CHAPTER 1

CAPITAL CASES AND FEDERAL CONSTITUTIONAL ISSUES
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[1.1.] History, Numbers and Demographics

The imposition of capital punishment in the United States dates back to its colonial beginnings when the laws of each colony were strongly influenced by the Puritan religious beliefs of the day. The earliest confirmed death sentence, in fact, was carried out in colonial Virginia in 1608, and there would be a total of 162 executions before the 17th century came to a close. The 18th century saw a sharp increase in the use of capital punishment, and, while the abolition movement began in earnest in the nineteenth century, the number of executions in America continued to rise. In the nineteenth century, for example, there were 5374 executions carried out under state and local authority, compared with only 1553 in the previous two centuries combined. The twentieth century, however, saw the trend reverse. While the number of executions reached its peak during the 1930s with 1567 executions, capital punishment rates began a rather rapid decline thereafter. In the 1950s, 717 people were executed and the number fell to 191 in the 1960s.¹

Although states reinstituted capital punishment following the decision in *Furman v. Georgia* and the cases that followed it, only 120 executions were carried out between 1976 and 1989. The number of executions increased significantly during the last decade of the twentieth century, with 478 executions in the 1990s, almost one hundred of those occurring in 1998. During that decade, the number of states conducting executions also increased from 13 in the 1980s to 29 in the 1990s.

All told, since 1976, 1159 persons have been executed nationwide, 11 of whom were women. The South is responsible for 956 executions, with Texas and Virginia accounting for 538 of that number. Below is a graph indicating the number of executions per year between 1976, the year that executions resumed following *Furman v. Georgia* and 2006. While the number of executions has continued to decline since 1999 with the number of executions in 2007 at 42 and in 2008 at 37, 2009 may see an increase in the number of executions. In the first four months of 2009, 20 people have been executed with 16 executions currently pending before year’s end.

As of January 1, 2009, 35 states, the federal government, and the U.S. Military held more than 3300 inmates on their respective death rows. Approximately 50 of the inmates presently on death row are female, constituting

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2 408 U.S. 238 (1972).
4 Id.
5 Id.
6 Id.
7 Id.
8 408 U.S. 238 (1972).
less than two percent of the total death row population.\textsuperscript{11} Texas, California, Florida, Pennsylvania and Alabama account for more than half of those on death row.\textsuperscript{12} The race of those presently on death row is 45% white, 41.70% black, and 11% Latino.\textsuperscript{13}

[1.2.] Trends

Some states have begun to reexamine their capital procedure out of growing concerns about the fallibility of death penalty proceedings. In more than two-thirds of the states with capital punishment, defendants sentenced to death have been exonerated of their crimes.\textsuperscript{14} Concerns over executing the innocent have led to moratoria in some states and abolition of the death penalty in others. These concerns have also prompted legislative action aimed at protecting the innocent.

A second trend in death penalty litigation is the issue of the application of international law and the relevance of international opinion. International courts of justice have become more regular venues for inmates, and nations, challenging the United States’ death penalty statutes.

[1.3.] Moratoria

Some states, either through legislation or executive action, have imposed moratoria to allow studies of various aspects of their capital punishment systems, including accuracy of factfinding, sufficiency of representation and support services, and cruelty of execution methods. Notably, the American Bar Association called for a moratorium on executions in 1997 calling on jurisdictions to implement policies and procedures that are consistent with ensuring that death penalty cases are administered fairly and impartially, in accordance with due process of law, and minimizing the risk that innocent persons may be executed.\textsuperscript{15}

The ABA Death Penalty Moratorium Implementation Project has urged the federal and state governments to stop executions “in order to take a hard look at the growing body of evidence showing that race, geography, wealth, and even personal politics can influence every stage of a capital case – from arrest through sentencing and execution.”\textsuperscript{16} To further its work, the Moratorium Implementation

\begin{itemize}
\item \textsuperscript{11} Women and the Death Penalty (2009), http://deathpenaltyinfo.org/women-and-death-penalty.
\item \textsuperscript{12} Id.
\item \textsuperscript{14} Innocence and the Death Penalty (2009), http://deathpenaltyinfo.org/innocence-and-death-penalty#inn-st.
\item \textsuperscript{15} Coyne & Entzeroth, Report Regarding Implementation of the American Bar Association’s Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions, 4 GEO. J. ON FIGHTING POVERTY 3, 49 (1996).
\item \textsuperscript{16} Death Penalty Moratorium Implementation Project, http://www.abanet.org/moratorium/why.html.
\end{itemize}
Project has conducted a series of comprehensive assessments of the operation of capital punishment laws and procedures in eight U.S. jurisdictions, including Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee. 17

[1.4.] Exonerations and Increasing Accuracy

The present decrease in death row population is attributable not only to executions but to exonerations as well. According to the Death Penalty Information Center, 130 persons have been exonerated in 26 states.18 The number of exonerations per year between 1973 and 1999 averaged slightly over three. For the last nine years, the average number of exonerations per year has increased, averaging slightly more than five per year.19

In 2004, Congress passed the Justice For All Act of 2004, Title IV of which is known as the Innocence Protection Act, largely in reaction to the increase in the number of exonerations.20 The Act contains three subtitles: “Exonerating the Innocence through DNA Testing,” “Improving the Quality of Representation in State Capital Cases,” and “Compensation for the Wrongfully Convicted.”21 The first subtitle sets out the procedure for federal prisoners wishing to secure DNA testing to assert their innocence, but many states have passed similar legislation. The second subtitle describes and defines an “effective capital punishment system.”22 Among other things, an effective system is defined to include an established list of qualifications for defense attorneys, the maintenance of a roster of qualified defense attorneys, the appointment of two attorneys in capital cases, the training and monitoring of capital defense attorneys, and funding for competent legal representation and experts.23 The subtitle also provides funds to states upon grant application to design and implement training programs for prosecutors.24

The third subtitle provides a mechanism to compensate the wrongfully convicted upon proof that the conviction has been reversed or set aside on the ground that the defendant “is not guilty of the offense of which he was convicted.”25 In 2009, the U.S. House of Representatives is considering a bill that

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19 Id.
21 Id.
22 Id.
23 Id.
24 Id.
would establish a fund to pay for services such as housing, medical care, and vocational counseling for the exonerated.26

[1.5.] Abolition

In the last two years, three states have abandoned the death penalty. In 2004, the New York Court of Appeals declared aspects of the New York death penalty unconstitutional.27 This led to a comprehensive review of the New York death penalty procedure and ultimately resulted in a legislative decision against reinstating the death penalty in New York.28 In 2007, New Jersey became the first state in over 40 years to legislatively abolish the death penalty.29 On March 18, 2009, New Mexico followed New Jersey’s lead when its governor signed a bill repealing the death penalty in New Mexico. Governor Bill Richardson based his decision on a lack of “confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime. If the state is going to undertake this awesome responsibility, the system to impose this ultimate penalty must be perfect and can never be wrong.”30

[1.6.] International Law and Opinion

The application of international law and the relevance of international opinion is an issue of emerging interest in death penalty litigation. International tribunals have become more frequent venues for foreign national defendants sentenced to death in the United States. These courts often issue orders relevant to the procedure in the underlying capital case.

Recently, for example, 50 Mexican nationals filed suit in the International Court of Justice challenging the failure to afford them their rights under the Vienna Convention on Consular Relations.31 The International Court ruled in their favor and ordered the United States courts to review the cases. The involved Texas courts refused, but the U.S. Supreme Court granted certiorari. Before the case was decided, however, President George W. Bush ordered the lower courts to provide review. Ultimately, the U.S. Supreme Court dismissed the writ of certiorari and the Texas courts continued to refuse to review the cases. Certiorari was again requested and granted to decide whether the President acted within his authority when he ordered the lower courts to comply with the treaty obligations of the United States. Specifically, the U.S. Supreme

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Court undertook to decide whether a “state is bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the . . . judgment in the cases?” Ultimately, the U.S. Supreme Court held that neither the international court’s decision nor the President’s memorandum “constitutes directly enforceable federal law” sufficient to preempt state procedural limitations on successive habeas petitions. The President is not authorized to order states to bypass state procedural rules to comply with a ruling of the International Court of Justice.

[1.7.] Eighth Amendment Jurisprudence

U.S. Const. Amend. VIII
“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”

Many historians tell the story of the U.S. Supreme Court and capital punishment by beginning in June 1972, with the case of Furman v. Georgia. Perhaps that is because, until then, most opposition to capital punishment was case-specific, attacking the procedures used in individual cases, rather than alleging that capital punishment itself violated the Constitution. In the mid 1960s, opponents to capital punishment began to challenge the constitutionality of the death penalty in an organized fashion. Eventually, the attack resulted in a suspension of executions, and after Furman, “the entire nation experienced for the first time virtually complete abolition of the death penalty.”

[1.8.] Arbitrariness in Imposition

The nine separate opinions that make up the Furman decision were prompted, among other things, by a recognition that capital punishment was being applied arbitrarily, thus violating the Eighth Amendment of the United States Constitution. A year prior to Furman, the U.S. Supreme Court decided McGautha v. California. McGautha involved a systemic challenge to the death penalty based on the absence of standards to guide a jury’s life and death decision. The U.S. Supreme Court found that the absence of standards did not violate due process. The following year, in Furman, a majority of the U.S. Supreme Court found an Eighth Amendment violation, based primarily on the arbitrariness and unfairness in the administration of capital punishment.

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32 Id.
33 Id. at 1353.
34 408 U.S. 238 (1972).
35 THE DEATH PENALTY IN AMERICA, CURRENT CONTROVERSIES (Hugo Adam Bedau, ed. 1997).
37 The decision prompted nine separate opinions. In a per curiam opinion expressing the view of five members of the court, it was held that the imposition and carrying out of the
The effect of Furman was to eliminate state death penalty statutes that did not discourage arbitrariness. In response to Furman, and in an effort to redraft statutes that would not run afoul of the Constitution, death penalty states devised various methods to address the issue of arbitrariness. Most states proposed a bifurcated trial system, separating the guilt-innocence and penalty phases. Many states defined aggravating and mitigating circumstances as a means to guide sentencing discretion, while every state provided for mandatory appellate review of death sentences. As part of that review, the appellate courts were sometimes charged with the obligation of determining whether a death sentence was the product of bias, passion, or prejudice or whether the sentence was disproportionate.

By 1976, cases challenging the new statutes were pending in the U.S. Supreme Court. In five consolidated cases, the U.S. Supreme Court evaluated new state death penalty schemes. In three of those cases, the U.S. Supreme Court upheld the new death penalty statutes. The statutes of Florida, Texas, and Georgia, were primarily modeled after the Model Penal Code and featured “guided discretion” by use of statutorily-defined aggravating and mitigating circumstances. By contrast, the statutory schemes in North Carolina and Louisiana eliminated sentencing discretion in favor of mandatory death sentences for certain crimes. These schemes failed in the U.S. Supreme Court’s view because they eliminated the “individualized consideration” essential to fairness. Furman and the five consolidated decisions that followed focused on eliminating arbitrariness and promoting individualized consideration by the use of guided discretion. Subsequent cases challenged the justness of death sentences, notwithstanding the use of approved schemes. In these later cases, the U.S. Supreme Court granted relief, if at all, based on some specific finding death sentence in the present cases constituted cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments. Justice Douglas stated that selective application of the death penalty to minorities and discriminatory application of the penalty constituted cruel and unusual punishment. Justice Brennan stated that the death penalty was cruel and unusual because it did not comport with human dignity and could not be shown to be a more effective means of punishment than less drastic means. Justice Stewart found the punishment unconstitutional because it was “wantonly” and “freakishly imposed.” Justice White found that the infrequency of the punishment made it “unusual,” and thus, unconstitutional. Justice Marshall, stated that the death penalty was morally unacceptable and a violation of the Eighth Amendment. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented.

40 Id.
42 Id.
of error in the case, but not based on any systemic fault with the capital punishment system.

In addition to its effect on state statutes, the Furman decision also had the effect of displacing the federal death penalty statute in effect at the time of the decision. In 1988, a new federal death penalty statute, modeled after the revised state laws, was enacted for murder in the course of a drug-kingpin conspiracy. In 1994, the federal death penalty statute was expanded to numerous offenses, more than 60 in all, three of which do not involve murder. Federal legislation of even greater significance to state-sentenced inmates passed two years later. The Anti-Terrorism and Effective Death Penalty Act of 1996 “affects both state and federal prisoners, restricts review in federal courts by establishing tighter filing deadlines, limit[s] the opportunity for evidentiary hearings, and ordinarily allow[s] only a single habeas corpus filing in federal court.”

[1.9.] Insanity, Race, Age, Mental Retardation, Offense, and Culpability

Opponents of capital punishment have made other systemic challenges of note. In Ford v. Wainwright, the U.S. Supreme Court held that the Eighth Amendment barred the execution of the insane. This categorical exclusion included both those who are insane at the time of the offense and those who are insane at the time of the execution. The following year, in McClesky v. Kemp, the U.S. Supreme Court upheld the Georgia death penalty system in the face of a systemic challenge based on racial discrimination. Opponents also challenged the execution of juveniles, and ultimately, in Roper v. Simmons, succeeded in having the U.S. Supreme Court declare that executing juveniles violated the Constitution. Further, in Atkins v. Virginia, the U.S. Supreme Court concluded that the Constitution does not allow the state to take the life of a mentally retarded offender.

The U.S. Supreme Court’s decisions have resulted in only two other categorical exclusions from execution. The first is based on the nature of the offense. In Coker v. Georgia, the U.S. Supreme Court held that the death penalty was disproportionate when applied to rapists who did not murder their adult female victims. The U.S. Supreme Court extended this rationale to cases

involved in the rape of a child.\footnote{Kennedy v. Louisiana, 128 S.Ct. 2641 (2008).} In a 2008 decision, the U.S. Supreme Court struck down as unconstitutional a Louisiana statute that allowed the death penalty for the rape of a child when the victim did not die. The U.S. Supreme Court held that laws providing for execution of defendants for crimes in which the victim did not die were not in keeping with the national consensus restricting the death penalty to the worst offenders.

The second categorical exclusion from capital punishment is based on the culpability of the offender. In Enmund v. Florida\footnote{458 U.S. 782 (1982).} and Tison v. Arizona,\footnote{481 U.S. 137 (1987).} the U.S. Supreme Court limited the use of capital punishment for those convicted of felony murder who did not kill or have some other heightened culpability that justified the death sentence.

The U.S. Supreme Court has also entered the arena of state-imposed death sentences in cases involving \textit{voir dire} proceedings, procedural issues, and federal \textit{habeas corpus} cases challenging the effective assistance of counsel. Additionally, at least occasionally, the U.S. Supreme Court has faced whether the rulings of international courts, the policy or substance of international law or treaties, or the weight of international opinion should affect the legality of capital punishment in the United States. This continues to be a divisive issue among present justices.

\textbf{[1.10.]} \hspace{1cm} \textbf{Age of the Defendant}

Even before the U.S. Supreme Court’s ruling in \textit{Roper v. Simmons},\footnote{543 U.S. 551 (2005).} statutes in some states prohibited a death sentence for a defendant who was under a certain age, usually 18, at the time of the murder.\footnote{Examples of states that prohibited the death penalty if the defendant committed murder while under age 18 included: California (Cal. Penal Code § 190.5); Colorado (Colo. Rev. Stat. Ann. § 18-1.3-1201); Connecticut (Conn. Gen. Stat. Ann. § 53a-46a); Illinois (720 Ill. Comp. Stat. 5/9-1(a)); and Ohio (Ohio Rev. Code. § 2929.02). New Hampshire prohibits execution of persons who commit murder while under age 17 (N.H. Rev. Stat. § 630:1). The FDPA prohibits execution of persons who were under the age of 18 at the time of the crime. 18 U.S.C. § 3591 (2004).} In \textit{Roper}, the U.S. Supreme Court found a constitutional bar to such executions, holding that the execution of an offender who was under the age of 18 at the time the murder was committed violated the Eighth Amendment.\footnote{Roper, 543 U.S. at 551.} The decision, which was 5-4, was authored by Justice Kennedy, with Justice Scalia writing a strongly-worded dissent.

Before \textit{Roper}, a plurality of the U.S. Supreme Court had vacated a death sentence imposed upon an offender who was 15 years old when his crime was committed,\footnote{Thompson v. Oklahoma, 497 U.S. 805, 815-16 (1988).} but only four of the justices were willing to exclude all defendants under 16 from a sentence of death. The fifth justice, Justice O’Connor, agreed to
reverse the juvenile’s sentence of death, but on more limited grounds.\textsuperscript{59} Less than a year later, the U.S. Supreme Court upheld the constitutionality of the death penalty in cases involving defendants who were 16 and 17 years old when the murders were committed.\textsuperscript{60}

The U.S. Supreme Court would not revisit the issue until 2004 when it was again presented with the argument that execution of those who committed murder while juveniles constituted cruel and unusual punishment and violated the Eighth Amendment to the United States Constitution. Justice Kennedy, writing for the majority, reasoned that juvenile offenders, because of their age, had diminished levels of culpability. Moreover, neither retribution nor deterrence could justify taking the life of a juvenile offender. Justice Kennedy relied upon the juvenile’s lack of maturity and underdeveloped sense of responsibility; their susceptibility to negative influences and outside pressures; and their “transitory, less fixed” characters.\textsuperscript{61}

It is the juvenile’s “chronological age” and not “mental age” that determines eligibility for the death penalty. Nonetheless, an offender’s mental age may be an appropriate consideration relevant to the prohibition against executing a mentally retarded defendant.\textsuperscript{62}

\section*{[1.11.]} Mental Retardation

In \textit{Atkins v. Virginia},\textsuperscript{63} the U.S. Supreme Court barred the execution of mentally retarded individuals but declined to adopt a uniform standard defining mental retardation or uniform procedures for determining its existence. As a result, state statutes, rules, and judicial opinions establish the applicable state definitions and procedures.

While the U.S. Supreme Court declined to set forth a mandatory definition, it did refer to definitions adopted by the American Association of Mental Retardation (AAMR), now the American Association of Developmental and Intellectual Disability (AADID) and the American Psychiatric Association (APA). While not identical the two definitions are similar and contain three components: (1) intellectual functioning; (2) adaptive behavior skills; and (3) age of onset. When \textit{Atkins} was decided, for example, the AAMR defined mental retardation as:

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substantial limitations in present functioning . . . characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction,
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\begin{itemize}
\item \textsuperscript{59} \textit{Id.} at 853-54 (O’Connor, J., concurring).
\item \textsuperscript{60} \textit{Stanford v. Kentucky}, 492 U.S. 361 (1989) (including consolidated case of \textit{Wilkins v. Missouri}).
\item \textsuperscript{61} \textit{Roper}, 543 U.S. at 569-70.
\item \textsuperscript{62} \textit{Alston v. State}, 723 So.2d 162 (Fla. 1998).
\item \textsuperscript{63} 536 U.S. 304 (2002).
\end{itemize}
health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.  

The APA’s similar definition provided that “[t]he essential feature of mental retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.”

As can be seen, each definition, and most, but not all state definitions, has three elements, all of which must be present in order for a defendant to be classified as mentally retarded. The first two elements — intellectual functioning and adaptive behavioral skills — are often established by standardized tests, while the third element — age of onset, which is not uniformly required — is often established by school or medical records or by individuals familiar with the conditions of the defendant’s birth or childhood. Expert testimony is often required on each of the elements.

Courts post-Atkins are also grappling with difficult procedural issues: who bears the burden of proof, what level of proof is required, when should the issue of mental retardation be decided, and should the decision be for the judge or jury? As is true of the substantive component, courts differ significantly on their approach to these procedural issues. Some of the issues are statutorily prescribed, while others are determined by the courts. Even in light of legislative directives, some courts adopt procedures that make the capital procedure more efficient. For example, the Supreme Court of Florida recently rejected a statutory procedure requiring that the issue of mental retardation be decided after the jury recommended the death penalty.

Deciding the mental retardation issue before trial has obvious advantages related to the efficiency of the capital proceeding. A pre-trial determination may remove the need to assure that the presiding judge and trial counsel meets state-imposed standards for death penalty cases. In addition, a pre-trial determination may eliminate the need to death-qualify the jury and to prepare for and resolve issues related to the penalty phase. For example, the court may not need to grant resources to hire investigators or expert witnesses for the penalty phase. Witnesses whose testimony is only relevant to sentencing need not be transported or subpoenaed. Legal issues that pertain only to sentencing issues will not need to

64 AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION DEFINITIONS, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (Luckasson et al. eds., 10th ed., 2002) (1921).
66 Amendments to Florida Rules of Criminal Procedure, 875 So.2d 563 (Fla. 2004).
be resolved. Moreover, determining the issue pre-trial may enhance the possibility of a plea agreement. Perhaps most importantly, a pre-trial determination of mental retardation removes the potential that an innocent mentally retarded defendant will enter a plea agreement to avoid the death penalty. For more information about mental retardation, see Chapter 6.

[1.12.] Offense

In *Gregg v. Georgia*, the U.S. Supreme Court held that the Eighth Amendment did not create a *per se* bar to the imposition of the death penalty for the crime of murder. One year later the U.S. Supreme Court reversed a death penalty in a rape case holding that the death penalty was disproportionate for the crime of rape of an adult woman, but did not hold that the death penalty only applied when a life was taken. As a result, some states, including Louisiana, passed statutes authorizing the death penalty for the rape of a child. But only two people were on death row for the crime of rape of a child.

In 2008, in *Kennedy v. Louisiana*, the U.S. Supreme Court struck down the Louisiana statute that authorized the death penalty for the rape of a child. The 5-4 Court reasoned that 44 out of 50 states did not permit the death penalty for similar crimes. “Based both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments.”

[1.13.] Culpability: *Enmund/Tison* Exclusion

In *Enmund v. Florida*, the U.S. Supreme Court held that the Eighth Amendment does not permit the imposition of the death penalty on a defendant who aids and abets a felony (in *Enmund*, a robbery) in the course of which a murder is committed by others and the defendant does not kill, attempt to kill, intend that a killing take place, or intend that lethal force be employed. In *Tison v. Arizona*, the U.S. Supreme Court held that a defendant’s major participation in a felony resulting in murder, combined with defendant’s reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement even if the defendant is not the killer.

In a 1986 decision, the U.S. Supreme Court held that the *Enmund/Tison* decision could be made by a jury, the trial judge, an appellate court, or even a federal habeas court, but that decision predated the U.S. Supreme Court’s

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70 Id. at 2643 (2008).
decisions in *Apprendi v. New Jersey*\(^{74}\) and *Ring v. Arizona*.\(^{75}\) Under *Apprendi* and *Ring* the defendant has a Sixth Amendment right to have a jury determine any fact necessary to elevate a defendant’s ultimate sentence. The *Ring* decision specifically held that capital defendants have a constitutional right to have a jury find any statutory aggravating circumstances that make the defendant death eligible. Thus, the issue of whether an *Enmund/Tison* finding is a similar finding that must be made by a jury is apparently an open question.

### [1.14.] Alternative State Schemes

Naturally, different states have different procedures for the application of capital punishment. Most have a system by which the jury weighs aggravating circumstances and mitigating circumstances in a bifurcated penalty proceeding. The major differences in these states are the specific circumstances and the weighing and proof provisions. Some states historically allowed judicialoverride, relegating the jury decision to the status of a recommendation.

Instead of, or in addition to, requiring juries to evaluate specific aggravating and mitigating circumstances, some states require the jury to answer specific questions following a guilt finding, pertaining most often to the future dangerousness of the defendant. For example, in Texas a jury must answer the following questions after finding a defendant guilty of a capital offense\(^{76}\):

1. whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
2. in [certain] cases, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.\(^{77}\)

### [1.15.] Federal Constitutional Requirements in Capital Litigation

The numerous U.S. Supreme Court decisions evaluating constitutional challenges to state death penalties have resulted in a constitutional capital punishment jurisprudence. The extent to which these principles are relied upon by the U.S. Supreme Court in subsequent decisions depends upon the composition and division of the U.S. Supreme Court. Yet, familiarity with the principles, some of which overlap, is essential to a complete introduction to capital litigation.

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\(^{74}\) 530 U.S. 466 (2000).
\(^{75}\) 536 U.S. 584 (2002).
\(^{76}\) **TEX. CODE CRIM. PROC. art. 37.071** (2005).
\(^{77}\) *Id.*
14 • Presiding over a Capital Case

[1.16.] Death is Different

Concurring in Furman, Justice Stewart wrote that:

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.78

After a decade of evolution, the U.S. Supreme Court summarized, in Spaziano v. Florida, its post-Furman jurisprudence as continuing to recognize that “death is different.”79

In the 12 years since Furman . . . every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.80

The constitutional reason that “death is different” is the application of the Eighth Amendment’s prohibition on “cruelty” to a degree that varies from its application in most other criminal cases. The U.S. Supreme Court has, on occasion, relied on this difference as the basis for upholding procedures in death cases that are not required in other cases. For example, in Murray v. Turner, the U.S. Supreme Court reversed a case in which the trial judge had failed to allow prospective jurors to be questioned on the issue of racial bias.81 The U.S. Supreme Court held that the failure resulted in a violation of the capital defendant’s rights.

[1.17.] Heightened Fairness and Heightened Reliability

The upshot of the recognition that death is different is a requirement that the procedures used in capital cases produce reliable results including a fair sentence. Thus, the U.S. Supreme Court has said that the constitutionality of imposing death depends upon a fair decision-making process, which assures that a death sentence is imposed in a manner that is not discriminatory, arbitrary, or capricious. Building on these requirements, the majority of the U.S. Supreme Court has explained in various cases that:

78 Furman, 408 U.S. at 306.
80 Id. at 468.
[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.\footnote{Woodson v. North Carolina, 428 U.S. 280, 305 (1976).}

The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed.\footnote{Simmons v. South Carolina, 512 U.S. 154, 172 (1994).} The U.S. Supreme Court has explained that the Amendment imposes a heightened standard “for reliability in the determination that death is the appropriate punishment in a specific case.”\footnote{Id. (citing Woodson, 428 U.S. at 305).} Thus, it requires provision of “accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die,”\footnote{Simmons, 512 U.S. at 172 (citing Gregg v. Georgia, 428 U.S. 153, 190 (1976)).} and invalidates “procedural rules that tend to diminish the reliability of the sentencing determination.”\footnote{Id. (citing Beck v. Alabama, 447 U.S. 625, 638 (1980)).}

[1.18.]  
**“Super” Due Process**\footnote{The phrase “super due process,” used to refer to a heightened level of substantive and procedural fairness anticipated in death penalty cases was coined by Margaret Jane Radin in her article Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S. Cal. L. Rev. 1143, 1168-69 (1980).} – Fairness in Factfinding

For decades, the U.S. Supreme Court has recognized that, in capital cases, a higher standard of due process is required for purposes of acquiring a higher standard of reliability. In *Reid v. Convert*, the U.S. Supreme Court said that “in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights.”\footnote{354 U.S. 1, 46-47 (1957).} Similarly, in *Eddings v. Oklahoma*, Justice O’Connor, in concurrence, noted that it would be cruel and unusual punishment to execute a defendant without providing “extraordinary measures to ensure that the prisoner . . . is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.”\footnote{455 U.S. 104, 118 (1982).} In a different context, the U.S. Supreme Court in *Gardner v. Florida*, held that due process was violated when the death penalty was imposed, at least in part, on the basis of confidential information which was not disclosed to the defendant or his
counsel. The due process rule has not been applied uniformly to noncapital sendencings. 

In one of its most recent capital punishment decision, Panetti v. Quarterman, the U.S. Supreme Court reversed and remanded, on federal review, a Texas case because of the state court’s failure to provide adequate procedures for determining an inmate’s incompetency to be executed. The U.S. Supreme Court reiterated many of its fundamental holdings relevant to fact finding in capital cases, stating that “if the Constitution renders the fact or timing of [an inmate’s] execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being.” Procedures that invite arbitrariness or error violate the requirements of due process. The U.S. Supreme Court specifically concluded that “due to the state court’s unreasonable application of Ford, the factfinding procedures upon which the court relied ‘were not adequate for reaching reasonably correct results’ or, at a minimum, resulted in a process that appeared to be ‘seriously inadequate for the ascertainment of the truth.”

[1.19.] Guided Discretion

A statutory scheme that does not properly guide the jury’s discretion violates the Eighth Amendment and the Due Process Clause. This principle led the U.S. Supreme Court to its decisions in Furman and Gregg v. Georgia. In Gregg, the U.S. Supreme Court upheld statutes that allowed the jury to exercise discretion in determining the sentence, but provided standards for the exercise of discretion, through, for example, the use of weighing mechanisms and aggravating and mitigating circumstances.

Mandatory death sentences violate the Constitution, but statutory schemes that require a death sentence do not. Therefore, a statutory scheme in which the jury “unanimously finds at least one aggravating circumstance to have been proven beyond a reasonable doubt and no mitigating circumstances” is constitutionally permissible.

[1.20.] Individualized Consideration

In Gregg, the U.S. Supreme Court noted “that in capital cases, it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence.”

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92. Id. at 2855 (quoting Ford v. Wainwright, 477 U.S. 399, 411-12 (1986)).
93. Id. at 2859 (quoting Ford, 477 U.S. at 423-24).
95. Id.
97. Gregg, 428 U.S. at 189-90 n. 38.
One of the most important aspects of individualized consideration is the consideration of evidence that mitigates against a sentence of death. The U.S. Supreme Court has repetitively emphasized the myriad of factors that must be considered. In *Woodson*, the U.S. Supreme Court said that “[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassion or mitigating factors stemming from the diverse frailties of humankind.”

The U.S. Supreme Court elaborated on the constitutional requirement of “individualized consideration” in *Lockett v. Ohio*, when it stated that the jury must consider “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”

“[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” . . . The mandatory death penalty statute in *Woodson* was held invalid because it permitted no consideration of “relevant facets of the character and record of the individual offender or the circumstances of the particular offense.” . . . [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques – probation, parole, work furloughs, to name a few –

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99 *438 U.S. 586, 587 (1978).*
and various post-conviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The non-availability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.  

The requirement of individualized consideration is satisfied if the jury is allowed to consider all relevant mitigating evidence, even if the jury is required to impose a sentence of death upon a finding that the aggravating circumstances outweigh the mitigating circumstances. In other words, there is no requirement that the jury retain unfettered discretion to impose a life sentence even if aggravation outweighs mitigation.

The jury must be instructed that each juror is to evaluate mitigation and weigh it in the balance even if the other jurors do not agree that the mitigation is present. Neither state law nor jury instructions may preclude consideration of facts and circumstances proffered in mitigation.

Recently the U.S. Supreme Court decided a case in which the defendant challenged the restrictions on his introducing evidence of residual doubt of guilt in the penalty phase as mitigation. The U.S. Supreme Court held that the Constitution does not prohibit a state from limiting “innocence-related” evidence that has already been introduced at trial. The U.S. Supreme Court reasoned that sentencing generally focuses on how, not whether, a defendant has committed a crime; further the evidence was previously introduced and the matter previously litigated at the guilt phase.

[1.21.] **Evolving Standards of Decency, Proportionality, & Heightened Culpability: Substantive Bars to Capital Punishment**

The Eight Amendment prohibits excessive punishment. As early as 1910, the U.S. Supreme Court held that punishment “should be graduated and proportioned to the [crime].” In earlier decisions, when confronted with challenges that execution methods were cruel, for example, the U.S. Supreme Court evaluated the challenge based on a historical perspective, comparing the method of execution to historical methods. Beginning with *Weems v. U.S.*, the U.S. Supreme Court began, instead, to analyze excessiveness in terms of

100 Id. at 604-05.
105 Id.
106 Id.
108 Id.
“evolving social mores,” noting that the Eighth Amendment acquires “meaning as public opinion becomes enlightened by a humane justice.” In determining excessiveness, the U.S. Supreme Court looks to the “evolving standards of decency that mark the progress of a maturing society.” In reviewing evolving standards, the U.S. Supreme Court recognizes historical evidence, but also relies on legislative judgments, sentencing decisions of juries, and their own judgment. The U.S. Supreme Court explains the evolving standards of decency analysis as follows:

A punishment is “excessive,” and therefore prohibited by the Amendment, if it is not graduated and proportioned to the offense. An excessiveness claim is judged by currently prevailing standards of decency. Proportionality review under such evolving standards should be informed by objective factors to the maximum possible extent, the clearest and most reliable of which is the legislation enacted by the country’s legislatures. In addition to objective evidence, the Constitution contemplates that this Court will bring its own judgment to bear by asking whether there is reason to agree or disagree with the judgment reached by the citizenry and its legislators.

Based on this type of review, the U.S. Supreme Court has concluded that death is an impermissible punishment for certain categories of offenses and offenders. For example, the U.S. Supreme Court has concluded that death is an impermissible punishment for rape of an adult woman. Similarly, the U.S. Supreme Court held in Enmund v. Florida that the death penalty was inappropriate for one “who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intends that a killing take place or lethal force be employed.” The U.S. Supreme Court later clarified that Enmund “does not impose any particular form of procedure upon the states. The Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under Enmund for such punishment. . . . At what precise point in its criminal process a state chooses to make the Enmund determination is of little concern from the standpoint of the Constitution.”

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109 Id. at 358.
112 This measure of proportionality employed as part of the evolving standard of decency analysis must be differentiated from comparative proportionality, a feature of the post-Furman statutes that was applauded by the U.S. Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976) and Proffitt v. Florida, 428 U.S. 242 (1976), but subsequently overruled as a constitutional prerequisite in Pulley v. Harris, 465 U.S. 37 (1984).
Five years after *Enmund*, the U.S. Supreme Court arguably altered the culpability exclusion in *Tison v. Arizona*.\(^{116}\) In that case the U.S. Supreme Court held that a “major participation in the felony committed, combined with reckless indifference to human life is sufficient to satisfy the *Enmund* culpability requirement.”\(^{117}\)

Another aspect of the U.S. Supreme Court’s proportionality jurisprudence focuses on the penological purposes served by the death penalty. “Unless the imposition of the death penalty . . . measurably contributes to one or both of [the goals of capital punishment] it ‘is nothing more than the purposeless and needless imposition of pain and suffering’ and hence an unconstitutional punishment.”\(^{118}\)

Generally, the penological purposes served by the death penalty are said to be deterrence and retribution. The issue of deterrence is two-fold. General deterrence theory focuses on whether the death penalty is necessary to deter other murderers. It is argued that if a lesser punishment can achieve the same or a greater level of deterrence, that the death penalty cannot be justified on deterrent grounds.\(^{119}\) Conversely, specific deterrence theory focuses on the particular defendant who is charged with the capital crime. Proponents argue that specific deterrence guarantees that the defendant will not kill again.

In capital cases, retribution, as a penological goal, seeks to punish defendants in accordance with what they deserve. “Retributivists believe that punishment is justified when it is deserved. It is deserved when the wrongdoer freely chooses to violate society’s rules.”\(^{120}\)

In recent decisions, the U.S. Supreme Court has focused on whether the death penalty, in a given context, contributed to its penological purposes. Thus, in *Atkins v. Virginia*, the U.S. Supreme Court reasoned that mental impairments diminished a mentally retarded defendant’s degree of culpability. The “severity of the appropriate punishment necessarily depends on the culpability of the offender. . . . If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the state, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”\(^{121}\) Similarly, in *Roper v. Simmons*, the U.S. Supreme Court reasoned that neither retribution nor deterrence justified the execution of juveniles who, because of a lack of maturity and heightened vulnerability, have diminished culpability.\(^{122}\)

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\(^{117}\) Id. at 158.


\(^{120}\) Joshua Dressler, *Understanding Criminal Procedure* 16 (4\(^{th}\) ed. 2006).


\(^{122}\) 543 U.S. 551, 569-70 (2005).
[1.22.]  State Judicial Finality via Federalism

Since the administration of the death penalty is a matter for state government, federal court intervention is affected by federalism. The application of federalism, by the U.S. Supreme Court, gave rise to one of the more controversial cases in recent capital punishment jurisprudence, *Herrera v. Collins*.123 There, the U.S. Supreme Court noted that “[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of free-standing claims of actual innocence.”124 Therefore, the final resolution of factual issues in capital cases will almost always be by state courts. This healthy respect for federalism is the basis of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which limits federal habeas review and relief to state prisoners.125 The Act provides for separate and more restrictive treatment for capital cases when states have implemented “opt-in” provisions under the federal law.

Because federalism and AEDPA limit federal court review of state death sentences, state courts have an even greater responsibility to assure fairness and thoroughness of death penalty proceedings. In only rare cases will the federal courts have jurisdiction to provide alternative substantive review, thus placing the burden on state courts to assure that their processes are fair and reliable.

[1.23.]  “Truly Awesome Responsibility”126 of the Jury

The responsibility placed upon juries in capital cases has been described as the “truly awesome responsibility of decreeing death for a fellow human.”127 The U.S. Supreme Court has explained the ramifications of procedures that undermine the sense of responsibility:

capital sentencers [should] view their task as the serious one of determining whether a specific human being should die at the hands of the State. . . . Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an “awesome responsibility” has allowed th[e] Court to view sentencer discretion as consistent with – and indeed as indispensable to – the Eighth Amendment’s “need for reliability in the determination that death is the appropriate punishment in a specific case.”128

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124 *Id.* at 401.
127 *Id.*
Anything that diminishes the jury’s sense of responsibility for the imposition of a death sentence violates the Eighth Amendment. In Caldwell v. Mississippi, the U.S. Supreme Court held that an argument to a capital sentencing jury that the jury’s decision was not final would minimize the jury’s role, tend to diminish their overall sense of responsibility and violate the Eighth Amendment.\(^{129}\) “[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”\(^{130}\)

### [1.24.] Narrowing the Class of Eligible Defendants

The Eighth Amendment requires that the class of defendants eligible for capital punishment be sufficiently narrowed.\(^{131}\) Narrowing serves to provide a “meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.”\(^{132}\)

The narrowing requirement mandates that a state narrow the sentencer’s consideration to a smaller and more culpable class of homicide defendants than were death eligible before Furman.\(^{133}\) A proper narrowing device “insures that, even though some defendants who fall within the restricted class of death-eligible defendants manage to avoid the death penalty, those who receive it will be among the worst murderers – those whose crimes are particularly serious, or for whom the death penalty is peculiarly appropriate.”\(^{134}\)

Some state statutes perform the narrowing requirement in the definition of capital murder. Others, more broadly define capital murder, and then use aggravating circumstances to narrow those for whom death may be sought. These systems provide a means by which a jury narrows the class of persons eligible for the death penalty according to an objective legislative definition.

The Supreme Court has approved either method of narrowing, holding that the narrowing function for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.\(^{135}\)

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\(^{129}\) Id.

\(^{130}\) Id. at 328-29.

\(^{131}\) Furman v. Georgia, 408 U.S. 238 (1972).

\(^{132}\) Id. at 313.

\(^{133}\) Id.

\(^{134}\) Id.

Even when a state attempts to narrow, by one of the two schemes, it may violate the narrowing principle if it fails to create “any inherent restraint on the arbitrary and capricious infliction of the death sentence.” Thus in Zant v. Stephens, the U.S. Supreme Court struck down an aggravating circumstance deemed to be “too vague and nonspecific to be applied evenhandedly by a jury.” The aggravating circumstance failed to narrow because a “person of ordinary sensibility could find that almost every murder fit the stated criteria . . . [and] the facts of the case itself did not distinguish the murder from any other murder.”

The narrowing requirement may be violated when, for example, a single set of facts is the basis for the finding of both an element of capital murder and an aggravating circumstance. In Zant v. Stephens, the U.S. Supreme Court explained that

[a]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Recently the U.S. Supreme Court addressed the issue of the effect of an invalid aggravating factor on the narrowing requirement. The U.S. Supreme Court had previously set forth different rules for weighing and non-weighing states. In a weighing state, if the jury relied upon an aggravating or eligibility factor that was later determined to be invalid, the U.S. Supreme Court had found the process to be skewed in favor of death, requiring reversal. The result was different in a non-weighing state since automatic skewing would not necessarily occur. In 2006, the U.S. Supreme Court decided Brown v. Sanders. Noting that the prior law had been “needlessly complex,” the U.S. Supreme Court set forth a new rule for all future cases, regardless of whether the state was classified as “weighing” or “non-weighing.”

An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

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138 Id. at 878.
139 Id. at 877.
142 Id.
143 Id. at 213.
Under the facts in *Brown*, a new sentencing was not required because although two of the four special circumstances were invalidated, the remaining two were sufficient to satisfy the narrowing requirement.\footnote{Id.}

[1.25.] **Jury Determination of Facts Essential to Death**

The U.S. Supreme Court has recently explained the role that the Sixth Amendment plays in factual determinations. Any increase in a defendant’s authorized punishment that is contingent upon a finding of fact must be found by a jury beyond a reasonable doubt.\footnote{Id.} The Sixth Amendment does not depend on the “empty formalism” of how a state characterizes the elements of the offense or its sentencing procedures. Instead, it demands that facts “essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.”\footnote{Ring, 536 U.S. at 610 (Scalia, J., concurring).}

In *Ring v. Arizona*, the U.S. Supreme Court applied *Apprendi*’s rule to the “factfinding necessary to put [a defendant] to death.”\footnote{Id. at 586.} In *Ring*, the U.S. Supreme Court applied *Apprendi*’s nomenclature of an “element of a crime” to aggravating factors in a death penalty case.\footnote{Id. at 586.} The aggravating factors were equivalent to elements of a crime because absent the finding of an aggravating factor (under Arizona law), no death sentence could be imposed.\footnote{Id.} Thus, a capital defendant has a constitutional right to a jury finding of the statutory aggravating circumstances necessary to make the defendant eligible for a sentence of death.

[1.26.] **Emerging Jury Selection Issues**

Jury selection in the death penalty case is complicated by the death-qualification process. Because the same jurors decide the issue of guilt or innocence and punishment, the jurors’ attitudes about the imposition of a death sentence must be inquired into on *voir dire*. Recent U.S. Supreme Court decisions have addressed not only the death-qualification process, but also the discriminatory use of peremptory challenges in violation of *Batson v. Kentucky*.\footnote{476 U.S. 79 (1986).}
[1.27.] **Death Qualification: Review of Juror Removal; Factors for Consideration**

The process of determining a juror’s views about the death penalty in order to determine whether the juror is qualified to serve is known as death qualification. If a juror holds views either in favor of or in opposition to the death penalty that are so strong as to prevent or substantially impair the juror from considering sentences of both death and life in prison, the juror must be removed for cause.151 In *Uttecht v. Brown*, the U.S. Supreme Court revisited the standards for death qualification that had been outlined twenty years earlier.152

In *Uttecht*, the U.S. Supreme Court reviewed four “established” principles pertaining to the right to a fair and impartial jury.153 First, the right to an impartial jury entitles the defendant to a jury drawn from a venire that has not been “tilted in favor of capital punishment by selective prosecutorial challenges for cause.”154 Second, the state has a strong interest in having jurors who will apply capital punishment law as is proscribed by the state framework.155 Third, to balance these interests, a juror who is “substantially impaired in the ability to impose the death penalty under the state law framework can be excused for cause.”156 Fourth, a trial court must base its judgment in making the determination in part on the juror’s demeanor. In addition, the U.S. Supreme Court noted that trial court determinations are owed deference by the reviewing courts.157

In applying the *Witherspoon-Witt* standard, the court must consider the entire *voir dire* process,158 including the number of jurors challenged and excused by each side and the court’s jury selection procedure. In *Uttecht*, for example, the U.S. Supreme Court noted that before trial, each juror filled out an individual questionnaire,159 that during *voir dire* and before each ruling, the trial judge allowed each side to explain its position; and that the trial judge gave careful and measured explanations for each decision.160 In addition, the U.S. Supreme Court noted that the trial judge clearly explained the possible punishments to the jurors. Finally, although federal law does not require objections to preserve jury challenge issues, the U.S. Supreme Court considered the failure to object as indicating the defendant’s “voluntary acquiescence to, or confirmation of, a juror’s removal.”161

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153 Id.
154 Id.
155 Id.
156 Id.
157 Id.
158 Id.
159 Id.
160 Id.
161 Id.
error; it also deprived reviewing courts of further factual findings that would have helped to explain the trial court’s decision.”

[1.28.] **Batson Issues**

By court rule or statutes, states authorize each side to excuse a limited number of jurors by the exercise of peremptory challenges. Although counsel does not have to state a reason for the exercise of a peremptory challenge, the U.S. Supreme Court, in a series of cases, beginning with *Batson v. Kentucky*, has restricted their use. In *Batson*, the U.S. Supreme Court endorsed a three-part test by which the discriminatory use of a peremptory challenge could be contested. First, the objecting party must establish a *prima facie* claim of discrimination; second, the party exercising must state a neutral reason for the exercise of the challenge; and third, the court must evaluate the persuasiveness or plausibility of the stated reason and determine whether the objecting party has shown purposeful discrimination.

In 2008, the U.S. Supreme Court revisited the *Batson* issue in a case in which the Louisiana Supreme Court had interpreted *Rice v. Collins*, to require a reversal on *Batson* grounds only when a “reasonable fact finder would necessarily conclude that the prosecutor lied” about the reasons for the challenges. The U.S. Supreme Court disagreed with this interpretation, and held 7-2, in *Snyder v. Louisiana* that “[f]or present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution.” Although the prosecution claimed a non-racial reason for striking the juror – that the juror was a college senior with student-teaching obligations – the U.S. Supreme Court reasoned that the “implausibility of this explanation is reinforced by the prosecutor’s acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as [the challenged juror].”

[1.29.] **Emerging Evidence Issues**

Some evidence issues that have arisen in non-capital cases have application in the capital context as well. These include the issues of the right to confrontation, the right to present a defense, and the introduction of evidence of residual doubt.

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162 *Id.*
164 *Id.*
167 *Id.*
168 *Id.*
169 *Id.*


[1.30.]  **Crawford in Capital Sentencing**

In *Crawford v. Washington*, the U.S. Supreme Court held that the Sixth Amendment right to confrontation barred the use of testimonial statements made by unavailable declarants who did not appear at trial unless the defendant had a prior opportunity for cross-examination. Although a few courts have held otherwise, most courts rely upon pre-*Crawford* case law to support the proposition that the confrontation right applies only at trial and not at a capital sentencing hearing. Some state statutes provide for cross-examination at sentencing as a matter of statutory right, but most hold that the Sixth Amendment applies only to trial.

Two U.S. Supreme Court decisions may provide a basis for a more critical analysis. In *Gardner v. Florida*, the U.S. Supreme Court reversed a capital sentence that was based in part upon a pre-sentencing report that the judge had considered but that had not been provided to defense counsel. The U.S. Supreme Court held that sentencing was a “critical stage” of the trial and that “the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause . . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.” Despite the broad language, most courts read *Gardner* narrowly as only prohibiting sentences that are based on secretive, non-disclosed information.

Similarly, in *Specht v. Patterson* the U.S. Supreme Court overturned a Colorado procedure that allowed a defendant found guilty of a specified offense to receive a significantly increased sentence, based upon the judge’s finding of an additional fact. The Colorado procedure violated due process because it did not preserve the defendant’s right to be present with counsel and to “have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own.” While *Specht*’s rationale relevant to jury factfinding has been expanded in *Apprendi v. New Jersey* and *Ring v. Arizona*, the U.S. Supreme Court has not discussed their application to capital sentencing proceedings in light of those cases or *Crawford*.

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174 *Id.* at 358.
175 386 U.S. 605 (1967).
176 *Id.* at 610.
177 530 U.S. 466 (2000).
[1.31.] **Right to Present a Defense and *Holmes***

The U.S. Supreme Court has recognized a criminal defendant’s right to a “meaningful opportunity to present a complete defense.”\(^{179}\) In *Holmes v. South Carolina*, the defendant, who was charged with murder and related offenses, was prevented from offering evidence of third-party guilt in his trial based upon a rule set forth in a state court decision. The South Carolina rule required the trial judge to assess the strength of the state’s case in determining whether to allow the defendant to offer evidence of third-party guilt.\(^{180}\) The U.S. Supreme Court held that this rule violated the criminal defendant’s federal constitutional rights “[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or the Compulsory Process Clause or Confrontation Clause of the Sixth Amendment . . . .”\(^{181}\)

[1.32.] **Residual Doubt Evidence and *Guzek***

Conversely, federal constitutional law does not require the state to admit innocence-related evidence at a capital penalty hearing that was not introduced at trial. In *Oregon v. Guzek*,\(^{182}\) defendant Guzek offered evidence of alibi during the penalty phase of his capital hearing. Notwithstanding the rulings of the state and federal courts holding that Guzek had a federal constitutional right to present live alibi testimony during the penalty phase, the U.S. Supreme Court disagreed, holding that states may put reasonable limits on the evidence a defendant may present, particularly at sentencing, when the question is not *whether* the defendant committed the crime but *how*. Because the issue of innocence had already been resolved against defendant, and since state law allowed defendant to present evidence of his innocence in the form of transcripts from his original trial to the jury, the Oregon court did not have to hear Guzek’s additional evidence of innocence.\(^{183}\) The U.S. Supreme Court left it to the Oregon courts to determine whether the alibi evidence was admissible at the penalty hearing to impeach other witnesses whose earlier testimony the state intended to introduce at sentencing.\(^{184}\)

[1.33.] **Conclusion**

While the decision to authorize capital punishment is left to the judgment of the individual states, the administration of state capital punishment proceedings is influenced not only by state law, but also by federal constitutional law and, to a lesser extent, international treaties and conventions. Thus, state court judges must master not only the relevant constitutional provisions, statutes, rules, and decisions in the state, but they must also understand the principles of

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180 *Id.* at 319.
181 *Id.*
183 *Id.*
184 *Id.*
federal death penalty jurisprudence, which have developed as the U.S. Supreme Court has interpreted the Eighth Amendment. These interpretations, though complex and ever changing, impose restrictions on the states’ imposition of the death penalty.