SCOTUS Death Penalty Review

Lisa Soronen
State and Local Legal Center
lsoronen@sso.org
Modern Death Penalty Jurisprudence

• 1970s SCOTUS tells the states they must limit arbitrariness in who gets the death penalty
• SCOTUS approves a changed sentencing scheme
Furman Changed Everything

- *Furman v. Georgia* (1972)—Furman was discovered burglarizing a home; when attempting to escape, his weapon went off and killed a resident in the house; he was convicted of murder and sentenced to death; SCOTUS overturns his conviction

- No written majority opinion:
  - These death sentences are *cruel and unusual* in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.
Impossible to Underestimate Impact of *Furman*

- SCOTUS effectively voided about all death penalty statutes (about 40) and commuted the sentences of 629 death row inmates
- No one was executed in the U.S. for 10 years
- Every state with the death penalty had to re-write its statutes (with little guidance from SCOTUS until 1976)
Gregg v. Georgia Provides (Some) Clarity

- 1976
- SCOTUS approves Florida, Georgia, and Texas sentencing scheme
- Aggravating and mitigating factors part of sentencing
- Bifurcated trials (separate deliberations for the guilt and penalty phases)
- Automatic appellate review of convictions and sentence
- Proportionality review
General Themes of the Last 15 Years

- Who may be executed?
- How may they be executed?
- Who is the decision maker?
- What evidence may be considered?
Who May Be Executed?

- Three Ms
  - Mentally retarded (now intellectually disabled)
  - Minors
  - Murderers
Intellectually Disabled

- Intellectually disabled=no death penalty
- 6-3 Kennedy and O’Connor in the majority
  - Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants.
  - State laws changed after 1986
Intellectually Disabled

• Who is intellectually disabled?
• Everyone agrees: an IQ of 70 or less
• Hall v. Florida (2014)
• 5-4; written by Justice Kennedy
• If a capital defendant’s IQ falls within the standard error measurement, (plus or minus five) the defendant must be allowed to present additional evidence of intellectual disability
• “IQ score [isn’t a] final and conclusive evidence of a defendant's intellectual capacity”
Intellectually Disabled

- Can states rely on an old definition?
- Texas relies on a 1992 from the American Association on Mental Retardation adopted in a 2004 case
- Lower court says it up to the Texas Legislature to implement *Atkins*
- SCOTUS accidentally accepted the question of whether execution after an excessively long period of confinement under a death sentence constitutes cruel and unusual punishment
Minors

• Crime committed under age 18=no death penalty
• *Roper v. Simmons* (2005)
• 5-4 decision written by Justice Kennedy; O’Connor in dissent
  • Dwindling support among the states
  • Juveniles are different than adults—lack maturity, vulnerable to negative influences, unformed character
  • Only country *in the world*
Murderers

• Crime less than taking a life= no death penalty
• *Kennedy v. Louisiana* (2008) (involved the rape of a child)
• 5-4; written by Justice Kennedy
  • Few states make child rape a capital offense; only Louisiana was actually executing (very) few people
  • “hesitation that has special force where no life was taken in the commission of the crime”
  • Could lead to expansion of death penalty; could encourage underreporting; children are unreliable witnesses
How May Capital Defendants be Executed?

- Lethal injection—everybody does it
What if it Might Be Done Wrong?

• *Baze v. Rees* (2008)
• Messy 7-2 opinion with no majority opinion (Ginsburg and Souter dissent)
• Too bad: “an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a ‘substantial risk of serious harm’”
• Does not matter if “slightly or marginally safer alternative” may exist
What if the Pain Drug Doesn’t Work?

• 5-4; Justice Kennedy in the majority
• Lower court didn’t err in concluding that the alternative pain drug works just fine
• “Prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain”
• Bomb dropped: Breyer and Ginsburg what to review death penalty for constitutionality
Who Decides?

- The jury
If Aggravators Lead to Death…

• Jury gets to decide about them
• *Ring v. Arizona* (2002) 7-2 (O’Connor and Rehnquist dissent)
• In Arizona a jury determination a defendant committed first-degree felony murder lead to life imprisonment unless a judge found aggravating factors
• Two years earlier the Court decided in a non-capital case that criminal defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment
• *Ring* was not applied retroactively in *Schriro v. Summerlin* (2004)
Advisory Verdicts

• Don’t cut it
• Hurst v. Florida (2016)
• 8-1 (Alito dissented)
• Florida’s scheme was just like Arizona’s but the jury attends the sentencing evidentiary hearing and renders an “advisory verdict”
  • “It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury’s findings of fact with respect to sentencing issues than does a trial judge in Arizona.”
What Evidence Can Be Relied on?
Evidence of Innocence

- At sentencing evidence may be limited to what was already presented at trial
- Unanimous; Breyer wrote the opinion
- Guzek wanted to introduce live testimony from his mother as an alibi witness
  - Someone can read her trial testimony from the transcript
- Alito
  - In this case, we have the opportunity to put to rest, once and for all, the mistaken notion that the Eighth Amendment requires that a convicted capital defendant be given the opportunity, at his sentencing hearing, to present evidence and argument concerning residual doubts about his guilt.
Aggravators > Mitigators

- Death penalty is okay
- Kansas law says if unanimous jury finds that aggravating circumstances are not outweighed by mitigating circumstances, the death penalty shall be imposed
- *Kansas v. Marsh* (2006); 5-4; Kennedy is the majority
- Individualized sentencing means a jury must have the opportunity to consider all mitigation evidence
- “States are free to determine the manner in which a jury may consider mitigating evidence”
- “So long as the sentencer is not precluded from considering relevant mitigating evidence, a capital sentencing statute cannot be said to impermissibly, much less automatically, impose death”
15 Year Trends

• Category of who can be executed has shrunk
• Defining intellectual disabled will continue to be a challenge
• No death penalty for minors have spilled over to life in prison without parole
• Lethal injection cases strike strongest cord—problems with it aren’t going away
15 Year Trends

• Strongest commitment on the Court is to jury decision
• Justices tend to divide on ideological lines
• Justices O’Connor and Kennedy’s votes have mattered the most
• Justice Kennedy recently has been more liberal than not (especially about who)
How Much Flexibility Do States Receive?

- They are very carefully watched
Looking Ahead

- One more liberal Justice will make a big difference
- Garland as Oklahoma City prosecutor?
- Might a 7-2 Court be willing to overturn the death penalty?
  - Kagan and Sotomayor didn’t join the Breyer/Ginsburg dissent in "Glossip"
Breyer & Ginsburg Problems with Death Penalty

- No surprises here
  - Serious unreliability
  - Arbitrariness in application
  - Unconscionably long delays
Legal Issues for the States

- As many practical problems as legal problems
  - Drugs not available and expiring; botched executions
- Quality of counsel
- Long delays (SCOTUS accidentally accepted this issue)
- Appeals process/modifications to speed things up
- Non-unanimous juries (Florida, Alabama, and Delaware)
- Too much involvement by judges (Nebraska and Montana)
- Review of drug protocols (Arkansas, Montana, Tennessee)
What are State Legislatures Doing?

- NCSL has a great webpage:
  - Methods of execution (particularly back-up methods) (Utah back to the firing squad)
  - Confidentiality for execution participants and drug suppliers/manufacturers
  - Procedural changes to sentencing protocols and appellate procedures
  - Addition of aggravators (Indiana decapitation while alive)
  - Studies of humane execution and fiscal considerations