



# The DEATH PENALTY

Constitutional Issues, Commentaries and Case Briefs

2<sup>nd</sup> Edition

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2<sup>nd</sup> Edition

## **The Death Penalty: Constitutional Issues, Commentaries, and Case Briefs, Second Edition**

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# Preface and Introduction

Death as a form of punishment was used in the United States even before the American colonies became a republic. For a long time, the death penalty was—and still is—an option available to the state when dealing with serious offenders, and the public accepted it as such without many legal or political challenges. In recent times, however, issues have arisen concerning the constitutionality and wisdom of this ultimate sanction. This has spawned numerous court cases, decided over several decades, that have sought to declare this form of punishment unconstitutional, or that attempted to refine and polish some of its features. These cases and what they say are the focus of this book.

Constitutionality and the wisdom of imposing the death penalty are two separate issues, although they tend to be treated as one in some quarters. Constitutionality is an issue addressed and resolved by the courts, while the wisdom of imposing it is a political question to be resolved by political decisionmakers who represent the public. This book limits itself to the constitutionality issue. Whether the death penalty is wise or desirable as a form of punishment is for political entities to eventually determine and resolve.

Numerous books and articles have been written on the death penalty. This book seeks to add a legal dimension to existing literature by bringing together all the major cases decided by the United States Supreme Court on the death penalty. The first case decided by the Court on the death penalty was *Wilkerson v. Utah* in 1878. The cut-off date for the cases briefed in this book is July 1, 2008. A total of 64 cases are briefed here. As in any project in which choices are involved, subjectivity played a role in determining which cases from among the many decided by the Court are sufficiently important to justify inclusion among the briefed cases. That determination, including the “Top Ten Most Significant Death Penalty Cases,” was made by the authors based on their familiarity over the years with death penalty cases.

## The Book's Purpose and Audience

This text is written to fill a need for a book that brings together all the legal issues related to the death penalty. There is no such book available to the general public at present, except perhaps those used in law schools and in full case form. It classifies the death penalty cases according to legal issues, provides a commentary on the various subtopics, and then presents legal materials in an easy-to-digest and understandable form. The main audience of the book are undergraduates and criminal justice practitioners. The book should also prove useful, however, for anyone who has an interest in the legal issues surrounding the death penalty.

## The Book's Content

The book consists of twelve chapters, subclassified into four parts.

Part I (Chapters 1 and 2) introduces the history of the death penalty and then discusses the foundation cases of *Furman v. Georgia* and *Gregg v. Georgia*.

Part II (Chapters 3, 4, and 5) focuses on constitutional issues and specific groups. These groups are those discriminated against because of race, mental impairment, or due to their having committed serious crimes at a young age. These offenders are treated differently by the Court.

Part III (Chapters 6, 7, 8, 9, 10, and 11) constitutes the major thrust of the book. It addresses constitutional issues such as the role of juries and jurors, the right to effective assistance of counsel, the right to due process, aggravating and mitigating circumstances, appeals, habeas corpus, and the concept of evolving standards of decency.

Part IV (Chapter 12) addresses the future of the death penalty and where the United States might go on this increasingly controversial issue.

## Format

Every chapter starts with commentaries on the general case law on a subtopic, followed by a chart of the cases briefed in the chapter, and then the case briefs. The case brief approach to the study of law is deemed more effective for undergraduates and field practitioners who do not have the time or the inclination to go into a prolonged reading of United States Supreme Court cases. A case brief acquaints the reader with the case by summarizing its facts, issues, reasons, and holding. This is done in the interest of brevity, but hopefully not at the expense of accuracy.

## A Word on Legal Referencing and Access to Original Cases

Every case briefed in this book contains a case citation. For those who may need some guidance in understanding case citations, the legal citation used in this book is similar to those used in general in law books and articles. To illustrate, let us use the following citation: *Gregg v. Georgia*, 428 U.S. 153 (1976).

*Gregg v. Georgia* is the case title, 428 refers to the volume where the case starts, U.S. means the United States Reports (the official government publisher of United States Supreme Court cases), 153 refers to the page where the case starts, and 1976 refers to the year the case was decided.

Anyone who wants to read the case of *Gregg v. Georgia* as originally printed may therefore go to any law library, pull out Volume 428 of the United States Reports, then go to page 153, where the case starts. Some Supreme Court decisions are short, while others are very long.

The original decisions of the United States Supreme Court in these cases are readily available in various ways, particularly on the Internet. To find these cases, go to the Supreme Court's Web site at: [www.supremecourtus.gov](http://www.supremecourtus.gov) and click on "Opinions," then the year of the decision. If more research is desired on a case, perform an Internet search, then choose the U.S. Supreme Court decision from the many results. There will likely be many entries on that case, including the decisions of the lower courts that were appealed and commentaries on the case. Make sure the case is the U.S. Supreme Court decision and not that of the trial court, the court of appeals, or of a state supreme court.

## Preface to the Second Edition

The death penalty, in the context of the United States Constitution and the Supreme Court, is constantly evolving. In this, the second edition of *The Death Penalty: Constitutional Issues, Commentaries, and Case Briefs*, we try to reflect this evolution by presenting the most recent Supreme Court cases and the issues inherent in them that have occurred in the years since we published the first edition of this book. As I write this preface, we have just come off the longest hiatus in executions since the death penalty was reinstated following the Supreme Court decision in *Gregg v. Georgia*. This informal moratorium resulted from the Court's decision to consider the constitutionality of the execution method of lethal injection. The case was *Baze v. Rees*, one of the most recent among the new cases analyzed and discussed in this book, and the Court held that lethal injection is a constitutionally permissible method of execution. The first execution since September 25, 2007, was carried out on May 6, 2008, when William Earl Lynd was executed in Georgia by lethal injection at 7:51 P.M. As I write this, Mark Schwab is scheduled to be executed by lethal injection in Florida for the rape and murder of an 11-year-old boy; It will be the tenth execution of the year. There are more than 20 executions scheduled to take place over the coming months.

Over the last several years executions have slowed, but the Supreme Court's consideration of constitutional issues pertaining to them certainly has not. During the four years since the first edition of this book was published, The Supreme Court has made significant decisions about, among other things, racial disparity in capital jury selection, mental impairment as a mitigating factor in capital sentencing, standards of effectiveness of legal representation for capital defendants, jury instructions pertaining to aggravating and mitigating evidence, evidence of actual innocence in habeas corpus petitions, and, most recently, the constitutionality of lethal injection as a method of execution and the constitutionality of the death penalty in cases of the rape of a child when the victim is not murdered. The makeup of the Court has also changed in the years since this book was first published. Chief Justice William H. Rehnquist has been succeeded by new Chief Justice John G. Roberts and Justice Sandra Day O'Connor has been succeeded by Justice Samuel Anthony

Alito Jr. Justice Alito's first death penalty opinion was in *Holmes v. South Carolina* (briefed in Chapter 8) and Chief Justice Roberts has written several opinions in death penalty cases and penned the plurality opinion in *Baze v. Rees* (briefed in Chapter 11).

Although the structure and much of the content in this second edition remains the same as in the original edition, there is much that is new and revised. There are 17 new cases briefed and many more new cases discussed throughout the book. The added case briefs are:

### **Chapter 3—Racial Discrimination and the Death Penalty**

Cases Added:

*Miller El v. Dretke* (2005): Racially Disparate Questioning in Jury Selection  
*Snyder v. Louisiana* (2008): Exclusion of Prospective Black Jurors without Racially Neutral Explanations

### **Chapter 4—The Mentally Impaired and the Death Penalty**

Cases Added:

*Singleton v. Norris* (2003): Forcefully Medicating an Inmate for Competency in Order to be Executed  
*Tennard v. Dretke* (2004): Mental Retardation as Mitigating Factor when Unrelated to Crime  
*Panetti v. Quarterman* (2007): Mental Competency to Be Executed

### **Chapter 6—Juries, Jurors, and the Death Penalty**

Case Added:

*Uttecht v. Brown* (2007): Trial Court Judge's Role in Death Qualification

### **Chapter 7—The Right to Effective Assistance of Counsel and the Death Penalty**

Cases Added:

*Rompilla v. Beard* (2005): Counsel's Failure to Make a Reasonable Effort to Contest Evidence Supporting a Death Sentence  
*Schriro v. Landrigan* (2007): Defendant's Interference with Counsel's Strategy and the Presentation of Mitigating Evidence

### **Chapter 8—Due Process and the Death Penalty**

Cases Added:

*Deck v. Missouri* (2005): Shackling of a Capital Defendant During Sentencing Phase of Trial  
*Holmes v. South Carolina* (2006): Introduction of Third-Party Guilt Evidence



**Chapter 9—Aggravating and Mitigating Factors in Death Penalty Cases**

Cases Added:

*Kansas v. Marsh* (2006): Death Sentence when Aggravating and Mitigating Factors are Equal in Weight

*Brewer v. Quarterman* (2007): Statutory Restrictions on Jury Instructions Regarding the Consideration of Mitigating Factors

**Chapter 10—Appeals, Habeas Corpus, and the Death Penalty**

Cases Added:

*Nelson v. Campbell* (2004): Right to Bring a Lawsuit Challenging the Method of Execution

*House v. Bell* (2007): Habeas Corpus Appeals on the Grounds of Actual Innocence

*Lawrence v. Florida* (2007): Suspension of AEDPA's Statute of Limitations While Awaiting Habeas Corpus Decision

**Chapter 11—Evolving Standards of Decency and the Eighth Amendment's Ban on Cruel and Unusual Punishment**

Case Added:

*Baze v. Rees* (2008): Constitutionality of Lethal Injection as a Method of Execution

*Kennedy v. Louisiana* (2008): Constitutionality of the Death Penalty for Non-Homicide Cases of Sexual Assault against a Child

Only one case brief has been removed (the 2003 case of *Miller-El v. Cockrell* has been replaced by the more recent 2005 case of *Miller-El v. Dretke*). Discussion surrounding past cases and the rich history and lineage of Supreme Court decisions in capital cases has been preserved but has been supplemented by numerous new decisions and updated information on the many related death penalty issues. In the end, we believe that the second edition of this book significantly strengthens and bolsters what was already a valuable and unique book and offers the reader the most comprehensive and up-to-date collection and consideration of constitutional issues and Supreme Court decisions pertaining to the death penalty.

Scott Vollum, Ph.D.  
Harrisonburg, Virginia  
July 1, 2008

## About the Authors

**Rolando V. del Carmen** is Distinguished Professor of Criminal Justice (law) and Regents Professor at Sam Houston State University in Huntsville, Texas. He wrote Chapter 2 (The Foundation Cases: *Furman v. Georgia* and *Gregg v. Georgia*) and conceptualized and coordinated the writing and publication of the original edition of the book.

**Scott Vollum** is Assistant Professor of Justice Studies at James Madison University in Harrisonburg, Virginia. He wrote Chapter 6 (Juries, Jurors, and the Death Penalty), Chapter 9 (Aggravating and Mitigating Factors in Death Penalty Cases), and Chapter 11 (Evolving Standards of Decency and Cruel and Unusual Punishment). He conceptualized and coordinated the writing and revision of the book, and edited the various chapters.

**Kelly Cheeseman Dial** is Assistant Professor in the Department of Administration of Justice at the University of Southern Mississippi in Hattiesburg, Mississippi. She wrote Chapter 3 (Racial Discrimination and the Death Penalty) and Chapter 4 (The Mentally Impaired and the Death Penalty).

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## Acknowledgments

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## **“Top Ten” Most Significant Death Penalty Cases**

10. **Lockett v. Ohio**, 438 U.S. 586 (1978) — Death penalty statutes must allow for consideration of mitigating factors regarding the character or history of a defendant, as well as the circumstances of the offense.
9. **Payne v. Tennessee**, 495 U.S. 149 (1990) — Victim impact statements pertaining to characteristics of the victim and the emotional impact of the crime on the victim’s family do not violate the Eighth Amendment and are admissible in the sentencing phase of the trial.
8. **Baze v. Rees**, 553 U.S. \_\_\_\_ (2008) — Lethal injection does not violate the Eighth Amendment’s prohibition of cruel and unusual punishment and is thus a constitutionally permissible method of execution.
7. **Lockhart v. McCree**, 476 U.S. 162 (1986) — Prospective jurors whose opposition to the death penalty is so strong as to prevent or impair the performance of their duties as jurors at the sentencing phase of a trial may be removed for cause from jury membership.
6. **McCleskey v. Kemp**, 481 U.S. 279 (1987) — A statistical study suggesting racial discrimination in the imposition of death sentences does not make the death penalty unconstitutional. What is needed is that “petitioner must prove that decision-makers in his case acted with discriminatory purpose.”
5. **Ring v. Arizona**, 536 U.S. 584 (2002) — “The decision whether or not to execute a defendant must be made by a jury. A judge may not alone make a determination of aggravating circumstances and thus elevate a punishment to death. Such aggravating circumstances are ‘the functional equivalent of an element of a greater offense’ and therefore must be determined by a jury as required by the Sixth Amendment.”
4. **Atkins v. Virginia**, 536 U.S. 304 (2002) — “The execution of mentally retarded defendants is a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.”
3. **Roper v. Simmons**, 543 U.S. 551 (2005) — Imposing the death penalty on juveniles who commit crimes at age 16 or 17 constitutes cruel and unusual punishment prohibited by the Eighth Amendment.
2. **Furman v. Georgia**, 408 U.S. 238 (1972) — The death penalty is unconstitutional; it violates the Constitution’s equal protection clause and the prohibition against cruel and unusual punishment.
1. **Gregg v. Georgia**, 428 U.S. 153 (1976) — Death penalty statutes that contain sufficient safeguards against arbitrary and capricious imposition are constitutional.

## **Chapter Outline**

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### **II. A Retrospective Analysis of the Death Penalty**

- A. The Colonial Period
- B. The Age of Enlightenment and the Early Movement to Abolish the Death Penalty
  - 1. From Europe to the Colonies: The Impact of Enlightenment
  - 2. Changes in the Death Penalty from 1790–1950

### **III. Early Supreme Court Decisions on the Death Penalty**

- A. *Wilkerson v. Utah*: Death by Firing Squad
- B. *In re Kemmler*: Death by Electrocution
- C. *Louisiana ex rel. Francis v. Resweber*: The Constitutionality of Being Executed Twice
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### **IV. In Summary, What Do these Cases Say?**

### **V. Conclusion**

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*In re Kemmler*, 136 U.S. 436 (1890)

*Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947)

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