 n.2 (Scalia, J., dissenting)).
[26] Ring v. Arizona, 536 U.S. 584 (2002).
[27] *Id.* at 588-89 (implying that the relevant portion of the holding in *Walton* was incompatible with a defendant's Sixth Amendment rights).
[28] *Id.* at 609.
[29] *Id.* at 609 (overruling *Walton* in part).
[30] Blakeley v. Washington, 542 U.S. 296 (2004).
[31] *Id.* at 298.
[32] *Id.* at 303-304 (emphasis in original).
[33] United States v. Booker, 543 U.S. 220 (2005).
[34] *Id.* at 244 (requiring a defendant admission or proof beyond a reasonable doubt in order to impose a sentence above the "maximum authorized by the facts").
[35] *See, e.g.*, Wiener et al., *Guided Jury*, *supra* note 4, at 571-72 (finding that complex jury instructions are difficult for jurors to understand).
[36] *See* Weeks v. Angelone, 528 U.S. 225, 234 (2000).
[37] Francis v. Franklin, 471 U.S. 307, 324 (1985).
[38] *See generally* Judith L. Ritter, *Your Lips are Moving . . . but the Words Aren't Clear: Dissection the Presumption that Jurors Understand Instructions*, 60 Mo. L. Rev. 163 (2004) (providing an interesting discussion regarding the linguistic distinction between *assumption* and *presumption*, terms that are often used interchangeably in court opinions and the literature).

[39] *Weeks*, 528 U.S. at 226 (2000).
[40] Richardson v. Marsh, 481 U.S. 200, 211 (1987).
[41] Numerous studies have shown that jurors are not able to understand the applicable law. *See, e.g.*, R.W. Buchanan et al., *Legal Communication: An Investigation of Juror Comprehension of Pattern Instructions*, Comm. Q., Fall 1978, at 31; Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979); Sally Costanzo & Mark Costanzo, *Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 Law & Hum. Behav. 151 (1994); Shari Seidman Diamond & Judith N. Lev, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 Judicature 224 (1996); Amiram Elwork et al., *Toward Understandable Jury Instructions*, 65 Judicature 432 (1982); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. Rev. 77 (1988); David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 Judicature 478 (1976); Richard L. Wiener et al., *The Role of Declarative and Procedural Knowledge in Capital Murder Sentencing*, J. Applied Soc. Psychol. 124 (1998).
[42] James S. Liebman et al., A Broken System: Error Rates in Capital Cases, 1973-1995 n.42 (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/ (follow "Full Report and Endnotes" hyperlink)
(noting that reversal occurred "only if [the jury instructions] probably affected the outcome of the trial").
[43] Gregg v. Georgia, 428 U.S. 153 (1976).
[44] Furman v. Georgia, 408 U.S. 238 (1972).
[45] *Gregg*, 428 U.S. at 189.
[46] Jurek v. Texas, 428 U.S. 262 (1976); Lockett v. Ohio, 438 U.S. 586 (1978).
[47] Mills v. Maryland, 486 U.S. 367 (1988) (noting that petitioner, who was the defendant below, suggested his "relative youth, his mental infirmity, his lack of future dangerousness, and the State's failure to make any meaningful attempt to rehabilitate [him] while he was incarcerated" as potential mitigating factors).
[48] *See, e.g.*, Wiener et al., *Guided Jury*, *supra* note 4.
[49] *Id.*, at 570.
[50] *See* James Frank & Brandon K. Applegate, *Assessing Juror Understanding of Capital Sentencing Instructions*, 44 Crime & Delinq. 412 (1998).
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *See* Wiener et al., *Comprehensibility of Approved Jury Instructions in Capital Murder Cases*, 80 J. Applied Psychol. 455 (1995) [hereinafter Wiener et al., *Comprehensibility*].
[56] *Id.*
[57] *See* Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 Law & Hum. Behav. 411 (1994).
[58] *Id.* The potential for twisting mitigating evidence into aggravating evidence is not merely theoretical. As O'Connor noted in *Roper v. Simmons*, "the prosecutor's apparent attempt to use respondent's youth as an aggravating circumstance in this case is troubling." Roper v. Simmons, 543 U.S. 551, 603 (2005) (O'Connor, J., dissenting).
[59] Craig Haney et al., *Deciding to take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 J. Soc. Issues 149 (1994).
[60] *Id.* at 167. In *Roper*, the Court acknowledged the tenuous hold mitigating evidence (for example, immaturity) maintains on the jury's attention:

> An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." Scalia disapprovingly extended the Court's conclusion; that is, if juries are unable to process mitigating evidence regarding immaturity why would they be thought capable of applying any other mitigating information. Scalia wrote, "[n]or does the Court suggest a stopping point for its reasoning. If juries cannot make appropriate determinations in cases involving murderers under 18, in what other kinds of cases will the Court find jurors deficient? We have already held that no jury may consider whether a mentally deficient defendant can receive the death penalty, irrespective of his crime. Why not take other mitigating factors, such as considerations of childhood abuse or poverty, away from juries as well? Surely jurors 'overpower[ed]' by 'the brutality or cold-blooded nature' of a crime could not adequately weigh these mitigating factors either.

Roper, 543 U.S. at 573 (Scalia, J., dissenting).
[61] Bryan C. Edelman, Misguided Discretion: A Dual Process Model of Juror and Jury Sentencing in Capital Trials (2004) (Ph.D. dissertation, University of Nevada).
[62] Wiener et al., *Guided Jury*, *supra* note 4, at 531.
[63] Michael Burkhead & James Luginbuhl, *Sources of Bias and Arbitrariness in the Capital Trial*, 50 J. Soc. Issues 103 (1994).
[64] Wiener et al., *Guided Jury*, *supra* note 4, at 572.
[65] Franklin v. Lynaugh, 487 U.S. 164 (1988) (finding that it was not error for the trial court to deny defendant's request for jury instruction on mitigation where defendant was not prevented from presenting evidence indicating mitigation during the course of trial).
[66] Buchanan v. Angelone, 522 U.S. 269 (1998) (holding that there is no Eighth Amendment requirement for either general jury instructions on mitigation or specific jury instructions about statute-based mitigation factors).
[67] Boyde v. California, 494 U.S. 370 (1990) (upholding Supreme Court of California, which found that a general jury instruction on mitigation allowing the jury to consider "all of the evidence" permitted the jury to take the defendant's character and background into account and thus needed no further clarification).
[68] Weeks v. Angelone, 528 U.S. 225 (2000) (noting that "a slight *possibility* that the jury considered itself precluded from considering mitigating evidence . . . is insufficient to prove a constitutional violation") (emphasis in original).
[69] Francis v. Franklin, 471 U.S. 307 (1985).

[70] *Id.* at 331-42 (Rehnquist, J., dissenting).
[71] *Id.* at 309.
[72] *Id.* at 310.
[73] *Id.* After being unable to get inside the dentist's car, Franklin, still holding his hostage, demanded car keys from scattered passers-by. *Id.* One person said he did not have a car, and another refused to part with his keys. *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* Franklin continued unsuccessfully to seek a car before giving up, and releasing the hostage. *Id.*
[77] *Id.* at 310-11.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 309. The jury was instructed that "[t]he acts of a person of sound mind and discretion are presumed to be a product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." *Id.*

[81] *Id.* at 312.
[82] *Id.*
[83] *Id.*
[84] *Id.* at 319.
[85] *Id.* at 316.
[86] *Id.* at 318.
[87] *Id.* at 320.
[88] *Id.* at 322.
[89] *Id.* at 322.
[90] *Id.* at 331 (Rehnquist, C.J., dissenting) (emphasis added).
[91] *Id.* at 342.
[92] *Id.* at 340.
[93] *Id.* at 332.
[94] *Id.* at 339.
[95] 442 U.S. 62, 73 (1979).
[96] *Id.* at 324 n.9.
[97] *Id.* at 341 (emphasis added).
[98] *Id.* at 342 (emphasis in original).
[99] *Id.* at 324 n.8.
[100] Stromberg v. California 283 U.S. 359 (1931).
[101] 487 U.S. 164 (1988).
[102] *Id.* at 163 n.3.
[103] *Id.* at 170. The defense asked for modifications to the instruction to explain the use of mitigation. *Id.* at 170 & n.4. Specifically the defense asked that the jury be told (1) to apply any mitigating evidence found when deciding upon the aggravating factors, and that (2) even if they answered the aggravating factors affirmatively they could still use mitigation findings to support a vote for a life term. *Id.* The judge declined the defense's request. *Id.*
[104] *Id.* at 170-71.
[105] *Id.*
[106] *Id.* at 170.
[107] *Id.* at 177.
[108] *Id.* at 178-79.
[109] *Id.* at 183.
[110] *See supra* note 102 and accompanying text.
[111] Franklin v. Lynaugh, 487 U.S. 164, 191 (1988) (Stevens, J., dissenting).
[112] *Id.* at 192-93.
[113] Franklin v. Lynaugh, 487 U.S. 164, 184-85 (1988) (O'Connor, J., concurring) ("To the extent that the mitigating evidence introduced by petitioner was relevant to one of the special verdict questions, the jury was free to give effect to that evidence.").
[114] Buchanan v. Angelone, 522 U.S. 269 (1998).
[115] *Id.* at 273 n.1.
[116] *Id.* at 272.
[117] *Id.* Specifically, the defense sought to provide jurors with a list of mitigating factors such as Buchanan's age, impaired capacity, and lack of previous violent offenses. *Id.*
[118] *Id.* at 273.
[119] *Id.* at 758-59.
[120] *Id.* at 276.
[121] *Id.* at 277.
[122] *Id.* at 278.
[123] *See supra* notes 101-108 and accompanying text.
[124] Buchanan v. Angelone, 522 U.S. 269, 279 (1998) (Scalia, J, concurring).
[125] *Id.* at 279
[126] Buchanan v. Angelone, 522 U.S. 269, 282 (1998) (Breyer, J., dissenting) (asserting that the majority erred in isolating a specific portion of the jury instructions and should have considered the instructions in the context of all the instructions about sentencing.).
[127] *Id.* at 283.
[128] *Id.* at 283.
[129] *Id.* at 278.
[130] Breyer wrote in dissent that the third paragraph of juror instructions, what he labeled the "key paragraph," provided

> if the jury finds that the Commonwealth has proved death eligibility, the jury "may fix the punishment … at death." It immediately adds in the same sentence "or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment . . . at life imprisonment." It is the stringing together of these two phrases, along with the use of the connective "or," that leads to a potential understanding of the paragraph as saying, "If you find the defendant eligible for death, you may impose the death penalty, but if you find (on the basis of 'all the evidence') that death penalty is not 'justified,' which is to say that the defendant is not eligible for the death penalty, then you must impose life imprisonment." Without any further explanation, the jury might well believe that whether death is, or is not, "justified" turns on the presence or absence of...aggravating circumstances of the crime– not upon the defendant's mitigating evidence about his upbringing and other factors.

Id. at 282. Rehnquist replied,

> The dissent suggests that the disjunctive "or" clauses in the third paragraph may lead the jury to think that it can only impose life imprisonment *if it does not find the aggravator proved*. But this interpretation is at odds with the ordinary meaning of the instruction's language and structure. . . . The third paragraph states that "if" the aggravator is proved, the jury may choose between death and life. The fourth paragraph states that "if" the aggravator is not proved, the jury must impose life. The "if" clauses clearly condition the choices that follow. And since the fourth paragraph tells the jury what to do if the aggravator is *not* proved, the third paragraph clearly involves only the jury's task if the aggravator *is* proved.

Id. at 277 n.4 (emphasis in original).
[131] Boyde v. California, 494 U.S. 370 (1990).
[132] *Id.* at 373 & n.1.
[133] *Id.* at 374.
[134] *Id.* at 374.
[135] *Id.* at 372-77.
[136] *Id.*
[137] *Id.* at 372.
[138] *Id.* at 380.
[139] *Id.* at 383 ("Even where the language of the instruction is less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation."). *Id.*
[140] *Id.* at 381-83 (relying on a reasonable juror standard and asserting that a reasonable juror could have construed the language of the instruction in the manner that permitted consideration of mitigating factors).
[141] *Id.* at 380.
[142] *Id.* at 380.
[143] *Id.* at 380.
[144] Francis v. Franklin, 471 U.S. 307, 315 (1985) (emphasis added).
[145] Boyde v. California, 494 U.S. 370, 380 (1990) (emphasis added).
[146] *Id.* at 406 (Marshall, J., dissenting).
[147] *Id.*
[148] *Id.* at 380-81 (relying only upon the reasonable juror standard).
[149] But, as was made clear in his interpretation of juror tears in *Weeks v. Angelone*, divining the thoughts of jurors in their secret deliberations is something of a specialty for Rehnquist and his fellow conservatives. *Id.* at 380.
[150] *Id.* at 380-81.

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id.
[151] *See* Wiener et al., *Guided Jury*, *supra* note 4.
[152] Boyde v. California, 494 U.S. 370, 395 (1990) (Marshall, J., dissenting).
[153] *Id.* at 399 (emphasis in original).
[154] *Id.* at 398.
[155] *Id.* at 399.
[156] *Id.* at 406.
[157] *Id.* at 380 (stressing that the challenged instruction was not, itself, erroneous).
[158] *Id.* at 389 (emphasis in original).
[159] Boyde v. California, 494 U.S. 370, 380 (1990).
[160] *Id.* at 374 n.2 (quoting 1 California Jury Instructions, Criminal 8.85(k) (5th ed. 1988)).
[161] Weeks v. Angelone, 528 U.S. 225 (2000).
[162] *Id.* at 228-29 (noting that the jury twice asked the trial court for clarification of the jury instructions).
[163] *Id.* at 227-28.
[164] *Id.*
[165] *Id.*
[166] *Id.* at 229.
[167] *Id.* at 228-29 (emphasis in original). Earlier in their deliberations the jury asked whether a sentence of life imprisonment included the possibility of parole. *Id.* The judge told them "not to concern yourselves" with that matter. *Id.* While this issue was not the focus of the Court's attention, the case is a further example of juror confusion over the meaning of life sentences. The fact that the judge had already refused to answer a jury question, significantly undercuts an argument Rehnquist advanced that the jury would surely have continued asking and repeating questions if it remained confused.
[168] *Id.*
[169] *Id.* at 227.
[170] Weeks v. Angelone, 528 U.S. 225, 236 (2000).
[171] *Id.* at 234.
[172] *Id.* at 234-35. The Court noted that

> [m]ore than two hours passed between the judge directing the jury's attention to the appropriate paragraph of the instruction that answered its question and the jury returning its verdict. We cannot, of course, know for certain what transpired during those two hours. But the most likely explanation is that the jury was doing exactly what it was instructed to do.

Id. at 235. However, it is also possible that the jury spent the two hours arguing over their original question, resolved the matter incorrectly, and swiftly proceeded to agree on a death sentence that they erroneously believed they were obligated to impose.

[173] 471 U.S. 307, 312 (1985) (majority opinion). Justice Rehnquist accused the Court of "piling syllogism on syllogism" instead of analyzing the jury instructions as a whole. *Id.* at 332-33 (Rehnquist, J., dissenting).
[174] *Id.* at 234.
[175] *Id.* at 235-36.
[176] Weeks v. Angelone, 528 U.S. 225, 243 (2000) (Stevens, J., dissenting) ("By the Court's logic, a rather exceptionally assertive jury would have to question the judge at least twice and maybe more on precisely the same topic before one could find it no more than 'reasonably likely' that the jury was confused.").
[177] *Id.* at 243.
[178] *Id.*
[179] Even if the jury had asked the same question twice, Rehnquist would have presumably asserted that something in the jury's third reading of the instructions had cleared the matter up for them, since, after all, they did not ask the question yet again, and they continued deliberating for a period of time (either briefly or extensively) which was consistent with juror understanding. Weeks v. Angelone, 528 U.S. 225, 234-35 (2000) (majority opinion).
[180] Weeks v. Angelone, 528 U.S. 225, 248 (2000) (Stevens, J. dissenting).
[181] Weeks v. Angelone, 528 U.S. 225, 236 n.5 (2000) (majority opinion).
[182] Weeks v. Angelone, 528 U.S. 225, 238 (2000) (Stevens, J., dissenting).
[183] *Id.*
[184] *Id.* at 242.
[185] *Id.* at 244.
[186] *Id.*
[187] *Id.* at 242.
[188] Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 Cornell L. Rev. 627 (2000).
[189] *Id.* at 633-35.
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.* at 638.
[195] *Id.* at 639.
[196] *Id.* at 641-42 (finding that sixty-three percent of those who correctly understood the obligation favored a life sentence for the defendant).
[197] Francis v. Franklin, 471 U.S. 307, 331 (1985) (Rehnquist, C.J., dissenting).
[198] Boyde v. California, 494 U.S. 370, 380 (1990).
[199] Kevin M. O'Neil et al., *Exploring the Effects of Attitudes toward the Death Penalty on Capital Sentencing Verdicts*, 10 Psychol. Pub. Pol'y & L. 443(2004).
[200] Benjamin Steiner et al., *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 L. & Soc'y Rev. 461(1999).
[201] Gregg v. Georgia, 428 U.S. 153, 190 (1976).
[202] California v. Ramos, 463 U.S. 992 (1983).
[203] Simmons v. South Carolina, 512 U.S. 154 (1994).
[204] Shafer v. South Carolina, 532 U.S. 36 (2001).
[205] Kelly v. South Carolina, 534 U.S. 246 (2002).
[206] *See, e.g.*, *supra* note 167 and accompanying text (noting that the trial court in Weeks v. Angelone, 528 U.S. 225 (2000), instructed the jury that it should not concern itself with whether defendant would have the possibility of parole if given a life sentence).
[207] *Simmons*, 512 U.S. at 157.
[208] *Id.* at 160-61 (noting that the jury's sole question during two hours of deliberation was about petitioner's eligibility for parole).
[209] *Id.* at 156-57.
[210] *Id.* at 161.
[211] *Id.* at 163.
[212] *Id.* at 159.
[213] *Id.*
[214] Simmons v. South Carolina, 512 U.S. 154, 160 (1994)
[215] *Id.* at 160.
[216] As Justice Blackmun stated, "[i]t almost goes without saying that, if the jury in this case understood that the 'plain meaning' of 'life imprisonment' was life without parole in South Carolina, there would be no reason for the jury to inquire about petitioner's parole eligibility." *Id.* at 170 n.10.
[217] *Id.* at 165-66.
[218] *Id.* at 170.
[219] *Id.* at 160. Interestingly, the judge's instructions were clear on the definition of the death sentence: "by the death penalty, we mean death by

electrocution." *Id.* at 157 n.1.
[220] *Simmons*, 512 U.S. at 181 (Scalia, J., dissenting).
[221] *Id.* at 184.
[222] *Id.* at 182.
[223] *Id.* at 183 (emphasis added).
[224] There is a certain logical similarity between this point, and one Scalia advances in *Powers v. Ohio*, 499 U.S. 400, 417-23 (1991) that the exclusion of African Americans from juries was fair because whites or any other group could theoretically be excluded. In essence, any limitation that applies in both directions must be fair, even if one direction is frequently pursued and the other never sought.
[225] Simmons v. South Carolina, 512 U.S. 154, 185(1994) (Scalia, J., dissenting). How a death sentence could be unquestionably constitutional when the Constitution itself vaguely bars "cruel and unusual punishment" is difficult to fathom. Even if Scalia objects to relying upon "current and temporary" national consensus to define cruel and unusual punishment, his position requires him to assert that regardless of future conditions, opinions, mores, or practices death sentences can never become cruel and unusual.
[226] Shafer v. South Carolina, 532 U.S. 36 (2001).
[227] *Id.* at 44.
[228] *Id.* at 40.
[229] *Id.* at 53.
[230] *Id.* at 56 (Thomas, J, dissenting).
[231] *Shafer,* 532 U.S. at 57 (Thomas, J, dissenting).
[232] *Id.* at 57.
[233] Kelly v. South Carolina, 534 U.S. 246 (2002).
[234] *Id.* at 250.
[235] *Id.* at 249.
[236] *Id.* at 256.
[237] *Id.* at 250.
[238] *Kelly,* 534 U.S. at 253.
[239] *Id.* at 260 (Rehnquist, C.J., dissenting).
[240] *Id.* at 262.
[241] California v. Ramos*,* 463 U.S. 992 (1983).
[242] *Id.* at 1012.
[243] *Id.* at 1009.
[244] *Id.* at 1004 n.19.
[245] *Id.*
[246] *Id.* at 1016 (Marshall, J., dissenting).
[247] *Id.* at 1030 (Stevens, J., dissenting).
[248] Lowenfield v. Phelps, 484 U.S. 231 (1988).
[249] *Id.* at 249.
[250] *Id.*
[251] *Id.* at 235.
[252] *Id.* at 240-41.
[253] Buchanan v. Angelone, 522 U.S. 269, 277 n.4 (1998).
[254] *See* Wiener et al., *Guided Jury*, *supra* note 4.
[255] Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring).
[256] *Id.* at 173.
[257] Weeks v. Angelone, 528 U.S. 225, 242 (2000) (Stevens, J., dissenting).
[258] *Id.* at 242 (Stevens, J., dissenting).
[259] *Buchanan*, 522 U.S. at 283 (Breyer, J., dissenting).
[260] *See* Frank & Applegate, *supra* note 50.
[261] *Id.*
[262] *See, e.g.*, Wiener et al., *Comprehensibility*, *supra* note 55.
[263] *See* Wiener et al., *Guided Jury*, *supra* note 4.
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] Adams v. Texas*,* 448 U.S. 38, 45 (1980).
[268] Witherspoon v. Illinois, 391 U.S. 510, 521 (1968).
[269] *See* Brooke Butler, The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials (2000) (Ph.D. dissertation, Florida International University); James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 L. & HUM. BEHAV. 263, 267 (1988) (suggesting that some potential jurors respond more to aggravating circumstances, while others respond more to mitigating circumstances).
[270] Robert Young, *Guilty until Proven Innocent: Conviction Orientation, Racial Attitudes, and Support for Capital Punishment*, 25 DEVIANT BEHAV. 151 (2004).
[271] *Id.*
[272] Claudia Cowan, William Thompson & Phoebe Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 L. & HUM. BEHAV. 53, 59-60 (1984) (noting that homogenous juries, or those juries consisting of individuals with similar views on issues like the death penalty, are less likely to function in the way that courts would like them to).
[273] Michele Cox & Sarah Tanford, *An Alternative Method of Capital Jury Selection*, 13 L. & HUM. BEHAV. 167 (1989); Robert J. Robinson, *What does "Unwilling" to Impose the Death Penalty Mean Anyway?: Another Look at Excludable Jurors*, 14 L. & HUM. BEHAV. 471, 475 (1993) (finding that only 1.1% of jurors in the study absolutely "refused" to consider the death penalty in any case, whereas the remaining 98.9% were willing to consider the death penalty in at least one case).
[274] Mike Allen, Edward Mabry & Drue-Marie McKelton, *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 L. & HUM. BEHAV. 715. 725 (1998) (indicating that "death-qualified *voir dire* practices produce jurors more likely to render guilty verdicts," and thus more likely to impose death).
[275] Joseph Filkins, Christine Smith & R. Scott Tindale, *An Evaluation of the Biasing Effects of Death Qualification: A Meta-Analytic/Computer Simulation Approach*, *in* THEORY AND RESEARCH ON SMALL GROUPS 153 (R. Scott Tindale et al. eds., 1998).
[276] William Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 L. & HUM. BEHAV. 95, 100-102, 106 (1984) (contrasting testimony of white police officer that defendant, who was black, behaved belligerently with the same defendant's testimony the police officer was unnecessarily abusive, and then asking test subjects to consider 16 possible verdicts). Four verdicts were correct, and twelve erroneous, with six of those twelve erroneous acquittals or lenient verdicts, and the other six erroneous convictions or overly harsh convictions. *Id.* at 106.
[277] *Id.* at 106-09.
[278] Ronald Dillehay & Marla Sandys, *Life under Wainwright v. Witt: Juror Dispositions and Death Qualification*, 20 L. & HUM. BEHAV. 147 (1996). Indeed, many jurors found qualified to serve on capital cases are apt to demonstrate not mere acceptance of the death penalty, but enthusiasm. In *Miller-El v. Dretke*, Thomas quoted one juror (Mr. Woods) whose only reservation regarding the death penalty was that it could be "too quick." 545 U.S. 231, 290 (2005) (Thomas, J., dissenting). Instead the juror would "[p]our some honey on them and stake them out over an ant bed." *Id.* As Thomas noted, "[i]t is beyond cavil why the State accepted Woods as a juror: He could impose the punishment sought by the State." *Id.*
[279] Adams v. Texas, 448 U.S. 38 (1980). Adams' case was brought to the nation's attention in the documentary, The Thin Blue Line, which presented significant evidence suggesting Adams was uninvolved in the murder for which he was sentenced to death. THE THIN BLUE LINE (American Playhouse 1988). Adams' conviction was overturned in 1989 and prosecutors did not seek to try him again. *See Ex parte* Adams, 768 S.W.2d 281 (Tex. Crim. App. 1989); Northwestern Law Blum Legal Clinic, Center on Wrongful Convictions, Randall Dale Adams, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/tx-AdamsSummary.html (last visited Mar. 28, 2009) (noting that the Dallas District Attorney "dropped all charges" against Adams shortly after the Court of Criminal Appeals found that Adams was entitled to a new trial).
[280] *Adams*, 488 U.S. at 52.

[281] *Id.* at 45.
[282] *Id.* at 50-1.
[283] *Id.* at 50.
[284] *Id.* at 48.
[285] *Adams*, 488 U.S. at 54 (Rehnquist, J., dissenting).
[286] *Id.* at 55.
[287] Lockhart v. McCree, 476 U.S. 162 (1986).
[288] *Id.* at 173.
[289] *Id.* at 177.
[290] *Id.* at 167.
[291] *Id.* at 168.
[292] *Id.* at 171 (quoting Witherspoon v. Illinois 391 U.S. 510, 517-518 (1968)).
[293] *Lockhart, 476* U.S. at 189 (Marshall, J., dissenting).
[294] *Id.* at 174.
[295] *Id.* at 174.
[296] *Id.* at 178.
[297] *Id.*
[298] *Id.*
[299] *Id.* at 184 (Marshall, J., dissenting).
[300] *Lockhart,* 476 U.S. at 189 (Marshall, J., dissenting).
[301] *Id.* at 206.
[302] Gray v. Mississippi, 481 U.S. 648 (1987).
[303] *Id.* at 651.
[304] *Id.* at 665.
[305] *Id.* at 653.
[306] *Id.* at 654.
[307] *Id.* at 656 n.7.
[308] *Id.* at 663.
[309] *Id.* at 668.
[310] *Gray*, 481 U.S. at 678 (Scalia, J., dissenting) (emphasis in original).
[311] *Id.* at 678.
[312] *Id.*
[313] *Id.*
[314] *Id.*
[315] *Gray*, 481 U.S. at 654. Indeed, the state admitted there was no law supporting the capacity of a judge to grant an additional peremptory challenge. In the few documented occurrences when an additional peremptory challenge was granted, both sides received an equal number of additional challenges. *Id.*
[316] Ross v. Oklahoma, 487 U.S. 81, 83 (1988).
[317] *Id.* at 85.
[318] *Id*.
[319] *Gray,* 481 U.S. at 665.
[320] *Ross,* 487 U.S. at 87.
[321] *Id.* at 88.
[322] *Id.* at 90-91. Further, Rehnquist noted, "Because peremptory challenges are a creature of statute and are not required by the Constitution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. As such, the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides." *Id.* at 89.
[323] *Id.* at 90.
[324] *Id.* at 89.
[325] *Id.* at 90.
[326] *Ross*, 487 U.S. at 85.
[327] *Id.* at 86.
[328] *Ross*, 487 U.S. at 91 (Marshall, J., dissenting).
[329] *Id*. at 92-3.
[330] *Id.* at 94.
[331] Morgan v. Illinois, 504 U.S. 719 (1992).
[332] *Ross,* 487 U.S. at 85.
[333] *Morgan,* 504 U.S. at 729.
[334] *Id.* at 733.
[335] *Id.* at 734.
[336] *Ross,* 487 U.S. at 85.
[337] Morgan v. Illinois, 504 U.S. 719, 739 (1992) (Scalia, J., dissenting).
[338] *Id*. at 751 (emphasis in original).
[339] *Id*. at 741.
[340] *Id*. at 744 (emphasis added).
[341] *Id*. at 745.
[342] *Id*. at 751 ("What constitutes mitigation is not defined and is left up to the judgment of each juror.").
[343] 720 Ill. Comp. Stat. 5/9-1 (1990).
[344] *Morgan*, 504 U.S. at 751 (Scalia, J., dissenting).
[345] *Id*. at 736.
[346] *Id*. at 738.
[347] David C. Baldus, George Woodworth & Charles A. Pulaski, Equal Justice and the Death Penalty: A Legal and Empirical Analysis (Northeastern Univ. Press 1990).
[348] Thomas Keil & Gennaro Vito, *The Effects of the Furman and Gregg Decisions on Black-White Execution Ratios in the South*, 20 J. Crim. Just. 217 (1992).
[349] Michael Radelet, *Executions of Whites for Crimes against Blacks*, 30 Soc. Q. 529 (1989).
[350] Mona Lynch, Defendant/Victim Race, Juror Comprehension, and Capital Sentencing: An Experimental Approach (1997) (Ph.D. dissertation, University of California, Santa Cruz); Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 L. & Hum. Behav. 337 (2000); Edelman, *supra* note 61.
[351] Strauder v. W. Virginia, 100 U.S. 303, 308 (1880).
[352] *Id*. at 309.
[353] *Id*. at 308.
[354] Batson v. Kentucky, 476 U.S. 79 (1986). .
[355] *Id*. at 85-86.
[356] *Id*. at 89.
[357] In a concurring opinion, Marshall argued that prosecutors will almost always be able to advance some kind of explanation for employing peremptory challenges against African Americans, even if the explanation is false. *Id.* at 102-08 (Marshall, J., concurring). "How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, or seemed 'uncommunicative,' or 'never cracked a smile' and, therefore 'did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case.' If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory." *Id*. at 106. Ultimately, Marshall concluded, "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely." *Id*. at 102-103.
[358] *Id*. at 137 (Rehnquist, J., dissenting).
[359] *Id*. at 139.
[360] *Id*. at 138-139. Rehnquist offered a similar defense of efforts to remove women from the jury. In his dissent in *J.E.B. v. Alabama,* Rehnquist reiterated that there is a rational basis for sex based jury exclusion: "I think the State has shown that jury strikes on the basis of gender 'substantially further' the State's legitimate interest in achieving a fair and impartial trial." 511 U.S. 127, 156 (1994).
[361] Holland v. Illinois, 493 U.S. 474 (1990). .
[362] *Id*. at 482 (emphasis in original).
[363] *Id*. at 480.
[364] *Id*. at 484.
[365] Id. at 484.
[366] *Id*. at 478. In his dissent in *J.E.B. v. Alabama*, Scalia added that peremptory challenges were "an essential part of fair jury trial since the dawn of common law." 511 U.S. 127, 163 (1994) (Scalia, J., dissenting). To limit challenges in any way would be "vandalizing our people's traditions." *Id.*
[367] Holland v. Illinois, 493 U.S. 474, 483 (1990) (emphasis added).
[368] Adams v. Texas, 448 U.S. 38, 55 (1980) (Rehnquist, J., dissenting).

[369] *Holland,* 493 U.S. at 486-487.
[370] *Id*. at 479.
[371] *Id*. at 493 (Marshall, J., dissenting).
[372] *Id*. at 506 (Stevens, J., dissenting).
[373] *Id*. at 502 (Marshall, J., dissenting). Scalia is dismissive of Marshall's conclusion: "JUSTICE MARSHALL's dissent rolls out the ultimate weapon, the accusation of insensitivity to racial discrimination - which will lose its intimidating effect if it continues to be fired so randomly." *Id*. at 486.
[374]Powers v. Ohio*,* 499 U.S. 400 (1991). .
[375] *Id*. at 409.
[376] *Id.*
[377] Unlike Rehnquist's conclusion in *Duren* that jury service was "time consuming" and "useless," the majority in *Powers* spoke of it in valued terms. "Discriminatory use of peremptory challenges harms the excluded jurors and the community at large" by depriving them of a "a significant opportunity to participate in civic life." Powers v. Ohio, 499 U.S. 400, 406, 409 (1991). "Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." (*Id*. at 407).
[378] *Id*. at 429 (Scalia, J., dissenting).
[379]*Strauder,* 100 U.S. at 303.
[380] *Id*. at 417 (Scalia, J., dissenting).
[381] Holland v. Illinois, 493 U.S. 474, 486-87 (1990).
[382] *Powers*, 499 U.S. at 424. (Scalia, J., dissenting). In a related point, Rehnquist has advanced the notion that if you subscribe to notions of equality, you must understand the exclusion of any particular group from a jury to be irrelevant. That is, when the Court argues women and men are equal, Rehnquist reasons such equality eliminates any need for their fair representation. "If, then, men and women are essentially fungible for purposes of jury duty, the question arises how underrepresentation of either sex on the jury or the venire infringes on a defendant's right to have his fate decided by an impartial tribunal." Duren v. Missouri, 439 U.S. 357, 371 (1979) (Rehnquist, J., dissenting).
[383] *Id*. at 410.
[384] *Id*. at 424 (Scalia, J., dissenting).
[385] *Id*. at 425.
[386] *Id*. at 425.
[387] *Id*. at 425.
[388] *Id*. at 426 (emphasis in original).
[389] Miller-El v. Cockrell*,* 537 U.S. 322 (2003).
[390] *Id*. at 341.
[391] *Id.* at 332 (noting that African Americans were told the following: "Thomas Joe Miller-El will be taken to Huntsville, Texas. He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death.").
[392] *Id*. at 345.
[393] *Id*. at 335.
[394] Miller-El v. Cockrell*,* 537 U.S. 322, 360 (2003) (Thomas, J., dissenting).
[395] *Id*. at 364.
[396] *Id*. at 365.
[397] *Id*. at 368 n.15.
[398] Beyond the overall pattern discerned, the prosecution's position that race was not a factor in their behavior was undermined by repeated misstatements and misrepresentations. Most blatantly, when asked why the race of potential jurors was noted by prosecutors on their pre-trial records: "The State claimed at oral argument that prosecutors could have been tracking jurors' races to be sure of avoiding a *Batson* violation. *Batson*, of course, was decided the month after Miller-El was tried." Miller-El v. Dretke, 545 U.S. 231, 265 n.38 (2005).
[399] Breyer, in a concurring opinion, agreed that race was the basis for the prosecution's use of peremptory challenges. *Id.* at 267-70 (Breyer, J., concurring) (citing a number of studies and cases that indicate the prevalence of race as a factor in peremptory challenges). Breyer, harkening back to Marshall's concurrence in *Batson*, questioned whether it was possible to achieve a peremptory challenge system free from the infection of race. *Id.* at 272. Breyer noted that despite the *Batson* ruling, there was no shortage of social science evidence that race continues to be a potent factor in jury selection, indeed "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before." *Id.* at 270. Numerous studies have shown prosecutors to be twice as likely to strike African Americans as whites, and defense attorneys twice as likely to strike whites as African Americans. *Id.* at 268-69. Indeed, Breyer found several popular guides to jury selection used by attorneys which highlighted race as a factor in predicting a juror's value. *Id.* at 269-72. Breyer concluded, "[i]f used to express stereotypical judgments about race, gender, religion, or national origin, peremptory challenges betray the jury's democratic origins and undermine its representative function" thus "I believe it necessary to reconsider *Batson*'s test and the peremptory challenge system as a whole." *Id.* at 272-73.
[400] As Marshall warned in his Batson concurrence, deference to the post hoc explanations (e.g., "he never cracked a smile") of prosecutors would produce a litany of intangible distinctions which by their very nature could never be disproved. Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).
[401] *Miller-El v. Dretke,* 545 U.S. 231, 293 (2005) (Thomas, J., dissenting).
[402] *Id.* at 262 n.35 (majority opinion) (noting Crowson's unwillingness to impose the death penalty "if there was a chance at rehabilitation).
[403] *Id*. at 293 (Thomas, J., dissenting).
[404] Brief of Respondent at 20 n.11, 24 n.15, Miller-El v. Dretke, 545 U.S. 231 (2005) (No. 03-9659), 2004 WL 2446199.
[405] Duren v. Missouri*,* 439 U.S. 357, 376 (1979) (Rehnquist, J., dissenting).
[406] Holland v. Illinois, 493 U.S. 474, 482 (emphasis added).
[407] Powers v. Ohio, 499 U.S. 400, 425 (Scalia, J., dissenting).
[408] *Id.* at 425 (Scalia, J., dissenting).
[409] *Batson,* 476 U.S. at 137 (Rehnquist, J., dissenting).
[410] Ross v. Oklahoma, 487 U.S. 81, 89 (1988).
[411] *Id*. at 88.

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