not, perhaps, irreversible. The seeds of revival may be buried in the most obscure corner of modern Supreme Court jurisprudence: *Apprendi* and its progeny. *Cunningham* has advanced this agenda, but it does not go far enough. A jury verdict will meaningfully reflect the community's conscience and rein in an overly punitive legislature only when it is the product of knowledge, not ignorance, about sentencing.

5. Sixth Amendment — Death Qualification Decisions. — Endless review of death sentences is exhausting the courts. The legislative response to this problem can be seen in the Antiterrorism and Effective Death Penalty Act of 1996[1] (AEDPA), which sharply limits federal habeas review of state court decisions.[2] The judicial response is apparent in the Supreme Court's increasing reluctance to reverse sentences for minor errors many years after their imposition.[3] The Justices' frustration with the delaying tactics of capital defendants was on display last Term in *Uttecht v. Brown*,[4] in which the Court reinstated a thirteen-year-old death sentence overturned by the Ninth Circuit. The Court held that the trial judge had not abused his discretion by striking a potential juror who expressed some hesitancy to impose a death sentence under the circumstances of the case and whose removal was not objected to by defense counsel. *Brown* should remind appellate judges of the high degree of deference afforded to trial court determinations, particularly under circumstances that suggest the trial judge may have been relying on his observation of an individual's demeanor. But as Congress and the Court move to curb excessive review of death sentences, it is important that lower courts not mistake more lenient standards of review on appeal for less rigorous first-order standards. *Brown* did not alter the standard that trial judges must apply in deciding whether to exclude a juror for cause, which remains strongly tilted toward retention of all but the most biased veniremen.

---

[1] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

[2] *See* Woodford v. Garceau, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases . . . ." (citing Williams v. Taylor, 529 U.S. 362, 386 (2000) (opinion of Stevens, J.))); H.R. REP. NO. 104-23, at 10 (1995) ("[C]apital defendants and their counsel have a unique incentive to keep litigation going by any possible means. . . . The result of this system has been the virtual nullification of state death penalty laws through a nearly endless review process.").

[3] *See, e.g.*, Schriro v. Landrigan, 127 S. Ct. 1933, 1941–42 (2007) (holding that an Arizona district court was not required to hold an evidentiary hearing on death row inmate's habeas petition alleging ineffective assistance of counsel when inmate had declined to present mitigating testimony at sentencing hearing). *But see* Abdul-Kabir v. Quarterman, 127 S. Ct. 1654 (2007) (reversing a Texas death sentence on the ground that the jury was not able to give adequate effect to the defendant's mitigating evidence). Although the Court is apparently concerned about excessive review by the Ninth Circuit, it may have the opposite concern with regard to the Fifth Circuit.

[4] 127 S. Ct. 2218 (2007).

In June 1991, Cal Coburn Brown was charged in the state of Washington with aggravated first-degree murder for stabbing Holly Washa and leaving her to bleed to death in the trunk of her car.[5] The jury that tried him was selected over a period of more than two weeks, eleven days of which were devoted to "death qualification"[6] — the process of screening out potential jurors whose views on capital punishment would "prevent or substantially impair" their ability to follow the law regarding imposition of a death sentence.[7] One member of the venire, dubbed "Juror Z" by the Ninth Circuit, was questioned extensively about his professed belief that the death penalty was appropriate for an offender who "would reviolate if released."[8] When he was informed that Washington law provided for a sentence of life without parole for aggravated first-degree murder, Juror Z could not immediately think of a situation in which he would be willing to impose the death penalty.[9] He nonetheless averred repeatedly that he could consider and impose the death penalty in accordance with state law.[10] The prosecutor, however, asked the judge to strike Juror Z for cause on the ground that he had not "said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again."[11] The defense volunteered "no objection," and the judge excused Juror Z.[12] The jury convicted Brown of aggravated murder in the first degree, and at the conclusion of the sentencing phase of the trial, returned a verdict finding insufficient mitigating circumstances to merit leniency.[13] The court sentenced Brown to death.[14]

The Washington Supreme Court affirmed Brown's conviction and sentence, rejecting all sixteen of Brown's claims on appeal.[15] With respect to one of these claims, the court held that the trial judge had not abused his discretion by excusing Juror Z for cause during the death qualification phase.[16] In a section at the end of its opinion titled

---

[5] State v. Brown, 940 P.2d 546, 558 (Wash. 1997). For a full description of Brown's crimes, which include the attempted murder of another woman in California and the rape and torture of both victims, see *id.* at 556–58.

[6] *Brown*, 127 S. Ct. at 2225.

[7] Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)) (internal quotation mark omitted).

[8] *Brown*, 127 S. Ct. at 2233 (appendix to opinion of the Court).

[9] *Id.* at 2237 ("Q[:] And now that you know that there is such a thing [as life without parole] . . . , can you think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life? A[:] I would have to give that some thought.").

[10] *See id.* at 2237–38.

[11] *Id.* at 2238.

[12] *Id.*

[13] State v. Brown, 940 P.2d 546, 559 (Wash. 1997).

[14] *Id.*

[15] *See id.* at 554.

[16] *Id.* at 585.

"Summary and Conclusions," the court stated that Juror Z's views "would have prevented or substantially impaired [his] ability to follow the court's instructions and abide by [his] oath[] as [a] juror[]."[17] The Washington Supreme Court subsequently denied Brown's personal restraint petition, which raised five additional grounds for reversing his death sentence.[18] Brown then filed a habeas petition in federal district court, which was denied.[19]

The Ninth Circuit reversed the district court's denial of Brown's habeas petition and instructed that court to issue a writ overturning Brown's death sentence.[20] Writing for the panel, Judge Kozinski[21] held that the dismissal of Juror Z had been improper.[22] Juror Z had expressed a "balanced and thoughtful position" on the death penalty, and nothing in his voir dire suggested that he would not follow applicable law.[23] As a result, the trial court's dismissal of Juror Z had been contrary to clearly established Supreme Court precedent, which provided that a juror could be excluded based on his views on the death penalty only if those views would "prevent or substantially impair the performance of his duties as a juror."[24] Furthermore, when the Washington Supreme Court upheld Juror Z's removal, it had "applied the wrong standard" because it had not found that Juror Z was "substantially impaired" in his ability to perform his duties as a juror; its decision, therefore, had also been contrary to clearly established law.[25] Brown's failure to object to Juror Z's dismissal at trial was irrelevant, Judge Kozinski explained, because the Washington Supreme Court had not found the claim to be waived or procedurally barred and because the erroneous dismissal of a juror is structural error, making the absence of prejudice to Brown immaterial.[26] The full court voted to deny rehearing en banc.[27]

---

[17] *Id.* at 599.

[18] *See In re* Personal Restraint of Brown, 21 P.3d 687 (Wash. 2001).

[19] Brown v. Lambert, No. C01-715C, 2004 WL 5331923 (W.D. Wash. Sept. 15, 2004). With respect to the three excused jurors, the district court, applying AEDPA's standard of review, found that neither the trial court's decision to excuse them nor the Washington Supreme Court's affirmance of that decision was "contrary to, or an unreasonable application of, clearly established federal law as established by the Supreme Court." *Id.* at *16. The court stated, "Even if this Court would not have dismissed the jurors for cause, it cannot substitute its judgment for that of the state courts." *Id.*

[20] Brown v. Lambert, 451 F.3d 946, 954 (9th Cir. 2006).

[21] Judges Reinhardt and Berzon joined Judge Kozinski's opinion.

[22] *Brown*, 451 F.3d at 953.

[23] *Id.* at 949.

[24] *Id.* at 950, 953 (quoting Gray v. Mississippi, 481 U.S. 648, 658 (1987)).

[25] *Id.* at 953 n.10; *see also id.* at 951–52.

[26] *Id.* at 952 & n.9, 954 (citing *Gray*, 481 U.S. at 659–60).

[27] *Id.* at 947. Judge Tallman, joined by Judges O'Scannlain, Kleinfeld, Callahan, and Bea, dissented from the denial. Judge Tallman argued that the panel had not shown the deference to

The Supreme Court reversed. Writing for the Court, Justice Kennedy[28] held that neither the Washington Supreme Court nor the trial court had acted contrary to or unreasonably applied clearly established federal law as determined by the Supreme Court.[29] AEDPA, therefore, precluded the federal courts from granting Brown's habeas petition.[30]

First, the Washington Supreme Court had applied the correct legal standard in upholding the exclusion of Juror Z. Although that court's discussion of Juror Z's voir dire indicated only that he had misunderstood Washington law — not that he would have been unable to follow his oath[31] — the court's statement in its conclusion that Juror Z had been substantially impaired constituted an "explicit ruling" applying the correct legal standard.[32] In any event, the court was not required to make an explicit finding of impairment with respect to each excluded juror; it was enough that the court correctly summarized the governing legal standards and entered a finding of no abuse of discretion.[33]

Second, the Washington trial court had "acted well within its discretion" when it excused Juror Z.[34] The trial court's determination that Juror Z was substantially impaired was entitled to deference because the trial judge had been able to observe Juror Z's demeanor during voir dire.[35] Even the cold transcript of Juror Z's voir dire testimony revealed "considerable confusion . . . amounting to substantial impairment."[36] Juror Z's assurances that he could follow the law were "interspersed with more equivocal statements" in which he indicated that he believed the death penalty to be appropriate only for individuals who might otherwise reoffend.[37] This view was in conflict with Washington law, which provided only two possible sentences for aggravated first-degree murder: death and life imprisonment without the possibility of parole.[38] Juror Z's evident confusion, coupled with Brown's failure to object at voir dire, made the judge's decision reasonable. Even assuming that an objection was not required to preserve the issue under Washington law, the absence of an objection was

---

the Washington Supreme Court's judgment required by AEDPA. *Id.* at 955 (Tallman, J., dissenting from denial of rehearing en banc).

[28] Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined Justice Kennedy's opinion.

[29] *Brown*, 127 S. Ct. at 2230.

[30] *See* 28 U.S.C. § 2254(d)(1) (2000).

[31] *See* State v. Brown, 940 P.2d 546, 585 (Wash. 1997).

[32] *Brown*, 127 S. Ct. at 2228 (citing *Brown*, 940 P.2d at 599).

[33] *Id.*

[34] *Id.*

[35] *Id.* at 2229.

[36] *Id.* at 2230.

[37] *See id.* at 2227.

[38] *Id.*; *see* WASH. REV. CODE ANN. § 10.95.030 (West 2002).

relevant for two reasons: it suggested that "the interested parties present in the courtroom all felt that removing Juror Z was appropriate," and it explained the absence of specific factual findings in the trial record concerning the reasons for Juror Z's dismissal.[39]

Justice Stevens dissented,[40] arguing that the dismissal of Juror Z was wholly unjustified.[41] The record of Juror Z's voir dire testimony, standing alone, provided "absolutely no basis" for a decision to strike Juror Z.[42] This was so because Juror Z's belief that a death sentence was appropriate where an individual might reoffend — a belief that Juror Z had articulated "merely as an example of when that penalty might be appropriate" — did not in any way suggest that Juror Z would have been unable to perform his duties as required by law.[43] Justice Stevens recalled then-Justice Rehnquist's statement that even "those who firmly believe that the death penalty is unjust" could not be excluded from the venire in a capital case "so long as they state clearly that they are willing to temporarily set aside their own beliefs,"[44] which Juror Z did repeatedly.[45] Furthermore, the trial court's ability to observe Juror Z's demeanor did not warrant additional deference where the record contained no indication that Juror Z's demeanor was in any way remarkable.[46] Upholding an otherwise baseless dismissal on that ground would mean "defer[ring] to a finding that the trial court never made."[47]

Justice Stevens also took issue with the Court's reliance on the absence of an objection by defense counsel. He first contended that the most plausible reading of the record was that defense counsel had spoken the words "no objection" not to acquiesce in Juror Z's removal, but rather to express his comfort with Juror Z remaining on the panel.[48] In any event, said Justice Stevens, even if defense counsel failed to object to the removal, that fact was irrelevant because Washington law did not require an objection to preserve the issue and because the contemporaneous views of the parties in the courtroom could cast no light on Juror Z's facially unambiguous testimony.[49]

---

[39] *Brown*, 127 S. Ct. at 2229–30.
[40] Justices Souter, Ginsburg, and Breyer joined Justice Stevens's dissent.
[41] *Brown*, 127 S. Ct. at 2239 (Stevens, J., dissenting).
[42] *Id.* at 2243.
[43] *Id.* at 2241.
[44] *Id.* at 2240 (quoting Lockhart v. McCree, 476 U.S. 162, 176 (1986)).
[45] *See id.*
[46] *See id.* at 2242.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 2242–43.

Justice Breyer, who joined Justice Stevens's dissent, added a separate dissent[50] to emphasize that Brown's failure to object to the dismissal of Juror Z should have played no part in the Court's analysis. Justice Breyer argued that the majority "read[] too much into too little" when it inferred from the absence of an objection that defense counsel had believed Juror Z to be impaired.[51] Allowing such an inference would prevent "meaningful review of silent records" and would circumvent Washington's procedural rule permitting appellate courts to consider errors raised for the first time on appeal.[52]

As an initial matter, the Court was correct to defer to the trial court's death qualification judgment. A trial judge should be given the benefit of every doubt in determining whether the dismissal for cause of a potential juror is warranted, particularly when defense counsel fails to object and thereby prevents the creation of a record on which the judge's decision can be evaluated. But in light of the central role that rules of deference played in the majority's decision and the important interests served by a relatively low death qualification bar, *Brown* should be read more attentively by appellate courts than by trial courts. Trial judges should continue to look to *Wainwright v. Witt*[53] and its progeny for the law governing their death qualification decisions, and they should continue to apply a standard strongly disfavoring dismissal.

The need to distinguish between first-order standards and standards of review is particularly strong in the death qualification context. On one hand, the Supreme Court has long maintained that appellate courts should not second-guess trial court judgments that turn on assessing the demeanor of individuals in the courtroom,[54] and deferring to state courts' death qualification decisions is consistent with the congressional policy of promoting the finality of state death sentences. On the other hand, the Court has repeatedly held that an individual's views on capital punishment alone cannot bar her from serving on a jury;[55] she can be struck from the venire only if her testimony provides some reason to believe that she would not follow her oath to apply the law.[56] Moreover, excluding jurors who merely disagree with

---

50 Justice Souter joined Justice Breyer's dissent.

51 *Brown*, 127 S. Ct. at 2244 (Breyer, J., dissenting).

52 *Id.* (citing State v. Levy, 132 P.3d 1076, 1080–81 (Wash. 2006)).

53 469 U.S. 412, 424 (1985).

54 *See, e.g.*, Thompson v. Keohane, 516 U.S. 99, 111 (1995); Darden v. Wainwright, 477 U.S. 168, 178 (1986); Reynolds v. United States, 98 U.S. 145, 156–57 (1879).

55 *See* Lockhart v. McCree, 476 U.S. 162, 176 (1986) ("[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law."); *see also* Gray v. Mississippi, 481 U.S. 648, 658 (1987); *Witt*, 469 U.S. at 421.

56 *See, e.g.*, *Gray*, 481 U.S. at 658.

the law impinges on the jury's ability to function as a meaningful check on the government.[57]

The particular importance of the first-order right at stake in *Brown* arises from a defendant's right to have jurors consider the justice of the law they are asked to apply, which is a traditional component of the right to a jury trial[58] and may well be incorporated into the Sixth Amendment.[59] Jury review of the law can take one of two forms: the "broader form," in which a juror "negate[s] the law because he is generally opposed to its premise or purpose," or the "narrower form," in which a juror "refuse[s] to follow the precise dictates of the law because he believes that the particular application of the statute is contrary to the law's purpose or to the values of the community."[60] In the past, the Court's embrace of death qualification has meant rejecting only the broader form of jury review, because the Court's precedent has supported the exclusion of only those jurors "who are *absolutely* opposed to the death penalty and who would refuse to apply the penalty no matter how heinous the crime."[61] But if trial judges may legitimately exclude veniremen who express more nuanced views on the death penalty, death qualification will cross into excluding even those jurors who are merely disinclined to sentence a defendant to death under particular circumstances in which state law makes the death penalty available.[62] Extending *Witt* in this way would dramatically circumscribe the jury's role in regulating capital punishment.

In light of the well-established *Witt* standard and the Sixth Amendment values it serves, the trial court's application of the first-order standard to strike Juror Z was probably erroneous. Z's testimony may have been somewhat equivocal as to the circumstances under which he would have been willing to impose the death penalty, but its most problematic portions concerned Z's personal views about the death penalty. The prosecutor asked Z for "the underlying reason why *you think* the death penalty is appropriate," and Z responded by stating, "I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropri-

---

[57] *Cf.* Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968) (explaining that a "right to jury trial is granted to criminal defendants in order to prevent oppression by the government").

[58] *See* Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 169–77 (1972).

[59] *See* Bruce McCall, Comment, *Sentencing by Death Qualified Juries and the Right to Jury Nullification*, 22 HARV. J. ON LEGIS. 289, 291–97 (1985).

[60] *Id.* at 290–91.

[61] *Id.* at 291.

[62] *See Brown*, 127 S. Ct. at 2244 (Stevens, J., dissenting) (reasoning that death qualification "does not and cannot mean that jurors must be willing to impose a death sentence in every situation in which a defendant is eligible for that sanction").

ate."[63] In the exchange that followed, the prosecutor used Z's personal views to draw a negative inference about his ability to follow the law.[64] However, Juror Z's comments, taken as a whole, suggested a juror who was curious to understand and willing to apply the law. Unless there was strong demeanor evidence of impairment, the trial judge should not have struck Juror Z.

None of this, however, calls into question the ultimate decision in *Brown*, which was driven primarily by the application of statutory and judge-made rules of deference.[65] If deference means anything, there must be some cases in which the judgment of a lower court is left standing even though, on the record, it appears to be wrong. Especially in the habeas context, where deference abounds, it is important to distinguish rules about *who* should make a decision — trial judges rather than appellate judges — from rules about *how* a decision should be made. As Judge Tallman pointed out in his Ninth Circuit dissent, Juror Z's testimony was just equivocal enough that his voice or demeanor could have conveyed the requisite impairment,[66] and this possibility — coupled with the absence of a defense objection — justified deferring to the questionable dismissal.[67]

---

[63] *See id.* at 2233 (appendix to opinion of the Court) (emphasis added).

[64] *See id.* at 2237 ("I guess the reverse side of what you're saying is, if you could be convinced that he wouldn't kill again, would you *find it difficult to vote for the death penalty* given a situation where he couldn't kill again?" (emphasis added)).

[65] The majority identified two independent bases for deference to the state judgments in Brown's case: the trial court's unique ability to assess a venireman's demeanor, and the requirements of AEDPA. *See id.* at 2224 (majority opinion).

[66] *See* Brown v. Lambert, 451 F.3d 946, 960 (9th Cir. 2006) (Tallman, J., dissenting from denial of rehearing en banc); *see also* Brief for the United States as Amicus Curiae Supporting Petitioner at 26, *Brown*, 127 S. Ct. 2218 (No. 06-413), 2007 WL 621850 ("Where, as here, a prospective juror gives certain responses that assert an ability to remain impartial but gives other responses that call his or her partiality into question, 'only the trial judge could tell which of [the] answers was said with the greatest comprehension and certainty.'" (alteration in original) (quoting Patton v. Yount, 467 U.S. 1025, 1040 (1984))).

[67] Some statements in Justice Kennedy's opinion, however, seem to suggest that the trial court's decision was not only entitled to deference, but also objectively correct even on the record presented. *See Brown*, 127 S. Ct. at 2229 ("Juror Z's answers, *on their face*, could have led the trial court to believe that Juror Z would be substantially impaired." (emphasis added)); *id.* at 2230 ("[T]he *transcript* shows considerable confusion on the part of the juror, amounting to substantial impairment." (emphasis added)). To the extent these statements suggest that Juror Z's recorded answers justified his dismissal by themselves and regardless of his demeanor, they should be dismissed as ill-considered dicta. Justice Kennedy himself acknowledged at oral argument that the views Juror Z had expressed in his voir dire were "somewhat more equivocal" than those of the jurors whose exclusion had been upheld in previous cases. Transcript of Oral Argument at 8, *Brown*, 127 S. Ct. 2218 (No. 06-413), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-413.pdf. Moreover, since the only question the Court had to resolve was whether the decision to strike Juror Z constituted an *unreasonable* application of *Witt*, any opinions the majority expressed about the first-order merits of the trial court's judgment were not essential to *Brown*'s holding. *See* Williams v. Taylor, 529 U.S. 362, 411 (2000) (distinguishing between unreasonable and erroneous applications of law).

Read in this light, *Brown* established a sensible rule governing deference to a trial court's decision to strike a juror because of his views on the death penalty. A habeas court should uphold such a dismissal when all of three circumstances are present: First, there is some reason on the record to believe that the venireman may have been impaired.[68] Second, the trial judge's observation of the venireman's demeanor, coupled with the evidence on the record, could have justified a finding of substantial impairment.[69] Third, defense counsel failed to object to the dismissal, preventing the trial judge from making a record concerning the venireman's demeanor.[70] Each of these elements was present in *Brown*, and all three contributed to the Court's disposition.

Contrary to the views of the dissenting Justices, the third element — the absence of a defense objection — should play an important role in the decision to grant deference to a juror's dismissal. By placing the burden on the defense to create a record for review of death qualification decisions, the Court created appropriate incentives for capital defense attorneys to participate in the death qualification process in good faith and avoided rewarding capital defendants for errors that are unlikely to have affected the sentencing decision.

The Court understood that the placement of the burden would affect lawyers' incentives; Justice Kennedy signaled as much when he suggested that defense counsel's failure to object to the striking of Juror Z might have been "an attempt to introduce an error into the trial" of a defendant who was a prime candidate for capital punishment.[71] Justice Kennedy's comment on this point resonates with the controversial observations of Chief Judge Boggs of the Sixth Circuit, who, in a 2006 opinion, pointed out that death penalty jurisprudence often makes an error-free defense the quickest path to execution.[72] Chief Judge Boggs was discussing Sixth Circuit case law that provided for automatic reversal of a death sentence whenever the defense lawyer failed to look for potentially mitigating information about the defen-

---

[68] *See Brown*, 127 S. Ct. at 2229 (stating that Juror Z's answers supported a "reasonable inference" that he was impaired); *id.* at 2230 (stating that the trial court's ability to observe demeanor does not justify upholding excusal "where the record discloses *no basis* for a finding of substantial impairment" (emphasis added)).

[69] *See id.* at 2229 (stating that trial court's determination is entitled to deference because the trial judge had the ability to observe Juror Z's demeanor); *cf.* Brown v. Lambert, 451 F.3d at 960 (Tallman, J., dissenting from denial of rehearing en banc) (arguing that the trial judge could have based his determination that Juror Z was impaired on his "pauses, hesitations, and non-verbal expressions").

[70] *See Brown*, 127 S. Ct. at 2229 (finding that the failure to object "deprived reviewing courts of further factual findings that would have helped to explain the trial court's decision"); Transcript of Oral Argument, *supra* note 67, at 44 (Kennedy, J.) ("[I]f the objection is what prevents the demeanor finding, then maybe we should be able to consider the fact there was no objection.").

[71] *Brown*, 127 S. Ct. at 2230.

[72] *See* Poindexter v. Mitchell, 454 F.3d 564, 587 (6th Cir. 2006) (Boggs, C.J., concurring).

dant's childhood, even though such information was highly unlikely to persuade a jury to vote for leniency.[73] But his observations apply as well to a lawyer's failure to object to the questionable striking of a juror at the death qualification phase: the lawyer can help her client more by not objecting than she can by retaining the borderline death-qualified juror.

The import of this line of argument is not to question the integrity of capital defense lawyers,[74] but rather to point out the perversity of rules that provide capital defendants with disproportionate relief for relatively minor errors. Such rules frustrate the policy behind AEDPA by increasing both the likelihood that a state death sentence will be reversed and the opportunities for protracted collateral litigation concerning the validity of such a sentence. Rules requiring defense counsel to assist in eliminating error at the trial level are especially appropriate for errors that are deemed reversible per se. Because the erroneous exclusion of a juror damages the "impartiality of the adjudicator" and is therefore not susceptible to harmless error analysis,[75] errors of this type are particularly likely to yield disproportionate relief on appeal.[76] The accuracy and effectiveness of the capital sentencing process is enhanced when defense attorneys are enlisted in rooting out such errors at a time when they can easily be easily corrected.[77]

For these reasons, *Brown*'s holding of presumptive deference to death qualification decisions was justified, but it should not be read as altering the law governing the exclusion of jurors for cause in the first instance. Trial judges should continue to apply the standard set forth in *Witt* and elaborated in later cases — a standard that permits exclusion only when there is evidence to support a finding that a juror would be substantially unable to follow the law and not when the juror merely holds personal beliefs that conflict with certain applications

---

[73] *See id.* at 588.

[74] *But see id.* at 590 (Daughtrey, J., concurring).

[75] Gray v. Mississippi, 481 U.S. 648, 668 (1987).

[76] *Cf.* Transcript of Oral Argument, *supra* note 67, at 50–51 (Kennedy, J.) (suggesting that "the fact that this is structural error, that there's no harmless error analysis" means that the Court "should be very careful to give substance to the rule that there's deference to the trial judge"); Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 66, at 18–19 ("The case for deference is particularly strong (and the costs of reversal particularly high) in a case like this where the trial court has *granted* a motion to strike for cause, because there is no risk that a biased juror will actually sit.").

[77] Full enlistment of the defense bar is not possible, because defense lawyers must act in the best interests of their clients. If a lawyer determines that the erroneous excusal of a juror would benefit his client because the juror would actually be inclined to impose the death penalty — as Brown's lawyer may well have done, *see Brown*, 127 S. Ct. at 2229–30 — he is free to withhold his objection. In such cases, however, it is appropriate to require the lawyer to weigh the immediate benefit to his client against the potential loss of a ground for appeal.

of the law.[78] It is a common conceit among legal commentators that a rule for trial judges is meaningless without the specter of searching appellate review to enforce it, but AEDPA necessitates a change in that way of thinking. To faithfully follow Congress's directive, the Court must be able to defer to a state court's judgment, even one that may have applied an existing standard erroneously, without altering the underlying standard. It did so in *Brown*.

6. Sixth Amendment — Federal Sentencing Guidelines — Presumption of Reasonableness. — In *United States v. Booker*,[1] the Supreme Court found that the Federal Sentencing Guidelines violated the Sixth Amendment.[2] It held the Guidelines unconstitutional because they required judges to increase sentences above the level authorized by facts conceded by the defendant or found by a jury beyond a reasonable doubt.[3] Its remedy — making the Guidelines advisory rather than mandatory and changing the standard of review on appeal to reasonableness[4] — created a host of contested legal questions, including whether appellate courts could apply a presumption of reasonableness in reviewing sentences falling within the applicable Guidelines range. Last Term, in *Rita v. United States*,[5] the Supreme Court held that an appellate court could apply such a presumption.[6] But by also articulating a weak standard for the requirement that a sentencing judge provide a statement of reasons for the penalty she imposes, the Court undermined the rationale justifying the presumption. In so doing, it implicitly sanctioned lower court treatment of the Guidelines as de facto mandatory after *Booker*. To justify an appellate presumption founded on the exercise of independent trial-level judgment and to make real the constitutional promise of *Booker*, trial judges should be required to express in writing their precise reasons for choosing a particular sentence and rejecting any departures sought by the defendant.

In January 2003, Victor Rita purchased a machine gun parts kit from InterOrdnance of America, Inc., the target of a Bureau of Alcohol, Tobacco, Firearms, and Explosives investigation.[7] That October, Rita provided testimony before a grand jury that was contradicted by separate evidence.[8] The government indicted Rita in the United States District Court for the District of North Carolina on various charges,

---

[78] *See, e.g.*, Lockhart v. McCree, 476 U.S. 162, 176 (1986).

[1] 543 U.S. 220 (2005).

[2] *Id.* at 244 (Stevens, J., delivering the opinion of the Court in part).

[3] *Id.* at 226–27, 232, 244.

[4] *Id.* at 245, 260–63 (Breyer, J., delivering the opinion of the Court in part).

[5] 127 S. Ct. 2456 (2007).

[6] *Id.* at 2459.

[7] Brief for the United States at 2, *Rita*, 127 S. Ct. 2456 (No. 06-5754), 2007 WL 186288.

[8] *Id.* at 3.