

sence of written findings by the jury), the appellate court may preserve a death penalty through harmless error review or through a reweighing of the aggravating and mitigating evidence.<sup>126</sup> By contrast, where there is a possibility that the jury's reliance on a "totally irrelevant" factor (defendant had served time pursuant to an invalid conviction subsequently vacated) may have been decisive in balancing aggravating and mitigating factors, a death sentence may not stand notwithstanding the presence of other aggravating factors.<sup>127</sup>

In *Oregon v. Guzek*, the Court could "find nothing in the Eighth or Fourteenth Amendments that provides a capital defendant a right to introduce," *at sentencing*, new evidence, available to him at the time of trial, "that shows he was not present at the scene of the crime."<sup>128</sup> Although "the Eighth and Fourteenth Amendments require that the sentencer . . . 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," such evidence is a traditional concern of sentencing because it tends to show "*how*, not *whether*," the defendant committed the crime.<sup>129</sup> Alibi evidence, by contrast, concerns "whether the defendant committed the basic crime," and "thereby attacks a previously determined matter in a proceeding [*i.e.*, sentencing] at which, in principle, that matter is not at issue."<sup>130</sup>

Focus on the character and culpability of the defendant led the Court initially to hold that introduction of evidence about the character of the victim or the amount of emotional distress caused to the victim's family or community was inappropriate because it "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner."<sup>131</sup> Changed membership on the Court resulted in overruling of these decisions, however, and a hold-

testimony might have affected how the jury evaluated another aggravating factor. Consequently, the reviewing court erred in reinstating a death sentence based on this other valid aggravating factor. *Tuggle v. Netherland*, 516 U.S. 10 (1995).

<sup>126</sup> *Clemons v. Mississippi*, 494 U.S. 738 (1990). *Cf.* *Parker v. Dugger*, 498 U.S. 308 (1991) (affirmance of death sentence invalid because appellate court did not reweigh non-statutory mitigating evidence).

<sup>127</sup> *Johnson v. Mississippi*, 486 U.S. 578 (1988).

<sup>128</sup> 546 U.S. 517, 523 (2006).

<sup>129</sup> 546 U.S. at 524, 526 (Court's emphasis deleted in part).

<sup>130</sup> 546 U.S. at 526.

<sup>131</sup> *Booth v. Maryland*, 482 U.S. 496, 503 (1987). And culpability, the Court added, "depends not on fortuitous circumstances such as the composition [or articulateness] of [the] victim's family, but on circumstances over which [the defendant] has control." *Id.* at 504 n.7. The decision was 5–4, with Justice Powell's opinion of the Court being joined by Justices Brennan, Marshall, Blackmun, and Stevens, and with Chief Justice Rehnquist and Justices White, O'Connor, and Scalia dissenting. *See*